

***Hoffman Plastic Compounds, Inc. v. NLRB:* How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy**

Thomas J. Walsh*

Put yourself in the shoes of a factory manager. Like all businesspeople, you are trying your best to minimize costs while maintaining high levels of production. Your factory produces chemicals for other companies. The work is difficult and the environment is harsh. Your workforce consists largely of recent immigrants because most anybody who can get another job does. Many of the employees do not speak any English. You suspect most are in the country illegally, but all their papers checked out. Imagine that one day you hear rumors that a local labor organization is trying to organize your factory. Simply stated, your life would be much easier without a union. Consequently, you ponder how to persuade your employees to stay away from the union. Paying them more, increasing benefits, or reducing the workload are possibilities, but they cost money. Then it hits you, fire one of the illegal immigrants. Illegal immigrant workers have the normal fear of losing their job, plus they face the threat of deportation. Those remaining will never try to unionize again. What is the worst that can happen? You fire the workers. They get deported. You get told not to do it again. That is it.

As reprehensible as the behavior of the manager is in this scenario, this conduct is possible after the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹ José Castro worked at the Hoffman factory and was fired after becoming involved in a union organizing campaign.² The National Labor Relations Board (NLRB)³ found Castro's dismissal a

* J.D. expected 2004, University of Minnesota Law School. B.S. 2000, *magna cum laude*, University of Minnesota. I would like to thank the staff and editors of *Law and Inequality*, especially Jaynie Leung and Nicole Lexvold, for their work on my article. Finally, I would like to say a special thanks to my family and friends. Without their love and support this article would not have been possible.

1. 535 U.S. 137 (2002).

2. *Id.* at 140.

3. For the purposes of this article "NLRB" will refer to the government agency's

violation of the National Labor Relations Act (NLRA).⁴ Until the hearing to determine his backpay, Hoffman had been acting in violation of the NLRA and was facing punishment for its actions.⁵ At the hearing it was discovered that Castro was in the country illegally and illegally working for Hoffman, which changed the nature of the case.⁶

Hoffman appealed the Board's order of backpay to the Supreme Court arguing that Castro could not receive backpay under *Sure-Tan v. NLRB*.⁷ Hoffman's theory was that because Castro was not available to work, he could not receive backpay.⁸ The National Labor Relations Board (NLRB) argued *Sure-Tan* did not apply and that awarding backpay upheld the policies of both the NLRA and the Immigration Reform and Control Act of 1986 (IRCA).⁹ After the discovery of his immigration status, the Administrative Law Judge (ALJ) presiding at the hearing denied Castro backpay.¹⁰ The Board later reversed the ALJ's ruling and awarded Castro backpay.¹¹

The Supreme Court rejected the Board's position, reversing the order of backpay.¹² Relying on *Southern S.S. v. NLRB*,¹³ the Court found the Board overstepped its authority by rewarding Castro for an illegal act.¹⁴ The Court held that denying backpay promoted the policies of the IRCA.¹⁵

Part I of this article details the legal and cultural environment of the decision.¹⁶ Part II explains the arguments

administrative functions. "Board" will also be used when referring to the judicial review body of the NLRB.

4. 29 U.S.C. § 157 (2002); *Hoffman*, 535 U.S. at 140.

5. *Hoffman*, 535 U.S. at 141.

6. *Id.*

7. Brief for the Petitioner at 5, *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595).

8. *Id.* (arguing that since Castro was illegally in the country, he was unavailable to work).

9. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Brief for Respondent at 12-16, *Hoffman Plastic Compound v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595).

10. *Hoffman*, 535 U.S. at 141.

11. *Id.*

12. *Id.* at 152.

13. 316 U.S. 31 (1942) (ignoring the issue of backpay and limiting the Board's authority to order reinstatement for workers discharged for striking because the strike violated the mutiny statute).

14. *Hoffman*, 535 U.S. at 149 (holding the Board's decision was counter to federal immigration law).

15. *Id.* at 149 (stating that congressional intent was to punish immigrants that illegally obtain employment).

16. See *infra* notes 20-86 and accompanying text.

made to the court, the holding, and the reasoning in *Hoffman*.¹⁷ Part III criticizes the Court's decision arguing the Court wrongly interpreted the case law, immigration policy, labor policy, and administrative law that the Court itself developed.¹⁸ More importantly, this article argues the Court's decision exposes an already vulnerable group of people to further abuses by unscrupulous employers and diminishes the rights of all employees to collectively bargain.

I. BACKGROUND

A. IMMIGRATION AND LABOR IN 2002

Every year large numbers of undocumented workers¹⁹ come to work in the United States.²⁰ Whether the impact of undocumented workers is ultimately positive or negative is subject to vigorous public debate.²¹ A traditional view is that immigrants

17. See *infra* notes 87-139 and accompanying text.

18. See *infra* notes 140-221 and accompanying text.

19. In this article, undocumented workers are defined as immigrants illegally residing and working in the United States. Writings on the subject often use the terms "illegal alien," "illegal immigrant," and "undocumented worker" interchangeably.

20. The Immigration and Naturalization Service (INS) estimates 275,000 undocumented workers enter the United States every year, adding to the six million that already reside in the United States. See Nancy Cleeland, *AFL-CIO Calls for Amnesty for Illegal U.S. Workers*, L.A. TIMES, Feb. 17, 2000, at A1. The U.S. economy is dependent on the contribution of illegal immigrants. See Julia Malone, *Report: U.S. Relies Heavily on Illegal Workers: Half on Farm, 25% in Home, 10% in Eateries*, ATLANTA J-CONST., Mar. 22, 2002, at A6 (citing a nationwide study finding 4% of the urban workforce is illegal).

21. Opponents contend illegal immigration "costs many Americans jobs, tax dollars, educational opportunities, and quality of life." Dan Stien, *Illegal Immigration, Amnesty Hurt Millions of Americans*, MILWAUKEE J. SENTINEL, Aug. 13, 2001, at A11. Immigration and its impact on the United States has been a controversial issue in political elections. See Marc Sandalow, *GOP Divided Over Immigration*, S.F. CHRON., Feb. 27, 1996, at A2 (discussing then Republican presidential candidate Pat Buchanan's call for a five-year moratorium on legal immigration and plan to build wall along the U.S.-Mexico border to keep out "Jose"). In more recent times, reform of immigration policy has focused more on inclusion in the political process rather than exclusion. See Dan Eggen & Darryl Fears, *Bush Weighs Legal Status of Mexicans: Illegal Immigrants May Get Residency*, WASH. POST, July 16, 2001, at A1 (explaining President George W. Bush was considering granting amnesty to 3 million illegal immigrants). While opinions vary, there is some indication that the general public does not oppose increased immigration. See Howard LaFranchi, *Support Grows for Immigration, but Reservations Linger*, THE CHRISTIAN SCI. MONITOR, Aug. 14, 2001, at 2 (citing a University of Chicago study finding that less than half of all Americans want to cut immigration, a significant drop from a survey conducted several years ago).

take jobs from American workers;²² however, this may not actually be true.²³ Illegal immigrants may compete, if at all, for jobs with lower skilled native workers.²⁴ Evidence shows that immigrants may actually add significant value to the economy while receiving little economic benefit in return.²⁵ Others argue the economy suffers by not reaping the benefits of the undocumented workers.²⁶

For years, labor unions were squarely against granting any rights to undocumented workers and advocated for strengthening immigration laws under the belief that immigrants take American jobs.²⁷ Although that traditional sentiment still exists among

22. Cecelia M. Espenosa, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 350 (1994) (identifying displacement of American workers as a "consistent justification for those favoring laws precluding the employment of unauthorized workers"); Karen Weinstock, Editorial, *Immigrants' Contribution to Economy Can't Be Ignored*, ATLANTA J-CONST., Sept. 23, 2002, at A9 (stating that the opinion that immigrants take jobs from American workers is not a new phenomenon, but that the terrorist attacks of 2001 and a slow economy have made this viewpoint more common).

23. See Larry J. Obhof, *The Irrationality of Enforcement? An Economic Analysis of U.S. Immigration Law*, 12 KAN. J.L. & PUB. POL'Y 163, 168 (2002) (using empirical analysis to conclude "even a significant increase in the number of immigrants has negligible effects on the average wage of natives" and little impact on employment rates of native workers).

