The Undocumented Dilemma: Labor Protections for Undocumented Workers in the Face of Immigration Reform

by

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INTRODUCTION

“Illegal Immigrants Benefit the U.S. Economy”
- The Hill

- Illinois State Bar Association Journal

“Here’s the Reality of Illegal Immigration in the United States”
- New York Times

There are over 11 million undocumented people living in the United States. More than 8 million of the undocumented population works in some capacity, making up 5% of the civilian labor force.¹ A look at the daily news and media outlets, like the New York Times and The Hill, shows a seemingly unceasing array of articles and op-ed pieces about “illegal immigrants”, “undocumented labor”, and “immigration reform”. It is no secret to the American public that immigration has become a hotly debated topic in the political and social spheres. While the media produces story after story about the benefits or problems with immigration, the lives of undocumented people, or the state of immigration reform, many Americans remain unaware of the ways in which the immigration debate is being addressed in the courts.²

Undocumented workers are an attractive commodity for unscrupulous employers looking for cheap labor. They are often exploited and mistreated by

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² The above quotes point to a trend in media and politics to refer to undocumented people as “illegal immigrants”. In this thesis, I do not use “illegal” to refer to undocumented people or workers at any point in my own words. If “illegal” is used, it is to show that it is used frequently and generally in many media outlets and Government documents.
employers, whether it is through wage theft, unsafe working conditions, or even racial discrimination. Within the labor market, undocumented workers are almost always at the bottom of the ladder. Importantly, there are some protections in place that may offset undocumented worker exploitation. Those protections take the form of federal labor laws like the National Labor Relations Act, Title VII of the Civil Rights Act, and the Fair Labor Standards Act, among others. These labor laws establish general protections for the civilian labor force in the United States, and have historically offered much needed protection for undocumented workers.

The passage of the Immigration Reform and Control Act of 1986 greatly complicated these protections, however. The changes to the federal immigration law that focused on the unlawful hiring of undocumented workers transformed the relationship between undocumented workers and the protections offered by these labor laws. In the last three decades, courts of all levels have debated the issue of undocumented worker coverage under labor statutes with mixed results. The question has become not ‘are they protected’, but ‘in what way are they protected’?

In this thesis, I explore the state of the debate surrounding undocumented workers’ rights and protections under certain labor laws. I will also attempt to uncover the various conflicts between the legislative and judicial systems with regards to undocumented workers.

In chapter one, I outline the legislative history of the immigration law in order to understand the motivations and intentions of the courts. The legislative history shows a complicated amalgamation of legal precedents, political motivations, and
economic push and pull factors that all contribute to the formation of an immigration law with restrictive tendencies.

In chapter two, I survey the relevant case law associated with labor protections for undocumented workers. The seminal Supreme Court cases *Sure-Tan, Inc. v. NLRB* and *Hoffman Plastic Compounds, Inc. v. NLRB* offer a wealth of intricate interpretations of both the labor statutes and the Congressional intent of the immigration law. I explain how the current state of undocumented workers’ rights under the NLRA rests on the Supreme Court’s decision in Hoffman, and whether that decision holds up in other courts.

In chapter three, I sketch out the extension of Hoffman reasoning into other labor statutes, namely Title VII of the Civil Rights Act and the Fair Labor Standards Act. I look at both the legislative history of each labor law and the relevant case law to accurately display the judicial debate over Hoffman extension, which rests on the differences between the labor statutes and the Congressional intent of the IRCA.

Finally, in the afterword I explore the issue of Congressional intent and highlight the confusion within the courts that makes the issue of undocumented workers’ rights so complex. By uncovering this legal debate with a two-pronged approach, with legislative and judicial history, I shed some light on the story of undocumented workers’ rights that is rarely told: undocumented workers may or may not be protected by labor statutes—and the courts are fighting about it.
CHAPTER I: Legislative History

The Immigration and Nationality Act of 1965

The Immigration and Nationality Act of 1965 was the first major reform legislation enacted in response to the changing immigration patterns of the 1950s and 1960s. The INA remains today as official immigration law, with multiple amendments that have modified it significantly. The original form of the INA functioned on a quota system that capped the number of immigrants from each country from the Eastern Hemisphere at 20,000 people. At first, there were no quotas for the Western Hemisphere because the agriculture industry was still very dependent on Mexican farmworkers who worked primarily on a seasonal basis. With a relatively porous and open border between Mexico and the United States, Mexicans were able to travel to California or other parts of the American Southwest to work on farms in the harvest months and then return to Mexico for the winter. The U.S. Government actually encouraged migration from Mexico in controlled amounts for much of the first half of the 20th century. The Bracero Program, a contract labor program for Mexican farmworkers, greatly increased the number of Mexicans living and working in the United States. It wasn’t until the economic slump after the Korean War that the thousands of “braceros” were no longer desirable and were systematically deported through the problematically termed repatriation program “Operation Wetback.”

