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NOTE

UNDOCUMENTED WORKERS, THE NATIONAL LABOR RELATIONS ACT, AND THE IMMIGRATION REFORM AND CONTROL ACT: IRRECONCILABLE DIFFERENCES OR A MATCH MADE IN LEGAL HEAVEN?

*Give me your tired, your poor, Your huddled masses yearning to
breathe free, The wretched refuse of your teeming shore. Send these, the
homeless, tempest-tossed, to me, I lift my lamp beside the golden door!*

– Emma Lazarus¹

I. INTRODUCTION

Every day, undocumented workers face the stress of finding work while living in fear that they will be separated from their children who were born in the United States, and thus, are American citizens.² According to multiple sources, the estimated number of undocumented workers in the United States varies from 5.3 million to 8.5 million, with some estimates reaching as high as 11 million.³ Immigration has been at the forefront of issues since the Nation's founding.⁴ Throughout the

1. Emma Lazarus, *The New Colossus*, POETRY FOUND., <http://www.poetryfoundation.org/poem/175887> (last visited Feb. 15, 2015).

2. U.S. CONST. amend. XIV, § 1; Stephen Dinan, *Illegal Immigrants Chain Themselves to White House Fence*, WASH. TIMES, Sept. 18, 2013, <http://www.washingtontimes.com/news/2013/sep/18/illegal-immigrants-chain-themselves-wh-fence>; see *Hidden America: Undocumented Workers*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/sc/undocumentedworkers.php> (last visited Feb. 15, 2015) [hereinafter *Hidden America*] (“Undocumented workers are among the most vulnerable and exploited workers in our country . . .”).

3. Sarah H. Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 804 (2003); Max Ehrenfreund, *Your Complete Guide to Obama's Immigration Executive Action*, WASH. POST, Nov. 20, 2014, <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/#order>; *Hidden America*, *supra* note 2.

4. See Act of March 26, 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795); Elizabeth Cohen, *Should Illegal Immigrants Become Citizens? Let's Ask the Founding Fathers*, WASH. POST, Feb. 1, 2013, http://www.washingtonpost.com/opinions/should-illegal-immigrants-become-citizens-lets-ask-the-founding-fathers/2013/02/01/ec3cca66-6bba-11e2-bd36-c0fe61a205f6_story.html.

nineteenth century, immigrants from Europe and Asia faced extreme discrimination as they were forced to take dangerous jobs—working on the railroads, for example.⁵ Today, many of these workers are employed in sectors of the economy that have a substantial effect on the day-to-day lives of every American.⁶

At various points in the twentieth century, xenophobia (the dislike of people from other nations) gripped the country.⁷ An especially potent example of this phenomenon is the internment of Japanese-Americans during World War II.⁸ Although not directly, it is likely that such anti-immigrant sentiment has had an influence on both federal and state immigration laws passed in the United States.⁹ In 1986, for example, Congress passed the Immigration Reform and Control Act (“IRCA”),¹⁰ which imposed employer verification requirements for newly hired workers.¹¹ As will be discussed in detail below, the passage of the IRCA was a major compromise for those who supported strict enforcement of immigration law, and those who favored an avenue for the legalization of undocumented workers already present in the United States.¹²

Much like the history of hostility directed toward immigrants, the United States has a decorated history of disdain for attempts at employee

5. See *Workers of the Central Pacific Railroad*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/general-article/tcrr-cprt> (last visited Feb. 15, 2015) (discussing the conditions that Chinese and Irish immigrant workers faced working on the Central Pacific Railroad).

6. See B. LINDSAY LOWELL & ROBERTO SURO, HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.–MEXICO MIGRATION TALKS 7-8 (2002), available at <http://www.pewhispanic.org/site/docs/pdf/howmanyundocumented.pdf> (estimating that there are 620,000 undocumented workers in the construction industry, 1.19 million in manufacturing, and 1.4 million in wholesale); *Hidden America*, *supra* note 2 (approximating that 6.5 million undocumented workers are employed in manufacturing, services, construction, restaurants, and field work).

7. Tom Head, *American Xenophobia: A Short Illustrated History of Xenophobia in the United States*, ABOUT.COM, <http://civilliberty.about.com/od/immigrantsrights/tp/Xenophobia-in-United-States.htm> (last visited Feb. 15, 2015); Reihan Salam, *Xenophobia: The Politics of the Mosque*, N.Y. MAG. (Aug. 27, 2011), <http://nymag.com/news/9-11/10th-anniversary/xenophobia>.

8. *Korematsu v. United States*, 323 U.S. 214, 215-16, 220-21 (1944).

9. See Joyce Adams, *The DREAM Lives On: Why the DREAM Act Died and Next Steps for Immigration Reform*, 25 GEO. IMMIGR. L.J. 545, 547 (2011) (“Republicans have found that immigration is an issue . . . particularly useful for rallying their core . . . during a time of . . . concern that undocumented immigrants are ‘taking jobs away’ from citizens.”); see, e.g., Michael A. Olivas, *The Political Economy of the Dream Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757, 1761-63, 1785, 1786 & n.127 (2009) (discussing the federal DREAM Act proposals and various state law immigration proposals).

10. Pub. L. No. 99-603, 100 Stat. 3359, 3360 (1986) (codified in 8 U.S.C. § 1324a (2012)).

11. § 1324a(b).

12. BETSY COOPER & KEVIN O’NEIL, LESSONS FROM THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, at 2-3 (2005); see *infra* Part II.

collective bargaining and unionization.¹³ Courts originally treated organization efforts with criminal sanctions before imposing civil injunctions in the latter part of the nineteenth century.¹⁴ Late in the nineteenth and into the early twentieth century, as the country dealt with recession and war, Congress saw the need to introduce legislation regulating working conditions.¹⁵ In 1935, Congress passed the National Labor Relations Act (“NLRA”),¹⁶ codifying workers’ entitlement to collectively bargain without fear of reprisal from their employer.¹⁷

Part II of this Note will provide further detail on the NLRA and the IRCA.¹⁸ In so doing, it will discuss the rights given to employees under the NLRA, specifically sections 7 and 8, and will discuss the National Labor Relations Board’s (“NLRB” or “Board”) ability and authority to enforce these rights.¹⁹ It will then go on to explain the requirements and penalties under the IRCA and the political motivations behind the IRCA’s passage.²⁰ Finally, it will discuss cases that have addressed the effect of the IRCA and the NLRA,²¹ with particular focus on *Hoffman Plastic Compounds, Inc. v. NLRB* (“*Hoffman Plastic*”)²² and *Palma v. NLRB*.²³ Part III will address the Supreme Court’s erroneous use of the implied repeal doctrine in holding that the IRCA overturns the NLRA’s backpay remedy for undocumented workers.²⁴ It will also discuss the Second Circuit’s unnecessary expansion of the *Hoffman Plastic* decision in *Palma*.²⁵ Finally, Part IV will call for Congressional action on the issue, specifically the need for more deterrent mechanisms against violating employers.²⁶ The availability of punitive damage remedies against violating employers is an effective way to provide such deterrence.²⁷ It will further argue that, should Congress fail to act,

13. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1-3 (1976).

14. *Id.* at 1-2.

15. *Id.* at 3-4; see, e.g., Antitrust Act of 1914, sec. 6, Pub. L. No. 63-212, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (2012)).

16. Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (2012)).

17. § 8, 49 Stat. at 452-53.

18. See *infra* Part II.A.

19. See *infra* Part II.A.1.

20. See *infra* Part II.A.2.

21. See *infra* Part II.B.

22. 535 U.S. 137 (2002).

23. 723 F.3d 176 (2d Cir. 2013).

24. See *infra* Part III.A.

25. See *infra* Part III.B.

26. See *infra* Part IV.A.

27. See *infra* Part IV.A.2.

it will be up to the remaining circuit courts of appeals to enforce what is left of workplace rights for undocumented workers.²⁸

II. HISTORY OF LABOR AND IMMIGRATION LAW IN THE UNITED STATES

The NLRA was passed in the middle of the Great Depression and came after years of judicial hostility towards worker organization.²⁹ As originally codified, the NLRA was applicable to all employees, except those expressly exempted by the statute.³⁰ However, after subsequent amendment³¹ and judicial interpretation of the statute, the NLRA currently excludes truck drivers, graduate students, and managerial employees.³² In passing the IRCA fifty-one years later, Congress, perhaps inadvertently, casted doubt as to whether the full effect of the NLRA would still apply to all non-exempt employees.³³ The Supreme Court has had to interpret how changing times, and potentially conflicting laws, such as the IRCA, have affected the NLRA's coverage.³⁴

28. See *infra* Part IV.B.

29. GORMAN, *supra* note 13, at 1-3; James Ellis Davis, Note, *The Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes*, 76 KY. L.J. 201, 203-04 (1988) (stating that prior to congressional action in the early to mid-twentieth century, courts struck down attempts at employee organization as illegal under anti-trust laws).

30. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 450 (1935) (codified at 29 U.S.C. § 152(3) (2012)) ("The term 'employee' shall include any employee . . . unless the Act explicitly states otherwise . . .").

31. Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 137-38 (1947) (current version at 29 U.S.C. § 152(3) (2012)) (extending the exemption, *inter alia*, to independent contractors and supervisors).

32. THEODORE J. ST. ANTOINE ET AL., *LABOR RELATIONS LAW: CASES AND MATERIALS* 24-25, 27-28 (12th ed. 2011).

33. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3360 (1986) (codified in 8 U.S.C. § 1324a (2012)); see Craig Robert Senn, *Proposing a Uniform Remedial Approach for Undocumented Workers Under Federal Employment Discrimination Law*, 77 FORDHAM L. REV. 113, 122-23 (2008).

34. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140-41, 148-49 (2002); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886, 893-94 (1984); see also *Palma v. NLRB*, 723 F.3d 176, 183-85 (2d Cir. 2013) (holding that backpay was precluded to employees who did not present fraudulent documents when securing employment); *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4-6 (D.C. Cir. 2008) ("In sum, there is absolutely no evidence that in passing IRCA Congress intended to repeal the NLRA to the extent its definition of 'employee' includes undocumented aliens."); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004) (analyzing the effect of the IRCA and the *Hoffman* ruling on Title VII suits); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) ("[T]his Court . . . conclude[s] that Plaintiffs should not be precluded . . . from obtaining relief under the [Fair Labor Standards Act] . . . by virtue of their undocumented status.").

*A. Statutory Law: The National Labor Relations Act and the
Immigration Reform and Control Act*

For much of the early history of the United States, state and federal courts have held that employee attempts at organization were criminal under the common law, and later began issuing injunctions against attempts at organization.³⁵ An especially common tactic used by federal courts was to prevent concerted labor activities through the Sherman Antitrust Act of 1890 (“Sherman Act”).³⁶ Under the Sherman Act, courts enforced bans on strikes by unions if the strike was intended to “inhibit competition in the product market or appeared objectionable for reasons extrinsic to antitrust policy.”³⁷ Such hard measures taken against labor organization began to sway public sentiment, and led to the passage of the Norris-LaGuardia Act³⁸ in 1932.³⁹ This sentiment reached the Supreme Court as well, evidenced, in part, by the holdings in *Apex Hosiery Co. v. Leader*⁴⁰ and *United States v. Hutcheson*.⁴¹

The immediate period preceding the passage of the NLRA consisted of labor unions using all of their power against employers, and employers using all of their power—like terminating employment—against the union, without any repercussions.⁴² On July 5, 1935, in order to keep the labor peace and balance the power between laborers and employers, Congress passed the NLRA.⁴³ Congress understood the need for employees to organize in order to protect their rights while maintaining labor peace.⁴⁴ Congress, therefore, stated that the NLRA was intended to prevent interruption of the flow of interstate commerce while, at the same time, protecting the rights of employees to organize

35. GORMAN, *supra* note 13, at 1-3.

36. 15 U.S.C. §§ 1-7 (2012); GORMAN, *supra* note 13, at 2-3.

37. GORMAN, *supra* note 13, at 3.

38. 29 U.S.C. §§ 101-115 (2012).

39. § 102; *see* GORMAN, *supra* note 13, at 4; Davis, *supra* note 29, at 204.

40. 310 U.S. 469 (1940).

41. 312 U.S. 219, 227-28, 233-34, 236-37 (1941) (finding that the Clayton Act and Norris-LaGuardia Act limit the Sherman Act’s reach on labor activity); *Apex Hosiery*, 310 U.S. at 480-81, 512-13 (holding that the Sherman Act does not apply to locally concentrated union activity).