24. Illegal aliens are often willing to take difficult, low-paying jobs that many native workers will not take. See Weinstock, *supra* note 22. See also Dick Meister, *Influx of Immigrants Offers U.S. Unions a Great Opportunity*, BUFFALO NEWS, Sept. 2, 2001, at H1 (reporting that immigrants are willing to work at difficult and potentially dangerous jobs). Immigrants' willingness to take "unwanted" jobs is even seen as a positive by some. See Irene Zopoth Hudson & Susan Schenck, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351, 362-63 (2002) (quoting President George W. Bush criticizing the ICRA for penalizing employers for hiring people to do jobs others are not willing to do). However, others assert that the idea that immigrants do not compete with native workers is a myth. See Steven T. Camarota, *Tired & Poor: The Bankrupt Argument for Mass, Unskilled Immigration*, NAT'L REV., Sept. 3, 2001, at 21 (finding there are over ten million native workers with similar educational background as undocumented workers competing with immigrants for jobs).

25. See S. Mitra Kalita, *Study: Illegal Workers Vital; Immigrants Give Economy a \$300B Lift*, NEWSDAY, Sept. 5, 2001, at A6 (reporting that according to a recent study illegal immigrants contribute \$300 billion dollars to the nation's economy each year); James D. Hamilton, Jr., *The Law and More: Plight of Immigrants is Far from Fiction*, N.J. LAWYER, Oct. 5, 1998, at 7 (finding "immigrants pay approximately \$28 billion per year more in taxes than they consume in services"); Obhof, *supra* note 23, at 175 (finding 75% of immigrants have income taxes withheld). But see Camarota, *supra* note 24, at 21 (estimating the average Mexican immigrant uses \$55,200 more in public services than he or she pays in taxes).

26. See Nancy Cleeland, *Off-the-Books Jobs Growing in Region*, L.A. TIMES, May 6, 2002, at C1 (stating that in Los Angeles, off-the-books employment costs the state \$1.1 billion in uncollected payroll benefits such as Social Security taxes, workers compensation insurance, and unemployment insurance).

27. See Cleeland, *supra* note 20.

some union members,²⁸ the animosity appears to have eased over the past fifteen years.²⁹ Organized labor is working to unionize undocumented workers offering that immigrants will benefit from unionization as a rallying point.³⁰ However, union organizers face hurdles in organizing immigrants, ranging from fears that participating in an organizational campaign will result in deportation³¹ to fears that unions will reduce the ability to work.³²

B. PROTECTION FOR EMPLOYEES

Congress established guidelines for national labor policy with passage of the National Labor Relation Act in 1935.³³ The NLRA protects workers' rights to bargain collectively³⁴ in order to ensure industrial stability³⁵ by prohibiting certain employer conduct.³⁶

28. See Warren Strugatch, *Unions Rethink Links to Undocumented Labor*, N.Y. TIMES, Oct. 28, 2001, at 14LI (indicating that long time union members are not enthusiastic supporters of unionizing immigrant labor).

29. See Cleeland, *supra* note 20 (reporting that the AFL-CIO called for amnesty for millions of undocumented workers and the repeal of laws targeted at making the hiring of undocumented workers illegal); Meister, *supra* note 24 (proposing that the impetus for the change in policy of the AFL-CIO, and unions in general, may have more to do with declining membership roles than with assisting current union members, stating "unions, which now represent less than 15 percent of America's workers, have been driven by a great need to expand").

30. Unions can help employees improve wages and working conditions, provide job security, and help employees resolve situations with employers. See AFL-CIO, *How and Why People Join Unions*, at <http://www.aflcio.org/aboutunions/joinunions> (last visited Feb. 22, 2003).

31. Nancy Cleeland, *Unionizing is Catch-22 for Illegal Immigrants*, L.A. TIMES, Jan. 16, 2000, at A1 (reporting that among undocumented workers "stories of retaliatory firings spread quickly, and carry far more weight than the carefully worded assurances of federal agencies").

32. See Steven Greenhouse, *Immigrants in the Middle: Some Workers Want a Union; Others Fear the Costs*, N.Y. TIMES, Oct. 9, 2000, at B1 (reporting that some immigrant workers at a bakery were hesitant to join a union for fear union rules would reduce their ability to work large amounts of overtime, resulting in smaller paychecks).

33. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2002)).

34. See 29 U.S.C. § 157 (granting employees the right to self organization, to participate in labor organizations, and bargain collectively).

35. See *id.* See also James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 948 (1996) (explaining that supporters of the NLRA reasoned that protection of collective bargaining would "reduce the costly effects of conflict between management and workers").

36. See 29 U.S.C. § 158(a)(3) (prohibiting conduct terminating an employee for participation in a union). See also *id.* § 158(a)(5) (stating that employers cannot refuse to bargain with the representative from a recognized union); *id.* § 158(a)(1) (stating that employers cannot interfere with employees' section 7 rights); *id.* § 157 (Section 7 rights include "the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

Decisions made under the NLRA are appealable.³⁷

For violations of the NLRA, employers may face reinstatement orders, backpay awards, cease and desist orders,³⁸ court ordered injunctions,³⁹ and other remedies.⁴⁰

In addition to the NLRA, undocumented aliens have traditionally been protected by other federal laws including the Fair Labor Standards Act (FLSA)⁴¹ and Title VII of the 1964 Civil Rights Act.⁴² Under Title VII and the FLSA, illegal immigrants retained the right to backpay.⁴³ While *Hoffman* specifically addressed backpay under the NLRA, how the decision will ultimately affect backpay under Title VII and the FLSA cases is

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

37. See 29 U.S.C. § 160(f) (2002).

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia....

Id.

38. See *id.* § 160(c).

39. See *id.* § 160(j) (granting the Board the authority to petition to a district court for injunctive relief).

40. Other remedies include posting the employer's illegal practices inside facilities, mandatory contract bargaining with the certified union, and temporary court injunctions. See *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 303 (1967) (posting the employer's illegal practices); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969) (mandatory contract bargaining); 29 U.S.C. § 160(j) (temporary court injunctions).

41. 29 U.S.C. §§ 201-219 (2002). The major provisions established under the Fair Labor Standards Act (FLSA) of 1938 were a minimum wage, a standard workweek, the requirement of overtime for hourly employees, and an increase in the minimum age for employment. See Natalie Slavens Abbott, *To Pay or Not to Pay: Modernizing the Overtime Provisions of the Fair Labor Standards Act*, 1 U. PA. J. LAB. & EMP. L. 253, 256-58 (1998).

42. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2 (2002) (explaining that Title VII prohibits discrimination on the basis of color, race, gender, national origin, or religion).

43. See THE U.S. EQUAL OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (Oct. 26, 1999), available at <http://www.eeoc.gov/docs/undoc.html> (listing the EEOC remedies as injunctive relief, instatement, reinstatement, and backpay). See also *Patel v. Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988) (pre-Immigration Reform and Control Act case allowing undocumented workers to bring claims for backpay under the FLSA). But see THE U.S. EQUAL OPPORTUNITY COMMISSION, RECESSION OF ENFORCEMENT GUIDANCE ON REMEDIES AVAILABLE TO UNDOCUMENTED WORKERS UNDER FEDERAL EMPLOYMENT DISCRIMINATION LAWS (June 27, 2002) available at <http://www.eeoc.gov/docs/undoc-recind.html> (recinding the enforcement guidance of EEOC remedies available to undocumented workers).

unclear.⁴⁴

C. DEFERENCE TO THE NLRB?

The NLRB has congressional authority to administer the NLRA.⁴⁵ Decisions of the Board are appealed to the United States Court of Appeals.⁴⁶ While the Board is generally given discretion in its decisions,⁴⁷ it is subject to limitations.⁴⁸

The Supreme Court established guidelines for the judicial review of agency decisions in *Chevron U.S.A. Inc. v. National Resources Defense Council*.⁴⁹ The applicability of the *Chevron* doctrine to the NLRB, however, is not clear.⁵⁰ Thus, the NLRB is

44. See *infra* note 220 (discussing recent court decisions applying *Hoffman* to Title VII and FLSA cases).

45. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (concluding that because of the wide scope of the NLRA, Congress left administration to the Board "subject to limited review"). See generally 29 U.S.C. §§ 151-169 (2002).

46. See 29 U.S.C. § 160(f). Any person aggrieved by the Board's decision can appeal to the Court of Appeals in the District where the violation occurred, or in the District of Columbia. *Id.* The Board also has the power to petition any court of appeals of the United States. *Id.* § 160(e).

47. See *id.* § 160(c) ("[The Board shall] take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this subchapter.").

48. See *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 46-7 (1942) (holding that while the NLRA can give the Board "considerable breadth," the Board cannot act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives"); accord *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (reversing the Board's decision to require reemployment for workers engaged in a violent strike).

49. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (establishing a two step test in *Chevron*, which requires (1) asking whether the statute plainly addresses the issue; and if not, (2) whether the agency interpretation is a "permissible construction" of the statute). See also *id.* at 864-65 (giving three policy reasons for giving deference to agencies: (1) agency expertise; (2) agency flexibility; and (3) political accountability); Susan K. Goplen, *Judicial Deference to Administrative Agencies' Legal Interpretations After Lechmere, Inc. v. NLRB*, 68 WASH. L. REV. 207, 211-212 (1993).

50. See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 838-39 n.23 (2001) (discussing the Court's deference to the NLRB before and after *Chevron*). See also *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534-35 (1992) (showing further evidence of the lower level of deference awarded the NLRB). In *Lechmere*, the Court applied a decision made thirty years before *Chevron* to limit the Board's authority to allow labor union access to private property. *Id.* at 540-41. See also Goplen, *supra* note 49, at 223-26 (arguing that relying on stare decisis undermines the three policy goals of *Chevron*); Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 762 (1992) (finding that the Court's use of stare decisis in *Lechmere* undermined *Chevron*); Russell L. Weaver, *Deference to Regulatory Interpretations: Inter-Agency Conflicts*, 43 ALA. L. REV. 35, 63-65 (1991) (discussing the problems courts face when two agencies reasonably interpret the interrelationship between different statutes of each agency).

left in a state of limbo. The issue of administrative deference is further muddled by the interrelation between labor policy, which the Board can effect, and immigration policy, which is out of the Board's jurisdiction.⁵¹

D. IMMIGRATION LAW IN THE U.S. PRIOR TO HOFFMAN

The state of immigration law in respect to awarding illegal aliens backpay changed dramatically in the 1980s. Prior to the enactment of the IRCA in 1986, the Immigration and Nationality Act (INA)⁵² dictated immigration law and policy.⁵³ The INA was primarily concerned with legal admission and treatment of legal immigrants to the United States, not the treatment of undocumented workers.⁵⁴ The INA was initially passed without provisions applying to employers.⁵⁵ The IRCA was culminated from a decade-long analysis of the impact of illegal immigration.⁵⁶

Congress designed the IRCA to "close the back door on illegal immigration so that the front door on legal immigration may remain open."⁵⁷ The primary target of the IRCA was employers,

51. Generally, agency interpretations of another agency's empowering statute are not entitled to any judicial deference. *See* New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n, 854 F.2d 1338, 1365 (D.C. Cir. 1988) (questioning the Federal Maritime Commission's ability to interpret labor law stating "[w]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference") (citing Dep't of the Treasury v. Fed. Labor Relations Auth., 837 F.2d 1163, 1167 (D.C. Cir. 1988)). *See also* California Nat'l Guard v. Fed. Labor Relations Auth., 697 F.2d 874, 879 (9th Cir. 1983) (holding judicial deference is not required for the Federal Labor Relation Authority's interpretation of the National Guard Technicians Act); Susan H. Welin, *The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration*, 9 B.C. THIRD WORLD L.J. 249, 251 (1989) (explaining that the Immigration and Naturalization Service has authority over immigration). The INS was formerly part of the Department of Justice, but is now under the umbrella of the Department of Homeland Security. *See* <http://www.immigration.gov/graphics/homeland.htm>.

52. *See* 8 U.S.C. §§ 1101-1537 (2002).

53. *See* Welin, *supra* note 51, at 250 (identifying the INA as "the principal legislation setting out the current system of immigration in the United States").

54. *See* De Canas v. Bica, 424 U.S. 351, 360 (1976) (holding that the INA showed "at best evidence of a peripheral concern with employment of illegal entrants").

55. *See* Welin, *supra* note 51, at 253-54 (explaining that an amendment allowing for sanctions against employers was turned down during the creation of the INA).

56. *See* H.R. REP. NO. 99-682(I), at 51-56 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5655-60 (detailing the Congressional immigration initiatives from the early 1970s to the early 1980s). *See also* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, §§ 101-103 (1986) (because the IRCA, not the INA, addresses the employment of undocumented workers, it is the primary immigration law discussed in this article).

57. H.R. REP. NO. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649,

not undocumented workers.⁵⁸ Congressional modifications to existing immigration law included changing how workers were hired and the penalties paid by employers.⁵⁹

The other major factor in changing immigration law relating to backpay was the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*.⁶⁰ *Sure-Tan* involved illegal workers who were reported to the INS by their employer in retaliation for voting in favor of union representation.⁶¹ The Court was presented with a Board order subsequently modified by the Seventh Circuit.⁶² While recognizing coverage of illegal workers by federal labor laws,⁶³ the Court rejected backpay based on a cryptic "unavailable for work"

5649-50.

58. See *id.* (providing that the Act's focus on the employer addresses the ineffectiveness of focusing sanctions and penalties on illegal immigrants stating "[e]mployment is the magnet that attracts aliens here illegally"). Employment in the United States is not the only factor impacting the decision of whether or not to immigrate. See Welin, *supra* note 51, at 263 (identifying "push factors" such as political unrest, unemployment, repressive governments, and high population growth rates as reasons to immigrate to the United States). Combining "push factors" with "pull factors" such as jobs, improved financial situation, and government programs gives immigrants reasons for wanting to immigrate. *Id.* A less sophisticated way to analyze the ineffectiveness of removing federal protections from undocumented workers is to realize immigrants are not likely to know about the Fair Labor Standard Act and NLRA sanctions. See also Patel v. Quality Inn South, 846 F.2d 700, 704 (11th Cir. 1988) (doubting "many illegal aliens come to this county to gain the protections of our labor laws").

59. See Welin, *supra* note 51, at 256-57. Under the IRCA employers must verify the work eligibility of every employee and face up to \$10,000 in civil penalties for each undocumented worker hired and up to six months imprisonment for a pattern of knowingly employing undocumented workers. *Id.* See also generally Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

60. 467 U.S. 883 (1984).

61. See *id.* at 887-88. The manager was aware of the employees' illegal status prior to the Union election and personally sent a letter to the INS asking the agency to check into the immigrants' naturalization status. *Id.* at 888. Approximately one month later the workers voluntarily returned to Mexico as a substitute for deportation. *Id.* Because the employer reported the undocumented employees to the INS in retaliation for supporting unionization, the Board found the employer in violation of §§ 8(a)(1) and 8(a)(3) of the NLRA. *Id.* at 887-88.

62. The Board awarded the employees reinstatement with backpay and issued its order after the NLRB's General Council suggested that ordering backpay and reinstatement could be illegal. *Id.* at 889, 890 n.3. The Court of Appeals, in its opinion, allowed the employees the option of reinstatement for up to four years and awarded an artificial "minimum award" of six months backpay. *Id.* The option of restatement was contingent on the worker's legal presence in the United States. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982). The "minimum award" represented the amount of wages based on a fictional amount of time the court determined the employees would have remained employed without being detained by the INS. *Id.*

63. See *Sure-Tan*, 467 U.S. at 891 (requiring deference where the Board has consistently found undocumented workers as employees covered by the NLRA).

standard.⁶⁴ Despite its ruling, the *Sure-Tan* Court indicated its support for application of the NLRA to undocumented workers.⁶⁵ The dissent, written by Justice Brennan, criticized the Court for not deferring to the Board⁶⁶ and for undermining immigration policy by limiting available remedies.⁶⁷

With the IRCA⁶⁸ and *Sure-Tan* as guides, the lower courts' and the Board's attempt to apply a uniform standard failed. The circuit courts since *Sure-Tan* have reached an almost opposite conclusions regarding an undocumented worker's ability to receive backpay. The three primary cases highlighting the conflict are *Local 512, Warehouse & Office Workers' Union v. NLRB*,⁶⁹ *Del Rey Tortilleria, Inc. v. NLRB*,⁷⁰ *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*⁷¹

Local 512 involved a pre-IRCA application of *Sure-Tan*.⁷²

64. See *id.* at 902-03. Because the workers were in Mexico, the Court denied awarding backpay, holding that such an award requires legal admittance to the United States. *Id.* "[E]mployees must be deemed 'unavailable' for work ... during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* While the text of the opinion seemed to clearly define the "unavailable for work standard," the context of *Sure-Tan* complicated the situation. *Id.* at 887. The workers in *Sure-Tan* voluntarily left for and were presumably still in Mexico. *Id.* Lower courts since *Sure-Tan* have disagreed whether the "unavailable" standard prohibited backpay to all undocumented workers before deportation or only when the undocumented workers are already back in their native country. See *infra* notes 70-85 and accompanying text (discussing several lower courts' interpretations of the "unavailable standard").

65. See *Sure-Tan*, 467 U.S. at 892-93 (citing *De Canas v. Bica*, 424 U.S. 351, 360 (1976), which held that the employment of undocumented workers was at best a "peripheral concern" of the INA and therefore, the NLRA was not in conflict with the INA). Furthermore, the Court noted that the application of labor standards to illegal immigrants puts them on equal footing with legal workers by reducing the undocumented workers' attractiveness to employers. *Id.* at 893.