42. *See* GORMAN, *supra* note 13, at 4-5; *see also* Gregory J. Hare, *Employee Participation Programs: A Great Idea, But Are They Lawful?*, 1991 DETROIT C. L. REV. 973, 976-77 (1991) (“The NLRA was enacted in 1935 as a response to years of industrial strife and social unrest.”).

43. National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449-50 (1935) (current version at 29 U.S.C. § 151 (2012)); *see* ST. ANTOINE ET AL., *supra* note 32, at 13-14.

44. § 1, 49 Stat. at 449-50. Congress later recognized that unions, intentionally or unintentionally, engage in tactics that have a substantial burden on the economy. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136, 136-37 (1947) (current version at 29 U.S.C. § 151 (2012)) (amending the NLRA after recognizing that labor organizations may engage in coercive behavior detrimental to public policy).

and collectively bargain with employers.⁴⁵ The constitutionality of the NLRA was challenged, and ultimately upheld, in *NLRB v. Jones & Laughlin Steel Corp.*⁴⁶ The NLRA was later amended in 1947 by the Labor Management Relations Act (“LMRA”), which, in part, restricted certain union activities and amended certain provisions affecting employees’ rights in organizing.⁴⁷

1. Employee Rights Under the National Labor Relations Act

Originally, section 7 of the NLRA gave employees,⁴⁸ *inter alia*, the right to organize and collectively bargain with employers.⁴⁹ Later, amendments were added to allow employees to refrain from such organizing activities, as well.⁵⁰ Section 8 provides for the enforcement of section 7 rights.⁵¹ In what has become the “catch-all” provision, section 8(a)(1) states that an employer cannot “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”⁵² While section 8(a)(1) provides the broad basis for harmed employees to bring an action,⁵³ sections 8(a)(2)–(5) provide specific practices employers are barred from committing.⁵⁴ The LMRA amendments added section 8(b) to the NLRA, which applied unfair practices to labor organizations.⁵⁵

Congress delegated the authority to enforce these rights to the Board,⁵⁶ with appellate authority given to the courts of appeals.⁵⁷ The

45. § 1, 49 Stat. at 449-50.

46. 301 U.S. 1, 30-32 (1937) (holding that the NLRA is constitutional under Congress’s power to regulate interstate commerce).

47. § 1, 61 Stat. at 136-37. The NLRA was further amended in 1959 by the Labor-Management Reporting and Disclosure Act of 1959, which further restricted union activities. Pub. L. No. 86-257, §§ 2, 701-707, 73 Stat. 519, 519, 541-46 (1959) (current version at 29 U.S.C. §§ 401-531 (1976) & scattered sections of 29 U.S.C.); see GORMAN, *supra* note 13, at 6.

48. Under the NLRA, “employee” is defined as:

[A]ny employee and shall not be limited to the employees of a particular employer, unless the Act 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

§ 2(3), 49 Stat. at 450. The section next lists specific exempted employees, including agricultural workers and domestic workers. *Id.*

49. § 7, 49 Stat. at 452 (current version at 29 U.S.C. § 157 (2012)).

50. § 7, 61 Stat. at 140 (current version at 29 U.S.C. § 157 (2012)).

51. § 8, 49 Stat. at 452-53 (current version at 29 U.S.C. § 158(a) (2012)).

52. § 8, 49 Stat. at 452 (current version at 29 U.S.C. § 158(a)(1) (2012)); see *infra* text accompanying notes 53-55.

53. *Id.*

54. § 8, 49 Stat. at 452-53 (current version at 29 U.S.C. § 158(a)(1) (2012)).

55. § 8(b), 61 Stat. 141-42. For example, section 8(b)(1) states: “It shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7.” *Id.*

56. §§ 3(a), 10(a), 49 Stat. at 451, 453.

procedure through which the NLRB enforces these rights is listed in section 10 of the NLRA.⁵⁸ Should the NLRB find that an employer has committed an unfair labor practice, it has the authority to require the employer to cease and desist from committing future unfair labor practices, reinstate the wronged employee, and award the wronged employee backpay.⁵⁹

While the NLRB has the authority to award these remedies, its power is solely remedial.⁶⁰ Furthermore, since it is an administrative board with limited authority, it does not have the ability to interpret other federal law outside of its jurisdiction, even if that law may contravene labor policy.⁶¹ Recently, there have been doubts as to whether the remedial power of the NLRB is enough to provide a legitimate deterrent to employers.⁶² Part of this criticism is that the NLRB, as per the U.S. Supreme Court's holding in *Republic Steel Corp. v. NLRB*,⁶³ is barred from awarding punitive relief.⁶⁴ In *Republic Steel Corp.*, the Court determined that the potentiality of reinstatement was enough of a remedy under the affirmative action clause of section 10(c) of the NLRA.⁶⁵ In finding that Congress intended the NLRA to be a remedial statute, it stated that section 10(c):

[S]hould be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think

57. § 10(e)–(f), 49 Stat. at 454–55; see Davis, *supra* note 29, at 208.

58. § 10, 49 Stat. at 453–55.

59. *Id.* at 454 (current version at 29 U.S.C. § 160(c)); see Davis, *supra* note 29, at 207–08.

Backpay has generally been awarded as follows:

[E]mployees shall be made whole for any loss of pay resulting from the unlawful action of the employer, who is required to pay each individual a sum of money equal to the amount which that individual would normally have earned between the date of the discrimination and, in an appropriate case, the date of the employer's offer of reinstatement, less the individual's earnings during that period.

Robert S. Fuchs & Henry M. Kelleher, *The Back-Pay Remedy of the National Labor Relations Board*, 9 B.C. IND. & COM. L. REV. 829, 830 (1968).

60. See Davis, *supra* note 29, at 208 (“The NLRA’s thrust is remedial rather than punitive . . .”).

61. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–44 (2002).

62. See generally Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579 (2005); Nancy Schiffer, ABA Section of Labor & Employment Law, Rights Without Remedies: The Failure of the National Labor Relations Act (CLE Conference, Denver, Colo., 2008), available at <http://apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/153.pdf>.

63. 311 U.S. 7 (1940).

64. *Republic Steel Corp.*, 311 U.S. at 9–11, 13; see Weiner, *supra* note 62, at 1587–90, 1619–20.

65. *Republic Steel Corp.*, 311 U.S. at 11–13.

would effectuate the policies of the Act. We have said that “this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices”⁶⁶

While the Court took a firm stance against punitive damages in *Republic Steel Corp.*, it later gave the Board more latitude in awarding backpay.⁶⁷

Though the holding in *Republic Steel Corp.* seemed to foreclose any possibility of punitive damages under the NLRA, the Supreme Court took up a similar issue not too long after in *NLRB v. Seven-Up Bottling Co. of Miami*.⁶⁸ The Court seemingly limited *Republic Steel Corp.* to its facts by stating that it would not enter “into the bog of logomachy, as we are invited to, by debate about what is ‘remedial’ and what is ‘punitive.’”⁶⁹

2. The Immigration Reform and Control Act

In order to combat the hiring of undocumented workers, Congress passed the IRCA, which amended the Immigration and Nationality Act (“INA”).⁷⁰ The IRCA made it illegal for an employer to knowingly hire and/or continue to employ an undocumented worker.⁷¹ Any employer who violated this law may be subject to a fine or imprisonment.⁷² The IRCA also made it illegal for any prospective employee to use fraudulent documents in attempting to gain employment.⁷³ In order to try to combat willful blindness, Congress established an employment

66. *Id.* at 11-12 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938)).

67. *Id.* at 11-13; see *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 347-49 (1953) (stating that the NLRB has broad discretion to award backpay, even when such an award may exceed what the employee would have earned in that timespan).

68. 344 U.S. 344, 345-46 (1953).

69. *Id.* at 348 (“Of course, *Republic Steel* . . . dealt with a different situation, and its holding remains undisturbed.”).

70. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a (2012)) (amending Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)). From this point forward, all references to the IRCA will be cited to the provisions found in 8 U.S.C. § 1324a (2012).

71. 8 U.S.C. § 1324a(a)(1)–(2) (2012); see Andrew S. Lewinter, Note, *Hoffman Plastic Compounds v. NLRB: An Invitation to Exploit*, 20 GA. ST. U. L. REV. 509, 522 (2003) (concluding that the Supreme Court’s holding in *Hoffman Plastics* was in violation of labor and immigration policy). Section 1324a(h)(3) states that unauthorized alien means “that the alien is not at the time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.” § 1324a(h)(3).

72. § 1324a(e)(4), (f) (establishing civil and criminal penalties for offending employers); Andrew P. Karabetos, *Immigration-Related Employment Discrimination Under IRCA*, 82 ILL. B.J. 32, 32 (1994) (“U.S. employers who violate IRCA’s prohibitions are subject to civil and criminal penalties.”).

73. § 1324a(b)(1)(E)(2).

verification system.⁷⁴ This system requires employers to verify, under oath, that they have not hired unauthorized workers, and further sets out what documents prospective employees may show in order to verify their immigration status.⁷⁵ Despite the statutory prohibition against hiring and continuing to employ undocumented workers, part of the legislative history indicates that the passage of the IRCA was not meant to interfere with the NLRB's power to enforce labor laws.⁷⁶

In order to understand the true purpose of the IRCA, it is important to look at the political motivations behind it.⁷⁷ One motivation was increased border protection to prevent an increase in undocumented workers.⁷⁸ Another motivation was establishing a path towards legalization for immigrants already in the United States.⁷⁹ Requests for punishing employers who hired undocumented workers began as early as the 1950s.⁸⁰ There was debate over how restrictive the legalization process should be, with both sides of the debate wanting either an easier pathway or a much tougher one.⁸¹ Congress sought to strike a balance between concerns over employment discrimination as a result of employer verification requirements, and having an unfair burden being placed on employers.⁸² This balance is evidenced through the law's provision on penalties,⁸³ with employers who "knowingly" hire an undocumented worker receiving the harshest penalty.⁸⁴

The IRCA's smaller civil fines are applicable to employers who do not abide by the documentation requirements in the verification

74. § 1324a(b); *see also* Senn, *supra* note 33, at 120-21 (noting that the IRCA requires employers to show a "good faith attempt" in complying with the employment verification system).

75. § 1324a(b)(1)(A)-(D).

76. H.R. REP. NO. 99-682, pt.1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662. A House Committee stated: "In particular, the employer sanctions provisions are not intended [sic] to limit in any way the scope of the term 'employee' in Section 2(3) of the National Labor Relations Act . . . or of the rights and protections stated in Sections 7 and 8 of that Act." *Id.*

77. COOPER & O'NEIL, *supra* note 12, at 1-2.

78. *Id.*; *see also* Lewinter, *supra* note 71, at 515 & n.57 (stating Congress intended to deter future undocumented worker migration by requiring employer verification of employment documents).

79. *See* COOPER & O'NEIL, *supra* note 12, at 1-2.

80. *See id.* at 2 (stating that Senator Douglas proposed immigration reform in the 1950s).

81. *See id.*

82. *Id.* Given its fear over employer discrimination, Congress included a provision requiring the General Accounting Office to issue semi-annual reports regarding the law's effect on employer hiring. Karabetos, *supra* note 72, at 32-33.

83. 8 U.S.C. § 1324a(a)(3), (e)(4), (f) (2012).

84. *Compare* § 1324a(e)(4) (establishing civil penalties of at least \$250 and no more than \$2000 for first-time offenders who hire undocumented workers), *with* § 1324a(e)(5) (establishing a penalty of at least \$100 but not more than \$1000 for employers who commit paperwork violations). *See also* COOPER & O'NEIL, *supra* note 12, at 3 ("[T]he law reserved the largest penalties for 'knowing' (as opposed to technical) violations.").

system.⁸⁵ The offenses that carry larger fines and criminal prosecution are reserved for employers who continue to employ persons, resulting in a hiring pattern.⁸⁶ On the other side of the equation are the penalties that undocumented workers are subject to for using fraudulent documents to secure employment.⁸⁷ Anyone who knowingly uses a fraudulent document to secure employment will be subject to a fine and/or no more than five years imprisonment.⁸⁸ Since 2002, it has been the responsibility of the Department of Homeland Security, and more specifically, the Immigration and Customs Enforcement, to enforce the IRCA.⁸⁹

3. Recent Congressional Attempts at Reform

In 2001, Congress first attempted to pass legislation known as the DREAM Act.⁹⁰ The bill was aimed at legalizing undocumented residents who came to the United States as children, and went to school in the United States.⁹¹ The move for federal legislation came after years of increased public awareness and attention towards undocumented immigrants.⁹² During the 1990s, several states passed laws affecting the ability of undocumented immigrants to attend school and receive public aid.⁹³ After the original DREAM Act failed in 2001, Congress again made attempts at passing it in 2003 and 2005, to no avail.⁹⁴ Finally, in 2007—after the DREAM Act failed again—Congress took a different approach to immigration reform when it tried to attach comprehensive immigration reform to an authorization bill for the Department of Defense.⁹⁵ The bill would have given millions of undocumented workers hope for attaining legal status.⁹⁶ After failing to go to vote during that

85. § 1324a(e)(5).