66. See *id.* at 908 (Brennan, J., concurred in part and dissented in part).

67. See *id.* at 912 (Brennan, J., concurred in part and dissented in part) ("Once employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their 'incentive to hire such illegal aliens' will not decline, it will increase.").

68. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

69. 795 F.2d 705 (9th Cir. 1986) (holding that undocumented workers were entitled to backpay under the NLRA).

70. 976 F.2d 1115 (7th Cir. 1992) (holding *Sure-Tan* prohibited awarding backpay).

71. 134 F.3d 50 (2nd Cir. 1997) (holding *Sure-Tan* did not unilaterally exclude illegal aliens from receiving backpay).

72. In *Local 512*, an Administrative Law Judge (ALJ) found a wire and tubular display manufacturer in California in violation of §§ 8(a)(1), (3), and (5) of the NLRA for actions against certain employees. *Local 512*, 795 F.2d at 709. Following *Sure-Tan*, the Board refused to enforce the ALJ's order of backpay and the union representing the workers petitioned for review of the Board's order. *Id.* at 710.

The Ninth Circuit held that undocumented immigrants were entitled to protection under the NLRA⁷³ and that denying backpay was inconsistent with the NLRA.⁷⁴

Del Rey Tortilleria dealt with a situation where the NLRB charged the employer with an unfair labor practice for firing two employees exercising their union rights.⁷⁵ While not admitting an unfair labor practice, the employer agreed, contingent upon a formal hearing, to reinstate the two employees and award them backpay.⁷⁶ At the hearing, the employer contested reinstatement on the grounds that the two employees were undocumented workers.⁷⁷ The ALJ, in a decision upheld by the Board, awarded reinstatement and backpay.⁷⁸ The Seventh Circuit rejected the Board's backpay holding,⁷⁹ finding that awarding backpay would undermine *Sure-Tan*⁸⁰ and Congressional intent.⁸¹

A.P.R.A. involved an employer who knowingly hired undocumented aliens, coerced the employees to sign affidavits stating that they did not support the union, and eventually fired the workers in violation of the NLRA.⁸² The Second Circuit held

73. *Id.* at 719 (commenting that "the Board's proposed remedy encourages employers to continue to violate the NLRA").

74. *Id.* at 719-20 (stating that awarding backpay promotes the goals of the NLRA and does not undermine the INA).

75. See John F. Barmon, *The Seventh Circuit Explains Why There Is No Harm in Exploiting Undocumented Workers: Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992), 24 U. MIAMI INTER-AM. L. REV. 567, 568-69 (1993).

76. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1117 (7th Cir. 1992).

77. *Id.* at 1117 (explaining that during the hearing the parties stipulated that the employees were undocumented workers during their time of employment).

78. *Id.* The ALJ relied primarily upon *Local 512*, to conclude that *Sure-Tan* applied only to undocumented workers no longer in the United States. *Id.*

79. *Id.* at 1121.

80. *Id.* The Court interpreted the "unavailable for work" doctrine to include illegal aliens residing inside and outside of the United States. *Id.*

81. *Id.* (holding the "IRCA reinforced the policy of the INA to preserve employment for American workers"). The Board argued that the IRCA gave it broad discretion in decisions regarding reinstatement and backpay. *Id.* The Court rejected the Board's decision holding that Congress endorsed an interpretation of *Sure-Tan* that barred all illegal immigrants from receiving backpay. *Id.* Furthermore, in dicta, the Court declared that the IRCA "makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after the IRCA's enactment." *Id.* at 1122. However, as the next two cases show, perhaps the issue was not as clear as the Seventh Circuit thought. See, e.g., *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2nd Cir. 1997); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

82. *A.P.R.A.*, 134 F.3d at 52-53. In *A.P.R.A.*, the employer hired two employees knowing they were in the country illegally and subsequently fired them when they participated in a union organizing drive. *Id.* at 52. The Board found the company fired two employees for ongoing union activity and therefore violated § 8(a)(3) of the

that backpay in this situation promoted the policy goals of the NLRA and the IRCA, reduced employer incentives to hire undocumented aliens, and prevented frustration of national labor policy.⁸³ Furthermore, the Second Circuit, focusing its attention on the employer, held that the awarding of backpay does not require the employer to violate the IRCA.⁸⁴ Instead, the backpay compensates the employees for the economic injuries suffered as a result of the employer's unlawful discrimination.⁸⁵

Courts are not the only entity experiencing confusion.⁸⁶ With the courts and the NLRB, the main enforcer of labor policy, in disagreement, the stage was set for the Supreme Court to determine the meaning of the IRCA and to determine whether *Sure-Tan* was still relevant.

In 2002, with ambiguous precedent, differing circuit court interpretations, and questions of administrative deference, the Supreme Court decided *Hoffman*.

II. HOFFMAN PLASTIC COMPOUNDS v. NLRB

In May of 1988, Hoffman hired José Castro to work in its production facility.⁸⁷ As required by federal law under the IRCA, the employer verified documents presented by Castro indicating his ability to legally work in the United States.⁸⁸ In late 1988, Castro became involved in a union organizing campaign at the Hoffman facility by the United Rubber, Cork, Linoleum, and

NLRA. *Id.* at 53. The employer knew the employees were illegal and the Board ordered the employer to pay backpay and reinstate the workers. *Id.*

83. *Id.* at 57-58.

84. *Id.* at 58 (commenting how "nothing in the Board's order requires the company or the employers to violate the IRCA").

85. *Id.*

86. The NLRB initially interpreted the IRCA as restricting its ability to award backpay. See Memorandum GC 87-8 from the Office of General Counsel, NLRB, to all NLRB Regional Directors, Officers in Charge, and Resident Officers, The Impact of the Immigration Reform and Control Act of 1986 on Board Remedies for Undocumented Discriminatees (Oct. 27, 1987), available at 1987 WL 109409 (establishing as Board policy not to seek backpay for undocumented workers that do not apply for temporary resident status). The Board switched its position over ten years later allowing backpay to undocumented workers wrongfully dismissed by an employer. See Memorandum GC 98-15 from Office of General Counsel, NLRB, to all NLRB Regional Directors, Officers in Charge, and Resident Officers, Reinstatement of Backpay Remedies for Discriminatees Who May Be Undocumented Aliens In Light of Recent Board and Court Precedent (Dec. 4, 1998), available at 1998 WL 1806350.

87. See Brief for Respondent, *supra* note 9, at 8.

88. See *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685 (1994) (providing that Castro presented documents belonging to a person born in El Paso, Texas).

Plastic Workers Union of America, AFL-CIO.⁸⁹ In January of 1989, because of their union organizing activities, Hoffman laid off Castro and other employees.⁹⁰ This action was later found to be a violation of § 8(a)(1)⁹¹ and § 8(a)(3)⁹² of the NLRA.⁹³ In accordance with the Board-ordered remedies, Hoffman reinstated the affected employees and offered each backpay.⁹⁴ At the hearing to determine backpay, Castro revealed he was in the United States illegally and obtained his job at Hoffman by offering the birth certificate of another.⁹⁵ Using provisions in the IRCA and the Supreme Court's reasoning in *Sure-Tan*, the ALJ denied the remedies of backpay and reinstatement.⁹⁶ The Board reversed the ALJ's decision and granted Castro backpay from the time of his termination by Hoffman up to the time his illegal status was discovered by Hoffman.⁹⁷ As permitted by the NLRA,⁹⁸ Hoffman petitioned for review to the Court of Appeals for the D.C. Circuit where both a panel⁹⁹ and the court en banc¹⁰⁰ denied Hoffman's petition and enforced the order of the Board in favor of Castro.¹⁰¹

The Supreme Court granted certiorari at Hoffman's request.¹⁰² Writing for the Court, Chief Justice Rhenquist reversed the Court of Appeals and the Board holding that the Board lacked the authority to proscribe remedies in what is

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

90. The Board found that Hoffman selectively laid off four employees: Mauricio Mejia, Casimiro Arauz, Moises Gonzalez, and José Castro. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. at 684.

91. 29 U.S.C. § 158(a)(1) (2002).

92. *Id.* at § 158(a)(3).

93. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 100 (1992) (finding violations of § 8(a)(1) and § 8(a)(3) of the NLRA). Rights granted by the NLRA are granted to employees and not limited solely to union members. 29 U.S.C. § 157 (2002). Because of the broad language, the Board extends protection to union employees, employees in the process of organizing, and employees not interested in unionizing. *Id.*

94. *Hoffman*, 535 U.S. at 140-41. The Board also ordered Hoffman to cease and desist from interrogating its employees, laying off employees because they support unions, and interfering with employees' rights under § 7 of the NLRA. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. at 107.

95. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. at 685.

96. *Hoffman*, 535 U.S. at 141-42.

97. *Id.* ([T]he most effective way to accommodate and further immigration policies embodied in [the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.") (quoting *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998)).