86. § 1324a(f).

87. 18 U.S.C. § 1546(b) (2006).

88. *Id.* In its decision in *Hoffman Plastics*, the Supreme Court emphasized that employees are afforded less protection under the NLRA if they secure employment in ways that contravene other federal law. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-45 (2002).

89. Homeland Security Act of 2002, 6 U.S.C. §§ 251, 271, 291 (2012); see Jarod S. Gonzalez, *Employment Law Remedies for Illegal Immigrants*, 40 TEX. TECH L. REV. 987, 987-88, 997 (2008).

90. DREAM Act, S. 1291, 107th Cong. § 1 (1st Sess. 2001), available at <http://www.gpo.gov/fdsys/pkg/BILLS-107s1291is/pdf/BILLS-107s1291is.pdf>; see Olivas, *supra* note 9, at 1759 (“The first version of what is known now as the DREAM Act was introduced in Congress in 2001 . . .”).

91. S. 1291, § 3; see Olivas, *supra* note 9, at 1759-64.

92. Olivas, *supra* note 9, at 1759-64.

93. *Id.* at 1761-63.

94. DREAM Act of 2005, S. 2075, 109th Cong. § 1 (1st Sess. 2005); DREAM Act of 2003, S. 1545, 108th Cong. § 1 (1st Sess. 2003); Olivas, *supra* note 9, at 1785.

95. DREAM Act of 2007, S. 774, 110th Cong. § 1 (1st Sess. 2007); Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. § 1 (1st Sess. 2007); Olivas, *supra* note 9, at 1785-86.

96. S. 1348, §§ 501-555; see Adams, *supra* note 9, at 546.

summer, it was sent to the Senate floor as a standalone bill that would affect only undocumented college students.⁹⁷ However, once again, the bill failed.⁹⁸

Congress's most recent attempts at significant immigration reform came in 2010 when the Senate failed to pass the DREAM Act of 2010,⁹⁹ after it passed the House by a significant margin, and in 2013, when the House failed to pass a bipartisan bill agreed to by the Senate.¹⁰⁰ In 2010, the proposed legislation would have provided an avenue toward citizenship for thousands of undocumented aliens.¹⁰¹ Specifically, the bill would have allowed for undocumented immigrants under the age of thirty to apply for permanent residence,¹⁰² so long as they met certain requirements.¹⁰³ As with the immigration proposals preceding it, the DREAM Act of 2010 failed to muster enough votes to continue debate, and died on the Senate floor that December.¹⁰⁴

The 2013 bill, known as the Border Security, Economic Opportunity, and Immigration Modernization Act,¹⁰⁵ would have addressed issues such as a legalization path for undocumented workers, stronger border security, and made changes to visa and immigrant work programs.¹⁰⁶ After the bill passed the Senate with bipartisan support, the Republican-controlled House failed to vote on it.¹⁰⁷ Thus, like the many attempts at reform preceding it, the once-promising Border Security, Economic Opportunity, and Immigration Modernization Act failed to bring about any change.¹⁰⁸

97. See Olivas, *supra* note 9, at 1785-86.

98. See *id.*

99. DREAM Act of 2010, S. 3992, 111th Cong. § 1 (2d Sess. 2010).

100. Adams, *supra* note 9, at 545; *A Guide to S.744: Understanding the 2013 Senate Immigration Bill*, IMMIGR. POL'Y CENTER (July 10, 2013), <http://www.immigrationpolicy.org/special-reports/guide-s744-understanding-2013-senate-immigration-bill> [hereinafter *A Guide to S.744*]; see Darlene Superville, *Obama Defends Immigration Executive Order*, HUFFINGTON POST (Nov. 23, 2014), http://www.huffingtonpost.com/2014/11/23/obama-immigration_n_6209068.html.

101. S. 3992, § 4; Adams, *supra* note 9, at 545 (stating that the DREAM Act "would have provided a path to citizenship for many of the 65,000 undocumented immigrants who graduate from high school every year and came to this country as children").

102. S. 3992, § 4(a)(1)(F); Adams, *supra* note 9, at 545.

103. S. 3992, § 4. The person must have entered the country before the age of sixteen and have been in the country for at least five years, must have good moral character, and must have attained a high school diploma or have been admitted into college. *Id.*

104. Adams, *supra* note 9, at 545; *On the Motion to Table S. 3992*, GOVTRACK.US, <https://www.govtrack.us/congress/votes/111-2010/s268> (last visited Feb. 15, 2015).

105. S. 744, 113th Cong. § 1 (1st Sess. 2013).

106. *A Guide to S.744*, *supra* note 100.

107. Ehrenfreund, *supra* note 3; Superville, *supra* note 100.

108. See Ehrenfreund, *supra* note 3; *supra* text accompanying notes 90-104.

5. President Obama's Reform Through Executive Order

On November 20, 2014, President Barack Obama announced that he was implementing several Executive Orders aimed at reforming the Nation's immigration policy.¹⁰⁹ Among the provisions are: expansion of the Deferred Action for Childhood Arrivals, which allows undocumented individuals meeting certain conditions to seek to have removal procedures against them deferred; alterations to the visa process for undocumented family members of U.S. citizens and lawful residents; and overall changes to the visa naturalization process.¹¹⁰ Perhaps the largest impact of the President's orders is on the estimated millions of parents whose children are U.S. citizens.¹¹¹

Shortly after the President's action, many Republicans and Conservatives questioned the legality of the orders, asserting they are unconstitutional.¹¹² Opponents of the orders argue that such expansive action must be taken by Congress, not the President.¹¹³ There is some precedent to this argument, though there are questions as to who can bring suit in a case challenging the action.¹¹⁴ Despite the threat of suit, the Obama administration has stated that it plans to continue with implementing the orders.¹¹⁵

B. Case Law Connecting the National Labor Relations Act and Immigration Reform Control Act: *Sure-Tan*, *Hoffman Plastic*, and *Palma*

Shortly prior to the enactment of the IRCA, the Supreme Court, in *Sure-Tan, Inc. v. NLRB*,¹¹⁶ held that existing immigration law did not preclude undocumented workers from the protection of the NLRA.¹¹⁷ However, with the passage of the IRCA, lower courts were left to determine the continuing validity of *Sure-Tan*.¹¹⁸ After sixteen years of judicial uncertainty, the Supreme Court provided clarity when it ruled in

109. *Executive Actions on Immigration*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Jan. 8, 2015).

110. *Id.*

111. Ehrenfreund, *supra* note 3.

112. *Debate Club: Is Obama's Immigration Executive Order Legal?*, U.S. NEWS & WORLD REP., <http://www.usnews.com/debate-club/is-obamas-immigration-executive-order-legal> (last visited Feb. 15, 2015) [hereinafter *Debate Club*]; Ehrenfreund, *supra* note 3.

113. *Debate Club*, *supra* note 112; Ehrenfreund, *supra* note 3.

114. Ehrenfreund, *supra* note 3; see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring) (discussing the ebbs of executive power).

115. See Superville, *supra* note 100.

116. 467 U.S. 883 (1984).

117. *Id.* at 886, 893-94.

118. See, e.g., *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50, 55-58 (2d Cir. 1997); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120-22 (7th Cir. 1992).

Hoffman Plastic.¹¹⁹ The Court stated that much of its analysis in *Sure-Tan* was mooted when Congress enacted the IRCA and, unlike immigration law as it existed in *Sure-Tan*, the policy of the IRCA conflicted with remedies afforded under the NLRA.¹²⁰ Importantly, the *Hoffman Plastic* Court was presented with a scenario in which the undocumented workers secured employment by presenting fraudulent documents to the employer.¹²¹ As a result of this factual backdrop, lower federal courts were split on the proper reach of the *Hoffman Plastic* decision.¹²² For example, in *Palma*, the Second Circuit held that despite the factual limitations of *Hoffman Plastic*, the Court broadly analyzed the policy implications of the IRCA as they relate to NLRA protection.¹²³ As a result, undocumented workers, even when not presenting fraudulent documents, are barred from recovering for violations of the NLRA.¹²⁴

1. *Sure-Tan*, the Circuit Split Caused by the Court's Decision, and the Passage of the Immigration Reform and Control Act

Two years prior to the enactment of the IRCA, the Supreme Court decided *Sure-Tan* under the INA.¹²⁵ In *Sure-Tan*, the Court found that while undocumented workers were "employees," as defined by the NLRA, backpay and reinstatement were to be tolled until the plaintiffs could show they were legally allowed to work in the United States.¹²⁶ While the Court recognized and agreed with the Seventh Circuit's finding that backpay would provide a good deterrent for employers, it stated that the Board must consider other controlling policies, such as the INA.¹²⁷ Nevertheless, Congress had not yet made it illegal to hire an undocumented worker under the INA, and therefore, there was no direct conflict between the INA and the NLRA.¹²⁸ The Court gave great deference to the Board's finding that undocumented workers were considered "employees" within the NLRA definition.¹²⁹ Furthermore,

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

120. *Id.* at 146-47.

121. *Id.* at 141.

122. *See, e.g., Agri Processor Co. v. NLRB*, 514 F.3d 1, 7-8 (D.C. Cir. 2008); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004).

123. *Palma v. NLRB*, 723 F.3d 176, 183-84 (2d Cir. 2013).

124. *Id.*

125. 467 U.S. 883 (1984).

126. *Id.* at 892, 903-05.

127. *Id.* at 904 & n.13, 905.

128. *Id.* at 892-94.

129. *Id.* at 891-92. Prior to that decision, the Board had consistently held that, since the NLRA explicitly stated which employees would be excluded, and undocumented workers were not statutorily exempted, they were entitled to backpay. *See Duke City Lumber Co.*, 251 N.L.R.B. 53,

the Court reasoned that not only were the INA and the NLRA compatible, but that enforcing the NLRA would promote the objectives of the INA.¹³⁰ Shortly after this decision was issued, Congress drastically changed the landscape of immigration law, and labor and employment law for that matter, when it passed the IRCA.¹³¹

In the intermediate years between passage of the IRCA and the Supreme Court's ruling in *Hoffman Plastic*, the courts of appeals were left to determine what effect the law had on undocumented workers' rights under the NLRA.¹³² While one court applied *Sure-Tan*'s backpay preclusion to all cases involving undocumented workers, two courts ruled that *Sure-Tan* barred backpay only to undocumented workers who were no longer in the country and were not legally permitted to reenter the United States.¹³³ With these varying opinions amongst the courts of appeals, the issue was ripe for review by the Supreme Court.¹³⁴

2. *Hoffman Plastic*—The Rehnquist Majority Opinion

In 2002, in *Hoffman Plastic*, the Supreme Court held that an undocumented worker is not entitled to backpay when that worker presents the employer with fraudulent documents in order to secure employment.¹³⁵ Jose Castro, an undocumented worker who was never legally authorized to work in the United States, was hired by Hoffman Plastic Compounds, Inc. ("Hoffman") in May 1988.¹³⁶ Later that year, the American Federation of Labor and Congress of Industrial Organizations began an organizing campaign, which Castro

53-54 (1980); *Apollo Tire Co.*, 236 N.L.R.B. 1627, 1629-31, 1635-36 (1978), *enf'd*, 604 F.2d 1180, 1181-83 (9th Cir. 1979); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214, 214 (1976).

130. *Sure-Tan*, 467 U.S. at 893-94. As will be seen later, this logic is similar to that used by the dissent in *Hoffman Plastic*, though that was decided under the IRCA. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 154-57 (2002) (Breyer, J., dissenting); *see infra* Part II.B.3.

131. 8 U.S.C. § 1324a (2012); *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 147 (majority opinion).

132. *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 642-50 (D.C. Cir. 2001), *rev'd*, 535 U.S. at 152; *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50, 55-58 (2d Cir. 1997); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120-22 (7th Cir. 1992).

133. Compare *A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d at 54-55, 58 (holding that undocumented workers still in the country after their wrongful termination are entitled to backpay under the NLRA), and *Hoffman Plastic Compounds, Inc.*, 237 F.3d at 645-46 (same), with *Del Rey Tortilleria, Inc.*, 976 F.2d at 1119-22 (holding that the preclusion of backpay in the *Sure-Tan* decision applied to all undocumented workers, whether still in the country or not).

134. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 142 & n.2; *see* Katherine E. Seitz, Comment, *Enter at Your Own Risk: The Impact of Hoffman Plastic Compounds v. National Labor Relations Board on the Undocumented Worker*, 82 N.C. L. REV. 366, 385 (2003) ("The divergent interpretations of the *Sure-Tan* decision and the subsequent enactment of the IRCA . . . left unresolved the granting of backpay remedies to undocumented workers.").

135. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 141, 150-52.

136. *Id.* at 140-41.

supported.¹³⁷ Shortly thereafter, Hoffman learned of this organizing attempt and fired workers, including Castro, who he believed were union supporters.¹³⁸ The NLRB determined that Hoffman committed an unfair labor practice in violation of section 8(a)(3) of the NLRA, and awarded relief, including backpay, to the fired employees.¹³⁹ After Castro testified at a compliance hearing that he was never legally admitted into the United States, the Administrative Law Judge (“ALJ”) found that the awarding of backpay was not valid, given U.S. immigration laws.¹⁴⁰ The NLRB disagreed, stating that awarding backpay to Castro would encourage compliance with the IRCA, not contravene it.¹⁴¹ The D.C. Circuit denied review and enforced the Board’s order, after which the Supreme Court granted certiorari.¹⁴²

In an opinion written by Chief Justice Rehnquist, the Court initially discussed a line of cases in which it had held that backpay was inappropriate because the aggrieved employee had violated a different federal law.¹⁴³ The Court normally gives the NLRB deference in interpreting the NLRA and fashioning remedies accordingly.¹⁴⁴ However, when there is another federal statute involved outside the Board’s expertise, the Board is afforded little, if any, deference.¹⁴⁵ In *Hoffman Plastic*, the Board was given deference as to whether employer-Hoffman committed an unfair labor practice, but it had no expertise, and therefore, was given no deference in interpreting the IRCA.¹⁴⁶ The Court noted that in situations where both the employer and employee have violated federal law, the remedies under the NLRA must be offset because of the employee’s illegal actions.¹⁴⁷

The Court proceeded to analyze the changed legal circumstances since it last discussed the issue (mainly, the passage of the IRCA two years after the Court’s last decision on undocumented workers’ entitlement to relief), and concluded that it was impossible for backpay to be granted without someone involved subverting the IRCA.¹⁴⁸ In

137. *Id.* at 140.

138. *Id.*

139. *Id.* at 140-41.

140. *Id.* at 141.

141. *Id.* at 141-42.

142. *Id.* at 142.

143. *Id.* at 142-45 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532-34 (1984); *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)).

144. *Id.* at 142-43; *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

145. *Hoffman Plastics Compounds, Inc.*, 535 U.S. at 142-45.

146. *Id.* at 149-52.

147. *Id.* at 148-52.

148. *Id.* at 147-49.

passing the IRCA, Congress required that an employer verify certain documents to ensure that the prospective employee was legally able to work in the United States.¹⁴⁹ Congress also made it illegal for an employee to use fraudulent documents in order to secure employment.¹⁵⁰ Therefore, despite the Board's broad discretion in fashioning remedies under the NLRA, the IRCA precluded Castro from receiving backpay.¹⁵¹

3. Justice Breyer's Dissent

In beginning his dissent,¹⁵² Justice Breyer immediately rejected the majority's contention that awarding backpay would contravene federal immigration policy.¹⁵³ The dissent then went on to argue that the power to award backpay is one of the NLRB's most effective ways of preemptively deterring employers from committing unfair labor practices.¹⁵⁴ Even with the Board's various possibilities for preventing future unfair labor practices (i.e., ordering an employer to cease and desist and requiring the employer to post a notification that it has committed an unfair labor practice),¹⁵⁵ these powers only prevent *future* violations.¹⁵⁶ Therefore, an employer in essence has the ability to commit one free unfair labor practice without facing any penalty.¹⁵⁷ Furthermore, Justice Breyer argued that neither the statute itself, nor the policy behind immigration law, justifies the Court's holding.¹⁵⁸ Finally,

149. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(b) (2012).

150. § 1324c.

151. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 149-52.

152. *Id.* at 153 (Breyer, J., dissenting). The dissent was joined by Justice Stevens, Justice Ginsburg, and Justice Souter. *Id.*

153. *Id.*

154. *Id.* at 153-54.

155. National Labor Relations Act, 29 U.S.C. § 160(c) (2012). From this point forward, all references to the NLRA will be cited to the provisions found in 29 U.S.C. See Ann C. Hodges & Ellen Dannin, *Judicially Amended "Remedies" Fail to Promote Purposes of NLRA*, TRUTHOUT (July 25, 2013), <http://truth-out.org/news/item/17706-judicially-amended-remedies-fail-to-promote-purposes-of-nlra> ("[R]ather than identifying remedies that will be effective in promoting the NLRA's policies, the normal remedy . . . is simply back pay, an offer of reinstatement and a notice posting to inform co-workers of their NLRA rights.").

156. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154.

157. See *id.*

158. *Id.* at 154-57. After stating that the IRCA does not provide any guidance on how labor laws should be applied in light of immigration violations, Justice Breyer refutes the idea that the loss of backpay would deter future undocumented workers from entering the United States:

For one thing, the general purpose of the immigration statute's employment prohibition is to diminish the attractive force of employment, which like a "magnet" pulls illegal immigrants toward the United States. To permit the Board to award backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual's decision to migrate illegally.

Id. at 155 (internal citations omitted).

the dissent dissected the majority's reliance on previous case law,¹⁵⁹ and concluded that the situation in those cases was significantly different from the facts of the present case.¹⁶⁰ One example Justice Breyer provides is the majority's departure from its previous holding in *Sure-Tan*.¹⁶¹ Unlike the plaintiffs in *Sure-Tan*, who had already left the country, the plaintiff here was still present in the United States, and therefore, awarding backpay would not have resulted in an additional violation of immigration law.¹⁶²

4. Cases Connecting *Hoffman Plastic* and *Palma*

During the period between the Supreme Court's ruling in *Hoffman Plastic* and the Second Circuit's decision in *Palma*, many district and circuit courts issued various opinions on how the *Hoffman Plastic* decision affected undocumented workers' rights under federal labor laws.¹⁶³ In *Agri Processor Co. v. NLRB*,¹⁶⁴ the D.C. Circuit held, in part, that undocumented workers are "employees" within the definition of the NLRA.¹⁶⁵ The court reasoned that nothing in the IRCA alters the definition of "employee" under the NLRA.¹⁶⁶ In addition, the court further cited for support that the Supreme Court, in *Hoffman Plastic*, refused to revisit its ruling in *Sure-Tan*, which was decided before the IRCA, and held that undocumented workers were employees under the NLRA.¹⁶⁷

Two additional cases, *Rivera v. NIBCO, Inc.*¹⁶⁸ and *Zavala v. Wal-Mart Stores, Inc.*,¹⁶⁹ in the Ninth Circuit and the District of New Jersey, respectively, addressed further issues involving undocumented workers'

159. *Id.* at 157-59. Justice Breyer cited the majority's failure to acknowledge the factual distinctions between the case at bar and the cases the majority relied on. *Id.* at 158. Whereas the employees in those cases had been terminated for "good cause" given their own bad conduct, employee-Castro had not been fired by Hoffman for "good cause." *Id.* at 158-60.

160. *Id.* at 159; see *S. S. Co. v. NLRB*, 316 U.S. 31, 47-49 (1942) (overturning the Board's award of backpay by reasoning that the employee also committed an illegal act); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247, 255-56, 259 (1939) (same).

161. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 159.

162. *Id.*

163. See *Agri Processor Co. v. NLRB*, 514 F.3d 1, 7-8 (D.C. Cir. 2008); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005) (holding that undocumented workers were not precluded from seeking unpaid wages under the Fair Labor Standards Act solely because of their immigration status).

164. 514 F.3d 1 (D.C. Cir. 2008).

165. *Id.* at 5.

166. *Id.* at 5-6.

167. *Id.* at 7-8; see *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

168. 364 F.3d 1057 (9th Cir. 2004).

169. 393 F. Supp. 2d 295 (D.N.J. 2005).

right to seek backpay.¹⁷⁰ In *Rivera*, the court had to decide whether employers were allowed to seek discovery of an employee's immigration status in relation to a lawsuit brought by the employee.¹⁷¹ The court, sympathizing with undocumented workers' employment conditions,¹⁷² held that if an employer was allowed to inquire into the employee-plaintiff's immigration status, there would be a chilling effect on undocumented workers bringing suit against unfair employers.¹⁷³

Zavala presents a contrasting viewpoint about the availability of backpay for undocumented workers suing under the Fair Labor Standards Act ("FLSA").¹⁷⁴ In *Zavala*, the District Court of New Jersey discussed the differences between seeking remedies under the FLSA and the NLRA.¹⁷⁵ Under the FLSA, employees seek backpay wages on work that they have already performed; under the NLRA, employees seek wages for work which would have been performed had the employer not committed an unfair labor practice.¹⁷⁶ The *Zavala* court concluded, therefore, that the *Hoffman Plastic* decision was not controlling and the undocumented workers were entitled to seek relief under the FLSA.¹⁷⁷

5. *Palma*: The Second Circuit's Interpretation of *Hoffman Plastic*

In July 2013, eleven years after the Supreme Court decided *Hoffman Plastic*, the Second Circuit decided the case of *Palma*.¹⁷⁸ In 2003, Christian Palma—along with her co-petitioners—was fired by her employer, Mezonos Maven Bakery, Inc. ("Mezonos"), after engaging in protected concerted activity.¹⁷⁹ A stipulation and order declaring that the employer's actions violated the NLRA was entered in 2005, with a compliance proceeding scheduled to determine the amount of backpay, if any, the petitioners were entitled to.¹⁸⁰ From the outset of the compliance proceeding, Mezonos sought to question the petitioners

170. *NIBCO, Inc.*, 364 F.3d at 1068-69; *Zavala*, 393 F. Supp. 2d at 321-25.

171. *NIBCO, Inc.*, 364 F.3d at 1061-66, 1074.

172. *Id.* at 1064-65 (discussing the implications undocumented workers and their families face if they bring a claim for an unfair labor practice against an employer).

173. *Id.* at 1065-66.

174. 29 U.S.C. §§ 201-219 (2012); *Zavala*, 393 F. Supp. 2d at 320-25. Whereas the NLRA is directed towards employee protection through organization and collective bargaining, the FLSA provides statutory protection to working conditions, such as minimum wages. 29 U.S.C. §§ 151, 206 (2012).

175. *Zavala*, 393 F. Supp. 2d at 321-23.

176. *Id.* at 322.

177. *Id.* at 322-25.

178. *Palma v. NLRB*, 723 F.3d 176 (2d Cir. 2013).

179. *Id.* at 177.

180. *Id.* at 177-79.

about their immigration status.¹⁸¹ In order to expedite the proceedings, the General Counsel conceded that the petitioners were undocumented, just for the purposes of that compliance proceeding.¹⁸² Proceeding under this assumption, the ALJ concluded that the employee's fraud that led to the Supreme Court's decision in *Hoffman Plastic* was not present in this case, and therefore, the petitioners were entitled to backpay.¹⁸³ However, the NLRB failed to adopt the ALJ's finding, citing the Supreme Court's broad wording in *Hoffman Plastic*.¹⁸⁴

The petitioners appealed the decision to the Second Circuit, which came to the same conclusion, despite factual differences between the present case and *Hoffman Plastic*.¹⁸⁵ The court cited to the Supreme Court's analysis of the connection between federal labor law and the IRCA.¹⁸⁶ The *Palma* court agreed that awarding backpay to petitioners would undermine the goals of the IRCA and encourage future undocumented workers to enter into the United States.¹⁸⁷ It further stated that Congress's failure to provide any penalty to undocumented workers simply for gaining employment, without further illegality, did not show an intention to allow these workers backpay.¹⁸⁸ Finally, the court reasoned that the denial of backpay does not mean that the employer goes unpunished:¹⁸⁹

[A]s the Supreme Court observed in a subsequent case, IRCA's requirements that employers verify the employment authorization status of prospective employees and not continue to employ unauthorized workers "are enforced through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions."¹⁹⁰

181. *Id.* at 178.

182. *Id.*

183. *Id.* at 178-79; see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 141 (2002). The ALJ agreed with the *Hoffman Plastic* dissent that precluding undocumented workers from receiving backpay would encourage employers to hire them. *Palma*, 723 F.3d at 178 (citing *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 153 (Breyer, J., dissenting)).

184. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 1, 2, 4 (2011) ("[W]e conclude that the Court's decision in *Hoffman* broadly precludes backpay awards to undocumented workers regardless of whether it is they or their employer who has violated IRCA.").

185. *Palma*, 723 F.3d at 180-85, 187. The petitioners did not present fraudulent documents when applying for employment with Mezonos, nor did Mezonos ask them to present any documents at all. *Mezonos Maven Bakery*, 357 N.L.R.B. at 1.

186. *Palma*, 723 F.3d at 181-83.

187. *Id.* at 183-84.

188. *Id.* at 184. But see H.R. REP. NO. 99-682, pt.1, at 58 (1986) ("It is not the intention of the Committee that the employer sanctions provision of the bill be used to undermine or diminish in any way labor protections . . . or to limit the powers of . . . labor relations boards . . .").

189. *Palma*, 723 F.3d at 184-85.

190. *Id.* at 185 (citing *Arizona v. United States*, 137 S. Ct. 2492, 2504 (2012)).

The court, therefore, held that undocumented workers are categorically not entitled to backpay under the NLRA, even when their employer hires them knowing they were undocumented.¹⁹¹

6. Coverage of Undocumented Workers Under Additional Employment Laws

As noted above, one federal court has held that *Hoffman Plastic* does not preclude undocumented workers from seeking remedy under the FLSA, citing the differing goals between the FLSA and the NLRA.¹⁹² However, *Zavala* is not the only case allowing recovery under the FLSA, nor is the FLSA the only statute in which undocumented workers are covered.¹⁹³ In distinguishing the FLSA from the NLRA, courts have highlighted the fact that the FLSA covers work already performed.¹⁹⁴ This is significant because the Court in *Hoffman Plastic* emphasized that awarding backpay under the NLRA would be granting relief to employees who were not lawfully entitled to that pay because of their immigration status.¹⁹⁵

In addition to the NLRA and the FLSA, Title VII of the Civil Rights Act of 1964 ("Title VII")¹⁹⁶ gives employees a cause of action against their employer.¹⁹⁷ Some commentators have noted that Title VII is more analogous to the NLRA than the FLSA, because under Title VII,

191. *Id.* at 183-85. The court remanded part of the case for the NLRB to decide whether, upon the showing of valid IRCA documents, the petitioners were entitled to conditional reinstatement. *Id.* at 185-87.

192. *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-24 (D.N.J. 2005); see ST. ANTOINE ET AL., *supra* note 32 at 13-14 (citing Congress's policy goals when enacting the NLRA); Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 35-36 (2008) ("Nearly every court to reach the issue of *Hoffman*'s relevance to wage and hour law has ruled that unauthorized immigrants may still assert claims for unpaid wages."); Seitz, *supra* note 134, at 398-404 (analyzing the varying judicial interpretations of the NLRA and FLSA); *supra* text accompanying notes 163-66.

193. See, e.g., *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004) ("We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases."); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192-93 (S.D.N.Y. 2002) (holding that it is not clear the *Hoffman Plastic* decision covered suits under the FLSA and the Defendant's request for Plaintiff's immigration status should be denied); see *Gonzalez*, *supra* note 89, at 992-93 (analyzing undocumented workers' coverage under various state employment statutes).

194. *Zavala*, 393 F. Supp. 2d at 321-24. The Department of Labor has also stated its belief that undocumented workers should be covered by the FLSA. *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, U.S. DEP'T LABOR, <http://www.dol.gov/whd/regs/compliance/whdfs48.htm> (last updated July 2008) ("The Department's Wage and Hour Division will continue to enforce the FLSA . . . without regard to whether an employee is documented or undocumented.").

195. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002).

196. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e-2 (2012)).

197. § 703, 78 Stat. at 255.

the plaintiff would be given damages for work not performed.¹⁹⁸ Fortunately, courts have not subscribed to this viewpoint, and have generally held that Title VII does apply to undocumented workers.¹⁹⁹

III. THE SUPREME COURT WRONGLY INTERPRETED THE IMMIGRATION REFORM AND CONTROL ACT TO SUPERSEDE EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT AND THE SECOND CIRCUIT ERRONEOUSLY EXPANDED THE COURT'S HOLDING

The dissent in *Hoffman Plastic* relied on the statutory language and policy of the IRCA in reasoning that the majority's holding was erroneous.²⁰⁰ This statutory interpretation is consistent with the general principles of statutory preemption that courts have followed.²⁰¹ Furthermore, the legislative history indicates that it was never the intention of Congress to limit existing labor laws at the time it passed the IRCA.²⁰² However, even assuming that the Supreme Court's reasoning was valid, the Second Circuit Court of Appeals should not have expanded the *Hoffman Plastic* reasoning to all undocumented workers.²⁰³

A. Rules of Statutory Interpretation

One of the main rules of statutory interpretation is that courts will generally try to avoid interpreting statutes to overturn one another, absent clear intention by Congress.²⁰⁴ Courts should only read a statute

198. See Gonzalez, *supra* note 89, at 990-91; Weiner, *supra* note 62, at 1622-24; see also Lewinter, *supra* note 71, at 531 ("[C]ourts have considerably more discretion in fashioning remedies under Title VII than under the NLRA.").

199. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004); De La Rosa v. Northern Harvest Furniture, 210 F.R.D. 237, 238-39 (C.D. Ill. 2002) (discussing, in dictum, *Hoffman Plastic*'s inapplicability due, in part, to a district court's broad remedial power as compared to the limited discretion of the NLRB). But see Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 896-97 (S.D. Tex. 2003) (foreclosing the possibility of backpay under Title VII for the period in which the plaintiff was not legally authorized to work in the United States).

200. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154-56 (Breyer, J., dissenting).

201. See Agri Processor Co. v. NLRB, 514 F.3d 1, 4-5 (D.C. Cir. 2008) (analyzing the rules of statutory interpretation, and stating that if there is ambiguity as to whether Congress intended to supersede a previous statute, the court should give effect to both statutes); Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny*, 29 BERKLEY J. EMP. & LAB. L. 1, 15-18 (2008) (citing several Supreme Court cases that analyze potentially conflicting federal statutes); *infra* Part III.A.

202. H.R. REP. NO. 99-682, pt. 1, at 58 (1986); see Seitz, *supra* note 134, 394-96.

203. See *infra* Part III.B.

204. *Blanchette v. Conn. General Ins. Corp.*, 419 U.S. 102, 133-34 (1974); *Agri Processor Co.*, 514 F.3d at 4 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984)); LINDA D. JELLUM & DAVID CHARLES HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND

to overturn a previous one when Congress expressly states that intention or when it is absolutely necessary.²⁰⁵ The Supreme Court has reasoned that Congress has presumably given great thought to its previous statutes and it should, therefore, be given force.²⁰⁶ The only circumstance in which a court is likely to find that Congress implicitly overturned a law is if the two statutes are irreconcilable.²⁰⁷

In order to determine whether two statutes are irreconcilable, a court will generally look at statutory interpretation techniques.²⁰⁸ There are three central guides to statutory interpretation: (1) textualism; (2) intentionalism; and (3) purposivism.²⁰⁹ A textualist is hesitant to look at any source past the text itself.²¹⁰ This approach is very formalistic, and is sometimes criticized for its rigidity.²¹¹ Only when there is an “ambiguity or absurdity” does a textualist look to other sources.²¹² Intentionalists, on the other hand, look at a variety of sources in addition to the text.²¹³ The ultimate goal of an intentionalist is to discern the legislative intent.²¹⁴ Finally, as its name suggests, a purposivist will try to ascertain the statutory purpose.²¹⁵ This is done by looking at the ill that the legislature intended to cure in passing the legislation.²¹⁶

As stated above, a court will try to read two conflicting statutes so that they can coexist, or if impossible, only overturn part of a statute.²¹⁷ However, should neither of these alternatives be possible, the statute that is passed later in time will be determined to supersede the earlier statute.²¹⁸ This doctrine is commonly referred to as “implied repeal.”²¹⁹

LAWYERING STRATEGIES 319 (2006).

205. See *Agri Processor Co.*, 514 F.3d at 4.

206. See *Blanchette*, 419 U.S. at 133-34.

207. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); Vu & Schwartz, *supra* note 201, at 19-20.

208. See JELLUM & HRICK, *supra* note 204, at 319; see also Vu & Schwartz, *supra* note 201, at 19-20 (discussing the many canons of statutory interpretation).

209. JELLUM & HRICK, *supra* note 204, at 7; Vu & Schwartz, *supra* note 201, at 21.

210. JELLUM & HRICK, *supra* note 204, at 7, 95-96; Vu & Schwartz, *supra* note 201, at 21; John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 218-19 (2001).

211. JELLUM & HRICK, *supra* note 204, at 96-97.

212. *Id.* at 96.

213. *Id.* at 97; John F. Manning, *Legal Realism & the Canon's Revival*, 5 GREEN BAG 283, 292-93 (2002).

214. JELLUM & HRICK, *supra* note 204, at 7, 97.

215. *Id.* at 99; Walker, *supra* note 210, at 214-15.

216. JELLUM & HRICK, *supra* note 204, at 99-100; Walker, *supra* note 210, at 215-17; see *supra* notes 193-205.

217. See JELLUM & HRICK, *supra* note 204, at 319.

218. *Id.*; see *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”). An additional construct is to

It must be stressed that courts across the country apply this doctrine with extreme reservation.²²⁰

The Court in *Hoffman Plastic* found that the IRCA and the NLRA were not capable of coexisting, at least as far as backpay was concerned.²²¹ As discussed earlier, the definition of employee under the NLRA is very broad, with a few exceptions.²²² In addition to the statutory definition, the NLRB has provided necessary guidance on whether certain workers are covered, either due to an ambiguity or a possible conflict with another federal law.²²³ Furthermore, undocumented workers do not fall under any of the statutory exceptions, and the NLRB has recognized that in two decisions concerned with the coverage of undocumented aliens.²²⁴ Even the Supreme Court tacitly recognized that the definition of “employee,” under the NLRA, includes undocumented workers.²²⁵ Thus, the Court must have found that the IRCA repealed the part of the NLRA that grants the NLRB broad remedial power.²²⁶ However, nothing in the IRCA explicitly states that it was amending the NLRA to include undocumented workers in the list of those exempted under section 2(3) or that undocumented workers were not fully covered by the NLRB’s remedial power under section 10(c).²²⁷

give a more specific statute greater deference than a more general statute. JELLUM & HRICK, *supra* note 204, at 319.

219. See *Mancari*, 417 U.S. at 550; JELLUM & HRICK, *supra* note 204, at 323; Vu & Schwartz, *supra* note 201, at 19.

220. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-55 (1976) (“It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem.”); *Meade v. Freeman*, 462 P.2d 54, 62-63 (Idaho 1969) (Prather, D.J., concurring in result, dissenting in part) (“[A] later act does not, by implication, repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts can not . . . be given effect or enforced concurrently.”).

221. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002).

222. See *supra* note 48 and accompanying text.

223. See *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 396-99 (1996) (upholding the Board’s determination that live-haul crews, whose duties include extra-agricultural work, are not exempt despite the statute’s agricultural exception); *In re Stockholders Publ’g Co.*, 28 N.L.R.B. 1006, 1024 (1941) (holding, prior to later statutory amendment, that newspaper delivery boys were employees under the NLRA), *aff’d*, *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 126-29 (1944).

224. *Concrete Form Walls, Inc.*, 346 N.L.R.B. 831, 833-34 (2006) (finding that undocumented workers were still covered employees, even after the Supreme Court’s holding in *Hoffman Plastic*); *Agri Processor, Co.*, 347 N.L.R.B. 1200, 1202 (2006) (same), *enf’d*, 514 F.3d 1, 7-9 (2008).

225. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 150 n.4, 152. By enforcing other sanctions ordered by the NLRB against the employer, the Court recognized that violations of the NLRA against undocumented workers were still covered. *Id.*

226. See Vu & Schwartz, *supra* note 201, at 13, 22-23.

227. See 8 U.S.C. § 1324a (2012); Seitz, *supra* note 134, at 393; Vu & Schwartz, *supra* note 201, at 13-14 (analyzing the doctrine of implied repeal, and arguing that the Supreme Court applied it in *Hoffman Plastic*).