98. 29 U.S.C. § 160(f) (2002).

99. 208 F.3d 229 (D.C. Cir. 2000).

100. 237 F.3d 639 (D.C. Cir. 2001).

101. *Hoffman*, 535 U.S. at 142.

102. *Hoffman Plastic Compounds, Inc. v. NLRB*, 533 U.S. 976 (2001).

primarily an immigration issue, that awarding backpay is explicitly counter to the purpose of national immigration policy under the IRCA, and that awarding backpay condones illegal behavior.¹⁰³

The Court began its 5-4 decision by establishing the extent and limitations of the Board's authority.¹⁰⁴ The Court highlighted the Board's inability to award backpay when the employee commits an illegal act,¹⁰⁵ and emphasized that the Court has conditionally limited the Board to the constraints of the NLRA.¹⁰⁶ The Court used two cases, *Southern S.S. Co. v. NLRB*¹⁰⁷ and *NLRB v. Fansteel Metallurgical Corp.*¹⁰⁸ to highlight limitations on the Board's authority.¹⁰⁹ In *Southern S.S.*, an employer discharged crewmembers that participated in a strike aboard a docked ship.¹¹⁰ Due to the fact that the workers were expressing their labor rights, the Board ordered for their reinstatement and backpay.¹¹¹ The Court reversed the Board's order of backpay, holding that the strike was in violation of federal mutiny statutes and therefore, federal law prohibited the employees' conduct.¹¹² The Court emphasized that Congressional intent contained in one statute cannot be used to interpret a separate statute.¹¹³

In *Fansteel*, employees unlawfully seized and occupied their employer's building while engaging in a sit-down strike.¹¹⁴ After a day the sheriff forcefully removed the employees for violating a

103. *Id.* at 151-52.

104. *Id.* at 144. The Court has held federal courts have the ability to decide labor law issues that "emerge as collateral issues in suits brought under independent federal remedies" *Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975). In *Connell*, the Court held the NLRA did not protect a labor agreement from federal anti-trust laws. *Id.* at 635. The Court further limited the NLRA in *NLRB v. Bildisco and Bildisco*, 465 U.S. 513 (1984) (precluding a Board order in conflict with the Bankruptcy Code).

105. See *Hoffman*, 535 U.S. at 143 ("Since the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment.").

106. *Id.* at 144 ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

107. 316 U.S. 31 (1942).

108. 306 U.S. 240 (1939).

109. *Hoffman*, 535 U.S. at 147.

110. 316 U.S. at 34.

111. *Id.* at 36.

112. *Id.* at 48 ("We cannot ignore that the strike was unlawful from its very inception.").

113. *Id.* at 47 (emphasizing that "the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another").

114. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 248 (1939).

court order to end the strike and surrender the premises.¹¹⁵ The employer fined many who participated in the strike.¹¹⁶ The Board ordered the employer to reinstate the employees with backpay.¹¹⁷ In *Fansteel*, the Court reversed the Board's order holding that illegal and violent behavior was counter to Congressional objectives of the NLRA and therefore the employees' conduct was not protected under the NLRA.¹¹⁸

The Court compared *Hoffman* to *Southern S.S. and Fansteel*.¹¹⁹ These examples of the Board's limitation were compared to its decision in *ABF Freight System, Inc. v. NLRB*.¹²⁰ In *ABF Freight*, an employee who falsely testified at a compliance hearing was nonetheless awarded backpay.¹²¹ The Court distinguished the employee's behavior in *ABF* with Castro's stating: (1) the conduct of the *ABF* employee was not serious misconduct; (2) *ABF* did not involve a Board interpretation of other areas of law; and (3) the employee's conduct in *ABF*, while illegal, did not cause the "underlying employment relationship" to be illegal.¹²²

Ignoring a large portion of both the petitioner's and respondent's briefs,¹²³ the Court largely disregarded *Sure-Tan*.¹²⁴ Instead, the Court focused on the current state of immigration law.¹²⁵ The Court indicated that the purpose of the IRCA was to "forcefully" combat the employment of illegal aliens,¹²⁶ imposing duties on employers in the hiring process and imposing penalties on employees that violate the IRCA.¹²⁷ Treating the burden of the employers and the employees as equal, the Court found awarding

115. *Id.* at 249.

116. *Id.*

117. *Id.* at 250-51.

118. *Id.* at 257-58 ("It is [not] any part of the policies of the [NLRA] to encourage employees to resort to force and violence in defiance of the law of the land.").

119. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143, 147 (2002).

120. 510 U.S. 317 (1994).

121. *Hoffman*, 535 U.S. at 145-46 (explaining that in *ABF Freight*, the employee testified falsely under oath).

122. *Id.* at 145-46.

123. See Brief for the Petitioner, *supra* note 7, at 7-20; Brief for the Respondent, *supra* note 9, at 16-29.

124. See *Hoffman*, 535 U.S. at 147 (summarizing the appellant's and respondent's interpretations of *Sure-Tan*, the court stated it "need not resolve the controversy").

125. *Id.* (assessing that "[w]hether isolated sentences from *Sure-Tan* definitively control ... we think the question presented here is better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed").

126. *Id.* (citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).

127. *Id.* at 147-48.

Castro backpay ran counter to the IRCA's underlying policies.¹²⁸

The Court claimed that the "significant sanctions" imposed by the Board, such as a cease and desist order and posted notice to employees informing them of their rights and Hoffman's infractions, imposed a serious penalty upon Hoffman and prevented Hoffman from getting away with a violation of the NLRA.¹²⁹ The Court was also quick to point out the inability of an employee to "obtain employment in the United States without some party directly contravening explicit congressional policies."¹³⁰ The Court rejected the Board's theory that Congress never specifically limited backpay as a remedy for illegal aliens and that allowing backpay is consistent with the IRCA and national immigration policy.¹³¹ To the contrary, added the Court, awarding backpay "condone[s] prior violations of the immigration laws, and encourages future violations."¹³²

The dissent, written by Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, viewed the issue from the vantage point of the impact of the backpay award on both immigration policy and labor policy.¹³³ Stressing the importance of backpay as one of the only "weapons in [the NLRB's] remedial arsenal,"¹³⁴ Breyer noted that removing that weapon would allow employers to "violate the labor laws ... with impunity."¹³⁵ Coming to the opposite conclusion of the majority, Breyer concluded that removing backpay would actually increase the amount of illegal immigration by removing the deterrents, thus, giving employers incentives to actively locate and hire illegal immigrants.¹³⁶ Breyer further argued that the extension of labor law to immigrants includes backpay.¹³⁷ Breyer distinguished the illegal behavior of Castro from the employees in *Fansteel* and *Southern S.S.* in that

128. *Id.* at 148 (stating that when an employee tenders false documents he or she "subverts the cornerstone of the IRCA's enforcement mechanism").

129. *Id.* at 152.

130. *Id.* at 148.

131. *Id.* at 149. The Board claimed the IRCA is primarily aimed at deterring employers from hiring illegal aliens rather than focusing on deterring aliens from seeking employment. Brief for Petitioner, *supra* note 7, at 20. Because of the importance of backpay to deterring rouge employers, the Board has the choice to ignore Castro's illegal use of documents. *Id.* at 22.

132. *Hoffman*, 535 U.S. at 150.

133. *See id.* at 153-61 (Breyer, J., dissenting).

134. *Id.* at 154.

135. *Id.* at 154.

136. *Id.* at 155.

137. *Id.*

those employees were fired for good cause, while Castro was not.¹³⁸ Lastly, considering the circumstances, Breyer found that the Board's decision was reasonable.¹³⁹

III. CRITICIZING THE COURT

A. The Flawed Legal Analysis of Five Supreme Court Justices

The primary thrust of the Supreme Court's analysis is relatively straightforward – illegal activities disqualify an employee from NLRA protection.¹⁴⁰ However, the cases relied upon by the court, *Southern S.S.* and *Fansteel*, are distinguished by the nature and circumstances of the employees' conduct.¹⁴¹ In *Southern S.S.*, the employees were fired for their strike, interpreted as a mutiny.¹⁴² In *Fansteel*, the employees were fired for violent behavior resulting from seizing the employer's buildings.¹⁴³ Both activities were found in violation of the law, therefore, the employer did not commit an unfair labor practice by firing the employee.¹⁴⁴ Hoffman fired Castro for union activity, not for his illegal immigration status.¹⁴⁵ In previous cases, the employees were held responsible by the employer for their own actions.¹⁴⁶ Following *Hoffman*, employees face the consequences

138. *Id.* at 158-59.

139. *Id.* at 161 (stating *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel Inc.*, 467 U.S. 837, 842-43 (1984) requires courts to uphold reasonable agency positions).