Turning to the legislative history, it becomes clear that Congress actually intended to give continuing force to the NLRA's broad remedial authority.²²⁸ In fact, the legislative history references the Supreme Court's reasoning in *Sure-Tan*—that the hindering of the NLRB's ability to award relief would have a serious negative effect on labor relations.²²⁹ The legislative history in this circumstance is especially helpful, because it shows that not only was Congress aware of the NLRA's applicability to undocumented workers, but it believed that the new law would not be irreconcilable with the former.²³⁰ Hence, after examining both the text and legislative history of the statute, it is clear that Congress neither explicitly nor implicitly exhibited an intention for the IRCA to supersede the NLRA.²³¹

This does not end the analysis, however, as it is still possible that regardless of congressional intention, it is impossible to give force to both statutes.²³² This is largely the reasoning of the majority in *Hoffman Plastic* and the gripe the dissent has with the holding.²³³ The Court looked to the various provisions of the IRCA that required verification of the employee's immigration status, and the penalties for failing to adhere to the requirements.²³⁴ The Court reasoned that given the clear intention of deterring the hiring of undocumented workers, the awarding of backpay would contravene congressional policy on immigration.²³⁵ By awarding the petitioners backpay for wages that would have been earned but for the employer's unfair labor practice, the petitioners would be awarded wages they were never legally entitled to.²³⁶ As such, "it is

228. See H.R. REP. NO. 99-682, pt. 1, at 58 (1986).

229. *Id.* ("[A]pplication of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'" (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984))).

230. *Id.*; see also JELLUM & HRICK, *supra* note 204, at 323 ("Courts disfavor repeal by implication because they presume that the legislature knew about existing related statutes and so would have explicitly expressed its intention to repeal one by saying so.").

231. See Vu & Schwartz, *supra* note 201, at 13.

232. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148-49 (2002); Vu & Schwartz, *supra* note 201, at 22-23, 29-30; see also *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4 (D.C. Cir. 2008) (refuting the employer's claim that the NLRA's definition of employee does not include undocumented workers); *Meade v. Freeman*, 462 P.2d 54, 62-63 (Idaho 1969) (Prather, D.J., concurring in result, dissenting in part) (stating that implied repeal should only be used when it is absolutely impossible to give force to the statutes in question).

233. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 146-52, 153-56 (Breyer, J., dissenting).

234. *Id.* at 147-48 (majority opinion) (citing 8 U.S.C. § 1324a (2012)); see Seitz, *supra* note 134, at 390.

235. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148.

236. *Id.* at 148-49; see 8 U.S.C. §§ 1324a, 1324c (2012) (making it illegal to hire employees without verifying their right to legally work in the United States, and for employees to tender fraudulent documents to an employer in order to secure employment).

impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”²³⁷ For these reasons, the Court found that the two statutes were irreconcilable, and therefore, the petitioners were not entitled to backpay.²³⁸

Justice Breyer’s dissent in *Hoffman Plastic* adequately and persuasively argues that the majority’s reasoning was not valid.²³⁹ In fact, Justice Breyer argues that the Board’s decision to award backpay would promote both federal labor law and immigration law.²⁴⁰ He argued that one of the goals of the NLRB is to deter future labor violations, and that the best way to do so is by awarding backpay to wronged employees.²⁴¹ According to the dissent, the overarching goal of the IRCA was to provide a disincentive for potential immigrants from entering the country illegally.²⁴² When the policy is analyzed from this viewpoint, as it should be, it becomes clear that the two statutes are not only reconcilable, but also quite harmonious.²⁴³ By denying backpay to undocumented workers, the Court is essentially providing a great incentive to subvert the law and hire the workers.²⁴⁴ An increase in job opportunities for undocumented workers is likely to have a much more real and direct incentive for future immigrants than would the possibility of backpay for a possible future unfair labor practice.²⁴⁵ Whereas current and future undocumented workers may be wholly unaware of labor rights, employers are much more likely to not only be aware of employee rights, but abuse those rights.²⁴⁶

Subsequent cases decided by the courts of appeals provide additional evidence in support of reconciling the NLRA and the IRCA.²⁴⁷ For example, in its initial analysis in *Agri Processor Co.*, the

237. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148; see *supra* note 229.

238. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148-52.

239. *Id.* at 153-60 (Breyer, J., dissenting); see Gonzalez, *supra* note 89, at 989-90; Lewinter, *supra* note 71, at 521-22; Seitz, *supra* note 134, at 394-95.

240. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-57.

241. *Id.*

242. *Id.* at 155 (citing H.R. REP. NO. 99-682, pt. 1, at 45-46 (1986)).

243. *Id.* at 155-57; Lewinter, *supra* note 71, at 521-22, 524.

244. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56; Gonzalez, *supra* note 89, at 989-90; Seitz, *supra* note 134, at 388.

245. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155 (“To deny the Board the power to award backpay, however, might very well increase the strength of this magnetic force. . . . It thereby increases the employer’s incentive to find and to hire illegal-alien employees.”); see Weiner, *supra* note 62, at 1599-1600.

246. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56; Cunningham-Parmeter, *supra* note 192, at 33; see *supra* text accompanying note 45 (“On July 5, 1935, in order to keep the labor peace and balance the power between laborers and employers, Congress passed the NLRA.”).

247. See *Agri Processor Co. v. NLRB*, 514 F.3d 1, 3-8 (D.C. Cir. 2008); *Concrete Form Walls*,

D.C. Circuit reiterated the *Hoffman Plastic* dissent, stating that nothing in the IRCA evidences intent by Congress to replace the NLRA definition of employee.²⁴⁸ In *NLRB v. Concrete Form Walls, Inc.*,²⁴⁹ the Eleventh Circuit affirmed the Board's finding that its precedence of applying the NLRA to undocumented workers still stands.²⁵⁰ Finally, as discussed above, the Ninth Circuit held that *Hoffman Plastic* notwithstanding, a defendant-employer is barred from seeking a plaintiff's immigration status in a suit brought under Title VII.²⁵¹

While the reasoning in these cases is insightful, their import comes from their conclusions that the two statutes are reconcilable.²⁵² As noted earlier, courts should generally find a statute to overturn another only when it is absolutely necessary to do so.²⁵³ The reasoning of the *Hoffman Plastic* dissent—and findings of the NLRB, D.C. Circuit, and Eleventh Circuit—makes it clear that the NLRA and the IRCA are able to exist without contravening each other.²⁵⁴ Therefore, the *Hoffman Plastic* Court should have held that the IRCA does not prevent undocumented workers from being awarded backpay.²⁵⁵

B. The Second Circuit in Palma Should Not Have Expanded the Scope of the Court's Ruling Given the Limited Holding in Hoffman Plastic

While the dissent in *Hoffman Plastic* commented on whether undocumented workers were entitled to backpay when the employer knowingly hires them, the majority's holding did not decide this issue.²⁵⁶

Inc., 346 N.L.R.B. 831, 833-35 (2006), *enf'd*, 225 F. App'x 837 (11th Cir. 2007).

248. *Agri Processor Co.*, 514 F.3d at 4-6.

249. 225 F. App'x 837 (11th Cir. 2007).

250. *Concrete Form Walls, Inc.*, 225 F. App'x at 838, *enf'g*, 346 N.L.R.B. at 833-34.

251. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-70 (9th Cir. 2004); *see supra* text accompanying notes 160-65.

252. *Agri Processor Co.*, 514 F.3d at 8; *Concrete Form Walls, Inc.*, 346 N.L.R.B. at 833-34; *see also NIBCO, Inc.*, 364 F.3d at 1066-67 (arguing that the *Hoffman Plastic* decision should not be read broadly).

253. *See JELLUM & HRICKI, supra* note 204, at 323; *supra* text accompanying notes 193-213.

254. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 155-57 (2002) (Breyer, J., dissenting); *Agri Processor Co.*, 514 F.3d at 7-8; *Concrete Form Walls, Inc.*, 225 F. App'x at 838, *enf'g*, 346 N.L.R.B. at 833-34. Prior to the Supreme Court's decision in *Hoffman Plastic*, the Ninth Circuit held that the IRCA did nothing to alter the coverage of the NLRA once undocumented workers were hired by an employer. *NLRB v. Kolkka*, 170 F.3d 937, 940-42 (9th Cir. 1999).

255. *See Cunningham-Parneter, supra* note 192, at 33; *Seitz, supra* note 134, at 392-98.

256. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56. In *Hoffman Plastic*, the employer had no reason to know that the employee was an undocumented worker as the employee presented the employer with a fraudulent birth certificate. *Id.* at 140-41 (majority opinion). Thus, the Court did not have to decide the question of whether undocumented workers would be entitled to the full protection of the NLRA when they did no further wrong and the employer hired them *knowing* they were undocumented. *Id.* at 155-56 (Breyer, J., dissenting).

Accordingly, the Second Circuit should have found, as have other circuit and district courts,²⁵⁷ that the Supreme Court's ruling was narrow, and thus, the petitioners in *Palma* were entitled to backpay.²⁵⁸ In expanding the denial of backpay to all undocumented workers, the Second Circuit is giving a counterintuitive incentive for employers to hire undocumented workers.²⁵⁹

In coming to its conclusion in *Palma*, the Second Circuit relied heavily on the Supreme Court's reasoning that the award of backpay to undocumented workers would be in direct violation of federal immigration law.²⁶⁰ However, other circuits have not found that language controlling.²⁶¹ The *Agri Processor* case, for example, claimed that, while the *Hoffman Plastic* Court precluded backpay in that case, the holding "addressed only what remedies the Board may grant undocumented aliens when employers violate their rights under the NLRA."²⁶² While the rest of the discussion goes on to differentiate the facts of that case with *Hoffman Plastic*, it is this reasoning that is most applicable to the Second Circuit's decision in *Palma*.²⁶³

In *Hoffman Plastic*, it was the employee who committed an illegal act when he presented the employer with fraudulent documents.²⁶⁴ In *Palma*, on the other hand, the employees did not present any illegal documents, or try to conceal their immigration status.²⁶⁵ As the NLRB's

257. See *supra* note 246.

258. See *Agri Processor Co.*, 514 F.3d at 8; *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1066-67 (9th Cir. 2004); *Seitz*, *supra* note 134, at 402-03, 407.

259. *Palma v. NLRB*, 723 F.3d 176, 183-85 (2d Cir. 2013); see *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56 ("Were the Board forbidden to assess backpay against a knowing employer—a circumstance not before us today—this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious." (internal citations omitted)); *Cunningham-Parmeter*, *supra* note 192, at 33-34. Despite Justice Breyer's assumption on remedies against knowing employers, the *Palma* court stated:

Although petitioners urge us to distinguish the present case from *Hoffman Plastic* because in that case [the employee] himself had violated IRCA, whereas the petitioners here did not present fraudulent documents, the *Hoffman Plastic* Court's discussion of the direct conflicts between IRCA and awards of backpay is equally applicable to aliens who did not gain their jobs through such fraud but who are simply present in the United States unlawfully.

Palma, 723 F.3d at 183.

260. *Palma*, 723 F.3d at 181-85.

261. See, e.g., *Agri Processor Co.*, 514 F.3d at 7 ("Nowhere in *Hoffman Plastic* did the Court hold that IRCA leaves undocumented aliens altogether unprotected by the NLRA."); *NIBCO, Inc.*, 364 F.3d at 1067 ("We seriously doubt that *Hoffman* is as broadly applicable as NIBCO contends, and specifically believe it unlikely that it applies in Title VII cases.").

262. *Agri Processor Co.*, 514 F.3d at 7.

263. *Palma*, 723 F.3d at 183-84; see *Agri Processor Co.*, 514 F.3d at 7-8.

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

265. *Palma*, 723 F.3d at 183.

opinion noted: “[The employees] never presented work-authorization documents, and the [employer] did not ask for documentation when it hired them.”²⁶⁶ This is the exact scenario that Justice Breyer predicted would take place as a result of the Court’s holding in *Hoffman Plastic*.²⁶⁷ Although the provisions of the IRCA require an employer to verify an employee’s legality in seeking work,²⁶⁸ the absence of serious punishment for unfair labor practices encourages the employer to hire these employees “with a wink and a nod.”²⁶⁹

IV. THE SUPREME COURT AND SECOND CIRCUIT’S RULINGS SHOULD BE SUPERSEDED BY CONGRESSIONAL ACTION

One of the most cited sources of hostility towards the Court’s reasoning in *Hoffman Plastic* was that it was going to have the exact opposite effect that the Supreme Court had intended: employers would be more likely to circumvent federal immigration policy.²⁷⁰ Eleven years after the Supreme Court’s ruling, the Second Circuit’s holding in *Palma* evinced that employers have continued to hire undocumented workers without penalty.²⁷¹ In order to combat this problem, Congress should impose stiffer penalties.²⁷² However, should Congress fail to take such action, the courts need to limit the reach of the *Hoffman Plastic* holding to ensure that the NLRA still has force, and that the policies of the IRCA are successfully carried out.²⁷³

266. *Mezonos Maven Bakery, Inc.* 357 N.L.R.B. 1, 1 (2011), *aff’d in part, Palma*, 723 F.3d at 187.

267. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 156 (Breyer, J., dissenting) (“[T]he Court’s rule offers employers immunity in borderline cases, thereby encouraging them to take risks, *i.e.*, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment . . . will lower the costs of labor law violations.”).

268. 8 U.S.C. § 1324a(b) (2012).

269. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 156; *see* Cunningham-Parmeter, *supra* note 192, at 33.

270. *See* Cleveland et al., *supra* note 3, at 810-11, 814; Cunningham-Parmeter, *supra* note 192, at 33-34; Seitz, *supra* note 134, at 397-98.

271. *Palma*, 723 F.3d at 177-79.

272. *See infra* Part IV.A; *see also* Ellen Dannin, *No Rights Without a Remedy: The Long Struggle for Effective National Labor Relation Act Remedies*, AM. CONST. SOC. FOR L. & POL’Y, June 2011, at 1, 16-17.

273. *See infra* Part IV.B.

A. Congress Needs to Implement New Legislation Ensuring Undocumented Employees' Rights Are Protected and Employers Are Properly Deterred from Committing Unfair Labor Practices

Over the past several years, there has been a growing sentiment that immigrants' rights need to be addressed.²⁷⁴ Additionally, there have been doubts as to whether the NLRB has enough ability to deter employers given their current remedial power.²⁷⁵ While the NLRB and courts can only go so far in allowing awards under the NLRA as currently enacted,²⁷⁶ Congress has the power to amend the Act and allow undocumented workers to become fully protected, which in turn would help deter employers from committing unfair labor practices.²⁷⁷ Congress should amend the NLRA, specifically entitling undocumented workers to backpay, but denying any reinstatement without showing proper documentation.²⁷⁸ Further, Congress should require an employer to pay punitive damages, essentially overruling *Republic Steel Corp.*²⁷⁹

1. Covering Undocumented Workers Under the National Labor Relations Act and Entitling Them to Backpay

In spite of the setback the Court dealt to undocumented workers' rights in *Hoffman Plastic*, it preserved the question of whether or not undocumented workers were covered employees under the NLRA.²⁸⁰ Nevertheless, in order to prevent any future confusion or judicial deterioration of those rights, Congress should explicitly state that undocumented workers are covered under section 2(3) of the NLRA.²⁸¹

274. See Lawrence Downes, Editorial, *Hope Leaves the Shadows at the Capitol*, N.Y. TIMES, Apr. 11, 2013, at A22; Dinan, *supra* note 2.

275. See Dannin, *supra* note 272, at 16-17. See generally Schiffer, *supra* note 62; Weiner, *supra* note 62.

276. See National Labor Relations Act, 29 U.S.C. § 160(a), (c) (2012); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 576-79 (2007); Hodges & Dannin, *supra* note 155.

277. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-32 (1937) (holding that the NLRA is constitutional under Congress's power to regulate interstate commerce).

278. See *infra* Part IV.A.1.

279. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-13 (1940); *infra* Part IV.A.2.

280. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150 n.4, 152 (2002). This is evidenced by the Court leaving intact the other penalties the Board handed down against the employer, including an order to cease and desist, and an order to post a notice that it has committed an unfair labor practice. *Id.* at 152. In a footnote, the Court stated that its decision in *Sure-Tan*, which held undocumented workers employees under the NLRA, was not at issue in *Hoffman Plastic*. *Id.* at 150 n.4.

281. See 29 U.S.C. § 152(3) (2012). Although "employee" is defined as any employee not specifically exempt under the NLRA, there has been much litigation over whether certain jobs fit into those exemptions. *Id.*; see *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 394-99, 408-09 (1996) (holding that live-haul crews are not agricultural laborers, and therefore, are covered employees).

Doing so would eliminate all analysis over the later-in-time rule and other statutory interpretation.²⁸² It would also make clear that there is, in fact, no conflict between the NLRA and the IRCA, in effect superseding the *Hoffman Plastic* decision.²⁸³

There has been much publication regarding the NLRB's inability to deter employers in the unfair treatment of lawful workers.²⁸⁴ This issue only becomes magnified and intensified when undocumented workers are being treated unfairly.²⁸⁵ Employers can continue to hire these workers because they know that there will be no monetary punishment, and undocumented workers will continue to seek out the employment because they likely have little choice.²⁸⁶ Exacerbating the problem is the ever-present fear of deportation.²⁸⁷ Large corporations are aware of their powerful grip on these workers and exploit them accordingly.²⁸⁸ Additionally, even the smaller employers can take advantage in a twisted cutting-off-your-nose-to-spite-your-face scenario.²⁸⁹ While the stakes are comparatively low for the employer, organizing attempts can have serious consequences for the undocumented worker-employee.²⁹⁰

under the NLRA); *Brown Univ.*, 342 N.L.R.B. 483, 483, 486-93 (2004) (overturning *N.Y. Univ.*, 332 N.L.R.B. 1205 (2000), by determining that graduate teaching assistants are not covered). Perhaps the most litigation has involved whether a worker is an employee or an independent contractor, and therefore, not covered by the NLRA. See *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 495-96, 504 (D.C. Cir. 2009); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 373-81 (D.C. Cir. 1983). For a discussion on covered versus non-covered employees, see *ST. ANTOINE ET AL.*, *supra* note 32, at 22-29.

282. *Agri Processor Co. v. NLRB*, 514 F.3d 1, 4-6 (D.C. Cir. 2008); see *supra* Part III.A; see also *JELLUM & HRICK*, *supra* note 204, at 7, 96-100, 319, 323 (discussing several canons of statutory interpretation).

283. 29 U.S.C. §§ 151-169 (2012); 8 U.S.C. §§ 1324a, 1324c(a) (2012).

284. See *Dannin*, *supra* note 272, at 16-17. See generally *Schiffer*, *supra* note 62; *Weiner*, *supra* note 62.

285. See *Cleveland et al.*, *supra* note 3, at 804-11.

286. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002) (requiring employer to cease and desist and post notice of NLRA rights); *Cleveland et al.*, *supra* note 3, at 804-11; *Hidden America*, *supra* note 2 (discussing various workplace problems that some undocumented workers face).

287. *Hidden America*, *supra* note 2.

288. *Cleveland et al.*, *supra* note 3, at 805-06, 808 ("Immediately after the Court's ruling, an employer's attorney . . . cited *Hoffman* when he issued a threat of litigation against a community group that had announced the intention to protest unpaid wages."); see, e.g., Steven Greenhouse, *Cleaner at Wal-Mart Tells of Few Breaks and Low Pay*, N.Y. TIMES, Oct. 25, 2003, at A10.

289. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886-87 (1984). After the NLRB certified a union as the lawful representative of its employees, the employer in *Sure-Tan* contacted the Immigration and Naturalization Service to determine whether its employees were legally allowed to work in the United States. *Id.* at 887.

290. See *id.*; *Hidden America*, *supra* note 2.

To alleviate this problem, Congress can amend the NLRA so that undocumented workers are entitled to backpay.²⁹¹ Backpay would provide a minimum deterrent to employers who would otherwise hire these workers knowing they can exploit them.²⁹² Under the general deference normally given to the Board to fashion remedies, the Board should be given the power to calculate the amount of backpay due an undocumented worker.²⁹³ One factor the Board has taken into consideration in the past is whether the amount of backpay owed should be tolled.²⁹⁴ However, this is just one example, and Congress should allow the Board to use its expertise in deciding which factors are appropriate under the specific circumstances.²⁹⁵

2. Subjecting Employers to Punitive Damages in Order to Provide a Stronger Deterrent Effect.

While backpay relief is an important first step, it is just that—a first step.²⁹⁶ In order for the Board to be able to effectuate what Justice Breyer believes to be the goal of the NLRA,²⁹⁷ there needs to be a more powerful deterrent than the remedies traditionally provided.²⁹⁸ While previous attempts have focused on remedying the wronged,²⁹⁹ a stronger punitive punishment will not only help the wronged, but also serve as a strong deterrent to the wrong-doer.³⁰⁰ As discussed above, deterrence is

291. See *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56 (Breyer, J., dissenting); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-32 (1937).

292. See *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56; Gonzalez, *supra* note 89, at 997.

293. See *Sure-Tan, Inc.*, 467 U.S. at 889, 891; Fuchs & Kelleher, *supra* note 59, at 832-33. When discussing the Board's interpretation of the definition of employee, the Court stated "the Board's construction of that term is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Sure-Tan, Inc.*, 467 U.S. at 891.

294. *Sure-Tan, Inc.*, 467 U.S. at 888-89.

295. See *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 405-06 (3d Cir. 1990) ("In fashioning a remedy in a particular proceeding, the Board may draw on the knowledge and expertise it has acquired during its continuous engagement in the resolution of labor disputes and need not confine itself to the record of the dispute before it.").

296. See *supra* Part IV.A.1.

297. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 153-57 (discussing the impact that backpay will have on the policy considerations behind IRCA, stating: "Rather, it reasonably helps to deter unlawful activity that both labor laws and immigration law seek to prevent.").

298. See Schiffer, *supra* note 62; Hodges & Dannin, *supra* note 155 ("Thanks to decades of judicial amendments, section 10(c)'s command that NLRA remedies must effectuate the NLRA's policies, has become a nullity.").

299. See, e.g., *Minette Mills, Inc.*, 316 N.L.R.B. 1009, 1011 (1995) (rejecting any compensatory damages classified as backpay, including distress, car, tools, and home); Memorandum from Leonard R. Page, Gen. Counsel, to Regional Directors, Officers-in-Charge, and Resident Officers (Feb. 3, 2000) (on file with the *Hofstra Law Review*).

300. See Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143, 1149-50 (1989).

an especially important requirement when an undocumented worker is the employee harmed.³⁰¹ While backpay is important in helping make the employee whole, it does very little to deter employers from committing future unfair labor practices.³⁰² An employer would essentially be paying the employee wages he would have earned anyway, so any deterrence would be minimal.³⁰³ Instead, requiring an employer to pay larger penalties, in addition to backpay, better discourages him from committing future violations.³⁰⁴ This system will both deter employers, and allow undocumented workers to be secure in the knowledge that their employer cannot so easily exploit them.³⁰⁵

Of course, this penalty will not be applicable only in situations in which an undocumented worker is the victim, though it may be most important in such a situation.³⁰⁶ Given that reinstatement is not a viable option for undocumented workers, punitive measures are especially important.³⁰⁷ Such a punishment can come in the form of a fine that is to be paid to the government.³⁰⁸ This is a particularly effective solution because it avoids the issue of the harmed employee being overcompensated.³⁰⁹

In determining how to calculate the punitive damages in a particular case, the Board can simply apply a normal tort formula that courts consistently use.³¹⁰ In order to determine ordinary negligence, one looks at whether the burden of precaution is lower than the probability of the accident and the loss as a result of the accident.³¹¹ In determining

301. See *supra* text accompanying notes 277-84.

302. Lieberman, *supra* note 276, at 579 (discussing the weak remedial power the NLRB has, including backpay); Schiffer, *supra* note 62.

303. See Dannin, *supra* note 272, at 16.

304. See Cooter, *supra* note 300, at 1160-61; Weiner, *supra* note 62, at 1623-24; Dannin, *supra* note 272, at 10-12.

305. See Cleveland et al., *supra* note 3, at 806-11; *Hidden America*, *supra* note 2.

306. See, e.g., Cunningham-Parmeter, *supra* note 192, at 34; Gonzalez, *supra* note 89, at 997, 999.

307. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 145 (2002). Permitting reinstatement for undocumented workers would admittedly result in a continued violation of immigration laws, and, as a result, does not present the strongest argument for deterrence. Immigration Reform and Control Act, 8 U.S.C. § 1324a(a)(1)-(2) (2012); see *infra* Part IV.A.3.

308. See, e.g., Dannin, *supra* note 272, at 10-11 (discussing the Court's holding in *Republic Steel Corp.*, the article reasons that the Court could have required the employer to pay money to the government agency as an alternative to compensating the victim).

309. *Id.* at 11.

310. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing the famous formula for negligence); Cooter, *supra* note 300, at 1149-53 (analyzing a formula for computing punitive damages stemming from Judge Learned Hand's negligence formula in *Carroll Towing*).