140. See *supra* notes 103-132 and accompanying text.

141. See *Southern S.S. v. NLRB*, 316 U.S. 31 (1942); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

142. *Southern S.S.*, 316 U.S. at 40 (holding a strike aboard a docked ship was in violation of mutiny statutes of the criminal code).

143. *Fansteel*, 306 U.S. at 257-58 (1939) (holding that the protections of the NLRA do not extend to workers engaged in violent activity).

144. See *id.* at 254 ("As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ.").

145. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002). Hoffman was not even aware of Castro's status until the hearing to determine backpay. *Id.* Had Castro not been fired for his union activity, he likely would have continued employment at Hoffman. *Id.* This statement is grounded in the fact Hoffman was unaware of Castro's illegal status for over four years after firing him. *Id.* at 141 (stating that Castro was fired in 1989 and his illegal status wasn't discovered until the backpay compliance hearing in 1993). Castro also demonstrated his desire and willingness to work by finding employment after termination by Hoffman. See Brief for Respondent, *supra* note 9, at 24.

146. See *supra* notes 141-144.

for the illegal actions of their employers.

Furthermore, in relying on *Fansteel* and *Southern S.S.*, the Court failed to adequately distinguish *ABF Freight*.¹⁴⁷ Under *ABF Freight*, the Board has the discretion to decide if illegal activity by employees precludes protection under the NLRA.¹⁴⁸ Similar to the claim of perjury in *ABF Freight*, Castro's violation of the IRCA was unrelated to the violation of the NLRA.¹⁴⁹ If Hoffman had fired Castro because he illegally obtained employment in violation of the IRCA, then Castro's situation would be analogous to those in *Southern S.S.* and *Fansteel*. However, because termination of workers for union activity is in direct violation of the NLRA,¹⁵⁰ Castro's situation is similar to that of the employee in *ABF Freight*. Like Castro, the *ABF Freight* employee violated the law¹⁵¹ but was still eligible for backpay.¹⁵² The Board was following the Court's decision in *ABF Freight* and therefore the Board's decision should be respected.

The Court validated its decision by noting the employer, Hoffman, faces other sanctions.¹⁵³ With respect to Castro, the Court argued that awarding backpay absolves Castro of any wrongdoing and actually assists him in his illegal activities.¹⁵⁴ Ironically, the Court, while analyzing the labor dispute through the lens of immigration law, ignored immigration law in analyzing Castro's conduct.¹⁵⁵ Under immigration law, as mentioned by the Court,¹⁵⁶ the employee faces the prospect of criminal prosecution.¹⁵⁷ Undocumented workers also face the prospect of deportation.¹⁵⁸ Punishment under immigration law, rather than

147. *ABF Freight Systems, Inc. v. NLRB*, 510 U.S. 317, 325 (1994) (holding that the Board's decision to allow reinstatement and backpay to an employee who gave false testimony before an ALJ during a proceeding to determine if the employer committed an unfair labor practice is reasonable).

148. *Id.* at 324 (holding since Congress delegated authority to the Board, its views "merit the greatest deference").

149. *See generally Hoffman*, 535 U.S. at 137.

150. 29 U.S.C. § 158(a)(3) (2002).

151. *ABF Freight Systems Inc.*, 510 U.S. at 326-29 (Scalia, J., concurring) (detailing the false testimony made by the employee while under oath).

152. *Id.* at 321.

153. *Hoffman*, 535 U.S. at 152 (providing the Board has already imposed significant sanctions against Hoffman, including a cease and desist order and posting notice of employees NLRA rights).

154. *Id.* at 150.

155. *Id.*

156. *Id.* at 148.

157. The criminal code allows fines and up to five years in prison for producing false documents. *See* 8 U.S.C. § 1324c(e) (2002).

158. *See* 8 U.S.C. § 1227 (2002) (allowing for the deportation of inadmissible

labor law, is the most reasonable in this situation.¹⁵⁹ Denying backpay adds an unnecessary additional punishment and removes a right granted by the NLRA while simultaneously benefiting the wrongdoing employer.¹⁶⁰ Punishing illegal employees under immigration laws, while also providing backpay, upholds the intent of the IRCA¹⁶¹ and the NLRA.¹⁶² Clearly, the best punishment in this situation is to uphold the two separate, but closely related, federal policies.

Under the NLRA, employees generally have a duty to mitigate damages by seeking other employment.¹⁶³ The Court uses this as further evidence that Castro, under immigration laws, cannot receive backpay since illegal immigrants are unable to mitigate damages.¹⁶⁴ However, the Court ignores that Castro indeed had mitigated damages by finding new work.¹⁶⁵ The purpose of mitigation is not to protect the employer from paying backpay, but rather to prevent employees from taking advantage of backpay and receiving a windfall.¹⁶⁶ Immigrants generally do

aliens). Aliens who are in the United States without permission are inadmissible. 8 U.S.C. §1182(a)(6)(A)(i) (2002).

159. I would like to stress that punishment under immigration law, i.e., deportation, is warranted in this situation, but not in others. Castro's situation, where his immigration status was discovered at a judicial hearing, is distinguishable from situations where employers intentionally call the INS to deport employees. See *Illegal Immigrants Help Unionize a Hotel but Face Deportation*, N.Y. TIMES, Jan. 13, 2000, at A24 (reporting on a settlement reached, after a hotel reported its workers to the INS, who were involved in a unionizing campaign). See also THE AWFUL TRUTH (Docurama 2002) (a short documentary detailing one outraged citizen's response to the firings, and tips on how to make life miserable for a hotel manager). Deportation initiated by employers is clearly unfair to the immigrant and should not result in automatic deportation. See generally Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 371-380 (2001) (criticizing the INS for allowing employer derived evidence in deportation hearings).

160. Under the *Hoffman* enforcement scheme, employers can illegally fire undocumented employees and employers will face only weak NLRB sanctions and virtually non-existent INS sanctions. See generally *Hoffman*, 535 U.S. at 137.

161. H.R. REP. NO. 99-682(I), at 46 (1986), reprinted in U.S.C.C.A.N. 5649, 5650 ("Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.").

162. 29 U.S.C. § 157 (2002) (protecting an employee's right to organize).

163. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941).

164. *Hoffman*, 535 U.S. at 151 (stating Castro could not mitigate damages "without triggering new the IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore the IRCA and hire illegal workers").

165. See Brief for Respondent, *supra* note 9, at 41 (indicating Castro found employment as a carpenter's helper and a gardener after termination by Hoffman).

166. See *Phelps Dodge*, 313 U.S. at 198 (holding the Board has the authority to

not concern themselves with the inner-workings of the NLRA and, generally, will not consider the ability to receive backpay when deciding to immigrate to the United States.¹⁶⁷ Thus, awarding backpay when undocumented workers seek other employment, upholds the spirit of the NLRA and does not weaken immigration policy.

The Court also felt awarding backpay would condone immigration violations.¹⁶⁸ In a theoretical sense this proposition might have some truth, but in practical terms awarding backpay does not support violations. It is relatively neutral in this respect. Immigrants simply want a job.¹⁶⁹ Whether or not the Board can award backpay is irrelevant to this underlying motive.¹⁷⁰

B. The NLRB has Authority to Grant Backpay to Illegally Terminated Employees Taking Into Account Immigration Policy

The Court errs in viewing the firing of undocumented workers for union organizing as only an immigration issue and not taking into account other areas of law. One of the primary reasons for immigration to the United States is the availability of higher paying jobs and through those wages a better life.¹⁷¹ Also, immigrants are quickly filling union ranks, especially in the unskilled labor sector.¹⁷² The two preceding phenomenon highlight the importance that employment and labor policy plays in this situation. Analysis solely from an immigration law perspective does not adequately address this labor issue. Indeed, when passed, Congress specifically limited the scope of the IRCA and its impact on existing labor law.¹⁷³

make workers whole for "actual losses").

167. See *Patel v. Quality Inn South*, 846 F.2d 700, 704-05 (11th Cir. 1988) (discussing the motivations of undocumented workers).

168. See *Hoffman*, 535 U.S. at 137 (allowing backpay to illegal immigrants would "encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations").

169. See *Patel*, 846 F.2d at 704 (explaining "it is the hope of getting a job - at any wage - that prompts most illegal aliens to cross our borders").

170. Because immigrants already face deportation back to their home country, it is unlikely that not receiving backpay for unfair labor practices by an employer is at the forefront of an immigrant's mind. *Id.* (doubting "many illegal aliens come to this country to gain the protection of our labor laws").

171. See *Welin*, *supra* note 51, at 263 (identifying jobs and improved financial situation as primary factors drawing immigrants to the United States).

172. See *supra* note 29 and accompanying text (discussing labor's campaign to organize illegal immigrants); *Meister*, *supra* note 24 (reporting illegal immigrants often get jobs bearing titles such as janitor or child care worker).

173. H.R. REP. No. 99-682(I), at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649,

In *Hoffman*, the Court established a myopic principle that limits the Board's ability to interpret immigration laws where the immigration statute falls outside the NLRA.¹⁷⁴ Laws should not be interpreted in a vacuum and must take into account practical application. Labor law is affected by other laws and agency interpretations. A bright-line rule stating that the NLRB is unable to reasonably interpret a statute affecting undocumented workers fails to promote either immigration or labor policy. The efficacy of the Court's rule is further diminished when one considers that the United States government, the enforcer of immigration law, supports the NLRB's position.¹⁷⁵ Immigration policy is not benefited by the Court's interpretation in *Hoffman* and labor policy is clearly hurt by it.¹⁷⁶ The proper approach is to analyze the purpose behind the two policies and decide on the policy most beneficial to both areas of labor and immigration. If the Court is truly trying to limit immigration into this country, a two-pronged deterrent approach of increasing workers rights and enforcing tougher sanctions on employers is more logical than giving employers incentives to hire illegal workers.¹⁷⁷ Increasing sanctions of employers will give them an incentive to ensure the status of their employees and the attractiveness of undocumented workers will be reduced.

Under *Chevron*, the Board had authority to decide this matter.¹⁷⁸ As previously discussed, this was a labor issue. The Board made a reasonable decision under the circumstances and,

5662.

It is not the intention of the Committee that the employer sanction provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. 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 (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act.

Id.

174. *NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2nd Cir. 1997).

175. *See id.* at 158 (Breyer, J., dissenting) (stating that the Attorney General, the head of the department containing the INS, supported the Board's position in *Hoffman*).

176. *See infra* notes 199-03.

177. This approach focuses on the employers, not the employees. *See supra* note 58 and accompanying text (discussing the original intent of the IRCA).

178. The extent of *Chevron's* application is disputed. *See supra* notes 49-50 and accompanying text.

therefore, deserved administrative deference.¹⁷⁹ The first step in analyzing the action of an agency is whether Congress has spoken clearly on the issue at question.¹⁸⁰ Congress' ambiguity is evident by looking at the Supreme Court's interpretation in *Sure-Tan* and the subsequent interpretations by circuit courts.¹⁸¹ After ambiguity has been found, the next step is to ask whether the Board's decision is reasonable.¹⁸² In *Hoffman*, it is entirely reasonable for the Board to award backpay to an employee wrongfully fired by an employer.¹⁸³

Castro's situation is made more complicated since the Board is not interpreting another agency's decision, but is utilizing a statute other than the NLRA.¹⁸⁴ The Board has two separate reasons for claiming jurisdiction in this situation. First, the IRCA was not designed to limit the protections of the NLRA or other existing labor laws.¹⁸⁵ Second, sanctioning the employer does not violate the congressional intent of the IRCA.¹⁸⁶ In both scenarios the Board is not interpreting another agency's statute, but rather is fulfilling congressional intent by interpreting labor law and establishing labor policy.¹⁸⁷

By ignoring the decision of the Board, the Court undermined the Board's authority and diminished the spirit of the statute. In *Sure-Tan*, the Court explicitly held that the NLRA covered

179. See *A.P.R.A.*, 134 F.3d at 50; *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 720 (9th Cir. 1986) (previous circuit court decisions supporting awarding backpay to undocumented workers); *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-44 (1984) (holding deference is due to an administrative agency when the statute is ambiguous and the agency's interpretation is reasonable).

180. *Chevron*, 467 U.S. at 842.

181. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (7th Cir. 1984) (holding that "in computing backpay, employees must be deemed 'unavailable' for work" during any period). The circuit courts and the Board have struggled to divine the meaning of "unavailable." See *supra* notes 64-67 and accompanying text.

182. *Chevron*, 467 U.S. at 842-43.

183. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941) ("Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.").

184. See *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1060 (1998) ("[T]he most effective way to accommodate and further the immigration policies embodied [in the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees.").

185. See H.R. REP. No. 99-682(I), at 58 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5662.

186. See *supra* notes 57-59 and accompanying text (discussing the intent of the IRCA).

187. See cases cited *supra* note 51 (discussing agency limitation of interpreting statutes).

immigrants.¹⁸⁸ Therefore, the *Hoffman* decision was within the authority of the Board. However, the Court somehow distinguishes the ability to be covered under the NLRA from the ability to receive backpay.¹⁸⁹ In the wake of *Hoffman*, individual undocumented workers are no longer protected under the NLRA.

C. The Court's Decision Ignores Congressional Intent Behind the IRCA

The majority and dissent came to opposite interpretations of the intent underlying passage of the IRCA.¹⁹⁰ Logically and practically, the dissent's interpretation upholds the intent of the IRCA.¹⁹¹ By denying protection to illegal immigrants under the NLRA, the Court will increase their attractiveness to employers¹⁹² and put legal workers at a disadvantage.¹⁹³ Protecting undocumented workers under the NLRA is necessary because deterring illegal immigration is difficult and unrealistic.¹⁹⁴ Furthermore, employers will have an incentive to look for illegal immigrants since they are easily terminated and the employer is unlikely to face sanction under other federal laws.¹⁹⁵

188. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (7th Cir. 1984) (explaining "[undocumented workers] plainly come within the broad statutory definition of 'employee'").

189. "Our first holding in *Sure-Tan* is not at issue here and does not bear at all on the scope of Board remedies with respect to undocumented workers." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149-50 n.4 (2002).

190. The majority found awarding backpay to illegal immigrants "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy." *Id.* at 151. The dissent found the Board's decision "reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent." *Id.* at 153.

191. See *supra* notes 57-59 and accompanying text (discussing congressional intent of the IRCA).

192. See David G. Savage & Nancy Cleeland, *High Court Ruling Hurts Union Goals of Immigrants*, L.A. TIMES, Mar. 28, 2002, at A20 (quoting a California Labor Department Official saying the decision in *Hoffman* "tends to encourage the most unscrupulous employers to only hire undocumented workers and then fire them when they try to assert their rights").

193. See Meister, *supra* note 24.

194. People immigrate for numerous and varied reasons depending on their individual situations in their native countries. See *supra* note 58 and accompanying text (detailing "push" and "pull" factors of immigration and naming employment as a primary reason). The majority failed to recognize that being punished by not allowing backpay is, at best, minor in comparison to the punishment every undocumented worker faces ... deportation. See *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988).

195. See *infra* Part III.D.

D. The Court's Decision Derogated the Board's Ability to Enforce the Internet of the NLRA

The Court pointed out that the Board cannot levy punitive sanctions on employers, but with its decision, the Court removed the remedial power of the Board.¹⁹⁶ As the number of illegal immigrants constitute an increasing number of unionized workers,¹⁹⁷ their impact on the U.S. economy also increases.¹⁹⁸ The Board's lack of power clearly hinders its future ability to ensure industrial stability.

The divide *Hoffman* created between immigrants and legal workers undermines the NLRA by creating division within the workplace.¹⁹⁹ The action of an employer who willingly fires an employee will psychologically affect the remaining employees, illegal or not.²⁰⁰ This dampening effect on bargaining undermines the intent of the NLRA by reducing the likelihood of negotiation.²⁰¹

The Court's reliance on other forms of sanction is misguided. *Hoffman* will only weaken already weak enforcement provisions.²⁰²

196. After *Hoffman*, the NLRA is powerless with respect to undocumented workers. Future employees, illegal immigrants, and legal employees alike are "protected" solely by cease and desist orders and notices. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). But cease and desist orders scolding the employer to refrain from illegal activity is of little comfort to the powerless fired immigrant.

197. See Margot Roosevelt, *Illegal But Fighting For Rights*, TIME, Jan. 22, 2001, at 68, 68 (reporting immigrants are a "rich new source of constituents" for unions).

198. See *supra* notes 21-26 and accompanying text (discussing the impact illegal aliens have on the economy).

199. Collective bargaining by its very nature depends on the ability of workers to come together. NLRA rules require certain percentages for union certification and elections. 29 U.S.C. § 159 (2002). By creating a class of workers who will not join in an organizing campaign, *Hoffman* destroys any ability for collective activity among workers and establishes a barrier for employees who want to organize. For example, if a workplace had ten employees, three of which are illegal, and therefore very unlikely to vote or organize, organizing employees would need to get six of the seven "eligible" employees to vote for a union.

200. Labor law is sensitive to the ultimate impact of employer actions on employees. Often the intent of the employer is less important than the action's impact on employees. See, e.g., *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948) (allowing for reelections where an employer's conduct prevented a fair election despite the fact the employers conduct may not constitute an Unfair Labor Practice as enunciated in the NLRA).

201. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (commenting that "[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation"). See also 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (2002) (requiring that employers and employees bargain collectively).

202. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1788-89 (1983) (explaining

The backpay provision itself is questionable in its effectiveness in convincing employers not to discharge workers for union activity in violation of § 8(a)(3) of the NLRA.²⁰³ However, it is the only monetary sanction left against an employer who illegally fires an undocumented worker²⁰⁴ and, therefore, this sanction is still important.²⁰⁵ Non-monetary sanctions, such as cease-and-desist orders, are rarely effective.²⁰⁶

Supporters of the Court's decision will state that employees' rights are not limited to the NLRA.²⁰⁷ Other federal laws such as the Fair Labor Standards Act (FLSA) and Title VII also protect illegal immigrants.²⁰⁸ However, inclusion under the FLSA and Title VII stems more from the need to protect workers than from deterring employers from hiring undocumented workers.²⁰⁹ While these outlets indirectly give some protection to undocumented workers, they do not protect the goal of the NLRA to promote

"the traditional remedies for discriminatory discharge – backpay and reinstatement – simply are not effective deterrents to employers who are tempted to trample on their employees' rights") (citation omitted). Weiler posits that while the language of the NLRA suggests that action by the Board should focus on employers, the remedial powers of the Board are "heavily oriented toward the repair of harm inflicted on individual victims of antiunion action by employers." *Id.* at 1788.

203. The "fine" against the employer is only the amount of wages the employee would have earned, subtracting out the employee's duty to mitigate damages. Therefore, the actual amount the employer has to pay is "far too small to be a significant deterrent." *Id.* at 1789. The amount of the "fine" for firing an organizer is small compared to the additional costs unions bring with them. *Id.* at 1790-91. In *Hoffman*, the amount the employer would have had to pay is large, approximately \$67,000, due to the four year delay during litigation. See Nancy Cleeland, *Employers Test Rulings on Immigrants*, L.A. TIMES, Apr. 22, 2002, at C1.

204. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940) (holding that the NLRA gives the Board power to devise remedial, not punitive measures).

205. *Sure-Tan* established the doctrine of denying reinstatement to undocumented workers since they cannot legally work after their status is discovered. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (7th Cir. 1984).

206. See Barmon, *supra* note 75, at 604- (pointing out that Del Rey Tortilleria, Inc. continually defied the cease and desist orders of the Seventh Circuit). Non-monetary sanctions were Castro's only available remedy because he was illegally in the country, thus, reinstatement was not possible. See *Hoffman Plastic Compounds, Inc.*, 326 N.L.R.B. 1060, 1061-62 (1998).

207. See *supra* notes 41-42.

208. See *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (finding that the protections of the FLSA are applicable to immigrants regardless of whether they are documented or undocumented); *Hudson & Schenck*, *supra* note 24, at 367-69 (arguing that Title VII protects undocumented workers even though they should not have been hired in the first place). But see *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 186-87 (4th Cir. 1998) (holding that an undocumented worker cannot bring an action under Title VII because undocumented workers are not qualified to hold any job position).

209. See *Hudson & Schenck*, *supra* note 24 (describing how according to the EEOC, extending the protections of federal antidiscrimination laws to illegal immigrants renders them less attractive as employees).

individuals' collective bargaining rights.

Furthermore, enforcement of labor policy through immigration law fails miserably. The enforcement strategy of the INS focuses on employees, not the employer.²¹⁰ This strategy runs counter to the purpose of the INS' empowering statute, the IRCA.²¹¹ The INS also faces severe staffing problems inhibiting its ability to enforce immigration policy.²¹² Even when the INS attempts enforcement, business and local communities may object to the raids.²¹³

Along with the less effective enforcement, the penalties imposed by the INS are often insufficient. Employers are subject to sanctions under the IRCA,²¹⁴ which are often cited as an effective deterrent by supporters.²¹⁵ However, these sanctions, while highly visible, rarely occur.²¹⁶ What remains is an understaffed, under-funded, and misguided agency that rarely sanctions employers.²¹⁷ It is no wonder that employers will flagrantly violate the law in order to hire illegal workers.²¹⁸

210. See T. Alexander Aleinikoff, *Illegal Employers*, THE AMERICAN PROSPECT, Dec. 4, 2000, at 15, 16 (describing how INS enforcement within the workplace is intended to be achieved by limiting employer access to illegal workers). After implementing an employee-based sanction system in fiscal year 1999, employer-sanction case completions dropped fifty-nine percent in fiscal year 1999 and an additional thirty-one percent through the first eleven months of 2000. *Id.* at 16.

211. See *supra* notes 57-59 and accompanying text for a discussion of the purpose of the IRCA.

212. See Elizabeth M. Dunne, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 646 (2000) (showing that in California in 1995 there were only 200 federal inspectors to investigate 873,400 private employers). See also Nessel, *supra* note 159, at 360 n.60 ("Relative to other enforcement programs in INS, worksite enforcement has received a relatively small portion of INS' staffing and enforcement budget.") (quoting U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED EMPLOYMENT EXIST 16 (1999)). See Camarota, *supra* note 24, at 22 (explaining that INS is severely understaffed with only 300 staffers enforcing the prohibition of hiring illegal immigrants).

213. Roosevelt, *supra* note 197, at 69 (detailing an INS raid of the Nebraska meatpacking industry resulting in damage to the state's economy that eventually led the governor to endorse an amnesty for undocumented workers).

214. Employers face civil penalties under 8 U.S.C. § 1324a(e)(4)(A) (2002) and criminal penalties, including jail time, under 8 U.S.C. § 1324a(f)(1).

215. See Timothy M. Cox, *A Call to Revisit Sure-Tan v. NLRB: Undocumented Workers and Their Right to Backpay*, 30 SW. U. L. REV. 505, 524 (2001) (referring to a restaurant company's \$1.9 million dollar settlement with the INS as a result of hiring undocumented workers).

216. See Cleeland, *supra* note 31, at A30 (stating that a restaurant chain's \$1.9 million settlement was an exception to the rule and that even when fines are sought, they are often reduced or eventually forgiven).

217. *Id.*

218. See *id.* (quoting a Los Angeles union official saying employers have even

Already, the ramifications of the *Hoffman* decision are beginning to influence labor relations. Employers are using immigration status as a way to deflect union grievances²¹⁹ and lower wages.²²⁰ *Hoffman* is also appearing in courtrooms across the country as employers attack other federal employment laws.²²¹ Excluding illegal immigrants from Title VII and the FLSA would remove immigrants from the protection of the federal government and open the floodgate for serious abuses by employers along with a depression of wages. The loss of protection under these federal acts would also result in the wholesale loss of both individual and collective rights of an entire class of people.

CONCLUSION

Setting aside all the discussion of judicial deference, congressional intent, and misapplied case law, the bottom line is that the Supreme Court has dealt a blow to workers, both legal and illegal in the United States. Those at the bottom rung of the employment ladder are most affected. These are the workers who need protection the most and who, by removing employer sanctions, are hurt the most by the Court's decision. Since the New Deal, workers have depended on their ability to act collectively and to unionize to improve their work environments and wages. No group of people needs the ability to act collectively more than new immigrants.

As the economy evolves, the Court will play a major role in shaping the lives of American workers. Only time will tell if this decision is the last erosion of workers' rights, or if the FLSA or Title VII will be the next to fall. By imposing another hurdle in

helped illegal immigrants get over the border).

219. See Cleeland, *supra* note 203, at C1 (reporting on a worker in Kentucky and a worker in Nebraska who were asked for their immigration documents after filing a sexual harassment claim and a workers' compensation claim respectively).

220. See *id.* at C5 (reporting an attorney representing an employer accused of paying workers less than minimum wage as citing *Hoffman* and claiming that illegal immigrants should not be entitled to backpay). The attorney stated, "I am sure you are aware of the ruling by the Supreme Court of the United States that illegal immigrants do not have the same rights as U.S. citizens." *Id.*

221. See *Cortez v. Medina's Landscaping*, No. 00 C 6320, 2002 WL 31175471, at *1 (N.D. Ill. 2002) (rejecting employer's claim that *Hoffman* precludes payment of earned wages for work actually performed); *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F.Supp.2d 1056, 1062 (N.D. Cal. 2002) (rejecting argument that *Hoffman* applies to FLSA situations, but admitting the arguments for and against FLSA protection of immigrants are remarkably similar to the arguments in *Hoffman*); *De La Rosa v. Northern Harvest Furniture*, No. 01-2160, 2002 WL 31007752, at * 2 (C.D. Ill. 2002) (rejecting the argument that *Hoffman* precludes backpay awards in Title VII discrimination claims).

the already difficult task of unionization, the Court is delaying and perhaps denying many workers the things many people take for granted: good wages, a safe workplace, health care, and a work environment free from fear and intimidation.