311. *Carroll Towing Co.*, 159 F.2d at 173.

whether punitive damages are appropriate, the extent of the negligence is examined.³¹² According to Professor Robert Cooter:

Definite predictions can be made about business defendants who are profit oriented, or more generally, about any rational decisionmaker motivated by private economic gain. Such a decisionmaker will not violate a legal standard intentionally unless the gain from doing so is, at a minimum, larger than the expected costs of liability.³¹³

This assertion is particularly on point, given the failures of deterring future violations under the current NLRA remedial scheme.³¹⁴ If an employer believes that he would be able to commit an unfair labor practice without being punished in the form of monetary damages, he is more likely to do it than not.³¹⁵ In normal unfair labor practice situations, this is a strong possibility given the weak deterrent effects that backpay and reinstatement have had.³¹⁶ When, as the Supreme Court has decided, the employer does not need to pay any backpay, and reinstatement is foreclosed, the incentive to treat undocumented workers unfairly is even higher.³¹⁷ Therefore, in calculating punitive damages, the NLRB should also take into account the extent of the employer's knowledge in hiring and continuing to employ undocumented workers, much like the penalties under the IRCA.³¹⁸

Seeking congressional approval of punitive damages is not foreign to the field of employment law.³¹⁹ In 1991, Congress amended Title VII to allow plaintiffs the ability to recover compensatory and punitive damages.³²⁰ Similar to the "knowledge" element proposed here, a Title VII plaintiff must show that he was intentionally discriminated

312. See Cooter, *supra* note 300, at 1148-53.

313. *Id.* at 1147-48.

314. Liebman, *supra* note 276, at 579; Schiffer, *supra* note 62 ("A recent study by the Center for Economic and Policy Research found that, in 2005, workers engaged in pro-union activism 'faced almost a 20% chance of being fired during a union-election campaign.'").

315. *Cf.* Cooter, *supra* note 300, at 1150-53.

316. See Liebman, *supra* note 276, at 579; Schiffer, *supra* note 62; Weiner, *supra* note 62, at 1621-22.

317. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 145, 148-52 (2002); *cf.* Cooter, *supra* note 300, at 1150-53.

318. Immigration Reform and Control Act, 8 U.S.C. § 1324a(e)(4), (f) (2012); COOPER & O'NEIL, *supra* note 12, at 3; see also Cooter, *supra* note 300, at 1152-53, 1176-77, 1179-80 (arguing that punitive damages are appropriate "when the actor intentionally harms others for personal gain").

319. Senn, *supra* note 33, at 136-42 (discussing the various remedies available under Title VII, the Americans with Disability Act, and the Age Discrimination in Employment Act).

320. Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a (2012)); see Senn, *supra* note 33, at 137-39.

against.³²¹ According to the legislative history of the law, Congress was motivated to end and deter intentional discrimination based on classes protected by Title VII.³²² Congress's citation of the failure of then-current remedies to effectuate the purpose of Title VII is analogous to the NLRA, as well.³²³ If, as is argued here, the lack of monetary punishment encourages employers to discriminate against undocumented workers if they try to organize, psychological and fiscal effects are also likely to result.³²⁴ As such, punitive damages are just as necessary under the NLRA as they are under Title VII.³²⁵

3. The Likelihood of Reform and the Practical Impossibility of Reinstatement

The ideal proposal would involve a pathway to citizenship, or at least legal worker status, for the millions of undocumented workers currently in this country.³²⁶ However, it would be naïve to believe that the current political landscape would allow for quick changes to the law.³²⁷ That is why this Note sets out two realistic solutions for protecting the undocumented workers rights, and deterring employers from future violations of both the NLRA and the IRCA.³²⁸

Of course, if reinstatement were at all realistic for undocumented workers, it would provide an alternative deterrent as well.³²⁹ It would also quell some of the anxiety that comes with needing to find a new job.³³⁰ However, such a scenario seems almost impossible, as evidenced, in part, by the plaintiffs in *Hoffman Plastic* not even contesting the reinstatement issue.³³¹ Allowing undocumented workers reinstatement would promote continued defiance of the IRCA, which prohibits the

321. § 1977A, 105 Stat. at 1072.

322. H.R. REP. NO. 102-40, pt. 2, 24-25 (1991). The Committee reasoned:

Victims of intentional sexual or religious discrimination in employment terms and conditions often endure terrible humiliation, pain and suffering. This distress often manifests itself in emotional disorders and medical problems. Victims of discrimination often suffer substantial out-of-pocket expenses as a result of the discrimination, none of which is compensable with equitable remedies.

Id. at 25.

323. *Id.* at 24-25; Dannin, *supra* note 272, at 16-17.

324. See Downes, *supra* note 274; Dinan, *supra* note 2; *Hidden America*, *supra* note 2; *supra* text accompanying notes 309-10.

325. See *supra* text accompanying notes 288-316.

326. See generally Adams, *supra* note 9; Downes, *supra* note 274.

327. Adams, *supra* note 9, at 545-47.

328. See *supra* Part IV.A.1-2.

329. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903-04 (1984); Senn, *supra* note 33, at 127.

330. See *Hidden America*, *supra* note 2.

331. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 141-42 (2002); see *supra* note 300.

hiring and continued employment of undocumented workers.³³² Therefore, allowing backpay and punitive damages is a fair and realistic balance between affording undocumented workers rights in the workplace and deterring employers from committing future violations.³³³

B. If Congress Fails to Act, Circuit Courts Should Interpret the Supreme Court's Holding as Narrowly as Possible

Despite the Second Circuit's opinion in *Palma*, the various Courts of Appeals should take advantage of the Supreme Court's narrow holding in *Hoffman Plastic* to ensure that backpay is available to undocumented workers.³³⁴ It is highly unlikely that the Supreme Court would revisit its decision to limit the NLRB's power to award punitive damages.³³⁵ Thus, absent congressional action, backpay is the only realistic way for the courts to provide any kind of deterrence towards employer unfair labor practices.³³⁶ Additionally, it would not take great legal maneuvering to hold *Hoffman Plastic* to its facts, evidenced in part by the several circuit and district court holdings between *Hoffman Plastic* and *Palma*.³³⁷

In *Palma*, the Second Circuit held that the Supreme Court categorically denied backpay to undocumented workers.³³⁸ Instead, the court could have limited the *Hoffman Plastic* decision to its facts, emphasizing the illegality of the employee's actions there.³³⁹ The *Hoffman Plastic* Court noted prior case law, which held that employees forfeited their potential right to remedies under the NLRA if the employee, in addition to the employer, committed an illegal act.³⁴⁰ In *Palma*, the employee committed no further illegal acts outside of his undocumented status, which is not a direct violation of the IRCA.³⁴¹ In

332. Immigration Reform and Control Act, 8 U.S.C. § 1324a(a)(1)–(2) (2012).

333. Cooter, *supra* note 300, at 1150-53; Dannin, *supra* note 272, at 10-13.

334. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148-52; *Palma v. NLRB*, 723 F.3d 176, 183-85 (2d Cir. 2013); *see* Lewinter, *supra* note 71, at 523-24.

335. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-13 (1940); *see* Schiffer, *supra* note 62 (noting the established doctrine of the NLRA's remedial, but not punitive, authority, and how the courts "return to it again and again").

336. *See* Weiner, *supra* note 62, at 1590-91.

337. *Agri Processor Co. v. NLRB*, 514 F.3d 1, 7-8 (D.C. Cir. 2008); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 321-25 (D.N.J. 2005).

338. *Palma*, 723 F.3d at 183, 185.

339. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 140-41. Conversely, it was the employer in *Palma* that violated the IRCA, not the employee. *Palma*, 723 F.3d at 183.

340. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 143-46.

341. *Mezonos Maven Bakery, Inc.*, 357 N.L.R.B. 1, 1-2 (2011), *en'd in part*, *Palma*, 723 F.3d at 185, 187.

fact, employer Mezonos admitted that he knew the potential employees were undocumented but never asked them to produce documents sufficient to satisfy the IRCA.³⁴² It is this exact factual scenario that Justice Breyer feared, and one that would require an employer to give backpay.³⁴³ Under the Second Circuit's expansive holding, employers essentially get a "get-out-of-a-labor-law-violation-free" card.³⁴⁴ Instead of deterring employers from hiring undocumented workers, this will very much encourage them to do so.³⁴⁵

Absent congressional legislation, the best way to limit the damage inflicted by *Hoffman Plastic* and *Palma* is for the remaining courts of appeals to rule narrowly when interpreting the Supreme Court's holding.³⁴⁶ While this is more of a patchwork remedy than real substantive reform, it may be essential in promoting and enforcing what is left of labor law protection for undocumented workers.³⁴⁷ Hopefully, courts find the D.C. Circuit's reasoning on the issue more persuasive than that of the Second Circuit.³⁴⁸ Failure to enforce these rights will have repercussions throughout both labor law and immigration reform.³⁴⁹

V. CONCLUSION

The rights of undocumented workers have been seriously undercut.³⁵⁰ Congress passed the NLRA to promote employee rights after courts undercut them for nearly a century.³⁵¹ For the first time at the federal level, employees could bargain collectively without fear of

342. *Id.*

343. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-56 (Breyer, J., dissenting) ("Were the Board forbidden to assess backpay against a *knowing* employer . . . this perverse economic incentive, which runs directly contrary to the immigration statute's basic objective, would be obvious and serious.").

344. *Palma*, 723 F.3d at 183, 185; see *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 154.

345. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 155-57; Cleveland et al., *supra* note 3, at 811.

346. See Seitz, *supra* note 134, at 406-08.

347. See Cleveland et al., *supra* note 3, at 814 ("Back pay is the only meaningful remedy available to workers under the NLRA.").

348. *Compare Agri Processor, Co. v. NLRB*, 514 F.3d 1, 7-8 (D.C. Cir. 2008) (holding that the *Hoffman Plastic* decision did not affect the Court's previous holding in *Sure-Tan* that undocumented workers are employees under the NLRA), with *Palma*, 723 F.3d at 183-84 (holding that *Hoffman Plastic* categorically barred undocumented workers from receiving backpay).

349. See Cleveland et al., *supra* note 3, at 806-11 (citing numerous examples of employer mistreatment of undocumented workers).

350. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148-52 (majority opinion); Cleveland et al., *supra* note 3, at 806-09; Seitz, *supra* note 134, at 385-98.

351. National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (2012)); GORMAN, *supra* note 13, at 1-5.

reprisal.³⁵² Fifty-one years later, Congress passed the IRCA in order to combat the employment of undocumented workers.³⁵³ On its face, the new immigration law seemed to seriously undercut undocumented workers rights in the workplace.³⁵⁴ This is the viewpoint the Supreme Court took in *Hoffman Plastic*.³⁵⁵ The decision came sixteen years after the IRCA's passage with various circuit courts coming down on both sides of the issue.³⁵⁶ While the Court reasoned that the acts were incapable of coexistence,³⁵⁷ Justice Breyer's dissent in *Hoffman Plastic* argued that not only could they both be given force, but also that enforcing NLRA violations against employers will actually promote the goals of the IRCA.³⁵⁸ Looking to the legislative history of the IRCA, it becomes clear that not only were the two acts capable of coexistence, it was fully the intention of Congress that the IRCA not interfere with existing labor laws.³⁵⁹

In failing to award backpay to undocumented workers, the decisions have given employers a strong incentive to hire these workers.³⁶⁰ The best remedy for such a situation is congressional action.³⁶¹ By amending the NLRA to specifically include undocumented workers, Congress can clarify all remaining uncertainty surrounding such workers' coverage.³⁶² Furthermore, given the impossibility of reinstatement, Congress should allow the Board to assess punitive damages against employers who knowingly violate both the NLRA and the IRCA.³⁶³ Such a remedy would effectuate both statutes, and is the best way to deter employers from committing future violations.³⁶⁴ Should Congress fail to act, the onus will be on the courts of appeals to remedy the problem.³⁶⁵ However, if it comes down to such a scenario,

352. § 7, 49 Stat. at 452 (current version at 29 U.S.C. § 157 (2012)); GORMAN, *supra* note 13, at 4-5.

353. 8 U.S.C. § 1324a (2012).

354. See § 1324a(a)(1)-(2), (e)(4), (f).

355. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 147-52.

356. *NLRB v. A.P.R.A. Fuel Oil Buyers Grp., Inc.*, 134 F.3d 50, 55-59 (2d Cir. 1997); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121-22 (7th Cir. 1992).

357. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148-49.

358. *Id.* at 153, 155-57 (Breyer, J., dissenting).

359. H.R. REP. NO. 99-682, pt. 1, at 58 (1986) ("[A]pplication of the NLRA 'helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.'" (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984))).

360. See Cleveland et al., *supra* note 3, at 811.

361. See *supra* Part IV.A.

362. See *supra* Part IV.A.1.

363. See *supra* Part IV.A.2-3.

364. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 135, 153 (2002).

365. See *supra* Part IV.B.

employers will not be as deterred from committing unfair labor practices and all American workers, both legal and undocumented, will suffer.³⁶⁶

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366. See H.R. REP. NO. 99-682, pt. 1, at 58 (1986); Hodges & Dannin, *supra* note 155.

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