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massive deportation program was an attempt to clear out unlawful populations of Mexican farmworkers and encourage employers to use the Bracero Program for contracted legal labor. However, employers strongly rejected government intervention in the labor market and thus considered contract labor programs to be a separate entity from traditional immigration law.4

During the postwar period, there was a public outcry to the rising unemployment rates. In response, Mexican farmworkers were labeled as the perpetrators of all economic downturn: they were taking jobs away from Americans who needed them. The media firestorm that accompanied Operation Wetback was one of the first large scale manifestations of an anti-immigrant sentiment that specifically targeted Mexican workers and employed economic arguments to support the claim.

Thus, the INA was enacted to address the issues surrounding the large number of Mexican immigrants flowing into the United States at a record pace. The Act did so by placing an annual 20,000 person per country cap on the Western Hemisphere, in addition to the Eastern Hemisphere caps already in place. However, the 20,000 per country cap worked in conjunction with a nationwide ceiling of 200,000, meaning that countries with much larger immigration rates like Mexico were suddenly extremely limited. Thousands of Mexican farmworkers with paying jobs were suddenly undocumented or, as lawmakers say, “illegal” immigrants with a stroke of a

The Act also did not accurately address the temporary worker population either, because of “heavy pressure” from labor lobbies to end foreign-contract labor programs. The labor lobbies opposed these programs because they drove labor wages up and limited the accessibility to loosely-regulated, unauthorized work. In fact, temporary workers were not to be given special preferences under the new visa categories outlined in the Act. The INA altered the understanding of authorization for undocumented immigrants, more specifically Latinx immigrants in the West. While the INA did not make any explicit mentions of criminality for undocumented immigrants, various amendments over the next 20 years would significantly modify the legality of undocumented immigrants living and working in the United States.

In 1976, an amendment was added essentially abolishing the capped quota system and delineating a “worldwide ceiling” of 290,000 immigrants per year. The amendment also got rid of the various preference systems that were in place that prioritized “family reunification, needed skills, and refugees.” The Refugee Act of 1980 sought to separate refugees from the regular immigrant populations in response to a rapid increase of Indochinese immigrants after the fall of Vietnam and Cambodia. The INA amendments of 1976 and the Refugee Act of 1980 marked a transition towards a less numerically regulated immigration system and repositioned the immigration law in relation to the actual trends that were occurring at the time—

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5 Wheatley and Rodriguez, Hidden Lives 164.
decreased European immigration and increased Latin American and Asian immigration.

*The Immigration Reform and Control Act of 1986*

The most important piece of legislation for the protection and/or the restriction of immigration following the INA was the Immigration Reform and Control Act of 1986 (IRCA). The Immigration Reform and Control Act of 1986 enacted substantial changes to immigration policy with regards to undocumented immigrants. The Act was the most comprehensive immigration reform legislation that the United States had ever seen and was the result of a bipartisan effort to address the issues of the growing unauthorized immigrant population. President Reagan signed the Act into law after it spent close to 4 years in Congress. The proposed purpose of the Act was to “close the back door” to illegal immigration, and “open the front door” (slightly) to legal pathways.\(^8\) It became a compromise between both parties that aimed for “stronger enforcement of immigration law both at the border and inside the country, and legalization of the unauthorized immigrant population.”\(^9\) The Act became known as a “three-legged stool” for its three major components: “employer sanctions, border enforcement, and legalization opportunities.”\(^10\)

The legalization provisions took the form of an immediate solution for millions of undocumented individuals who had been living in the United States for a


\(^9\) Chishti 1.

\(^10\) Chishti 2.
number of years, allowing all undocumented immigrants living in the country since 1982 to apply for adjusted permanent resident status. This program was an attempt to legalize the immigration status of a large portion of people in one swoop and hoped to alleviate any procedural and legal nightmares that might have occurred with the other provisions of the IRCA, namely the creation of criminal statutes for undocumented people. While the legalization program was successful initially, its time-stamp of five years was insufficient for many families of immigrants who were attempting to gain lawful permanent resident (LPR) status as a family unit. Ultimately, what the IRCA’s legalization program failed to do was address the “dynamic nature of the country’s immigration need.”

Despite those oversights, the program was still the country’s largest scale legalization project in history and legalized the status of over 3 million people.

Border protection was a heavily promoted facet of the Act because of its potential impact on the increase or decrease of unauthorized populations. Along with the legalization of unauthorized immigrants already in the country, lawmakers wanted to dramatically decrease the number of unauthorized entries that were causing the undocumented population to increase. The IRCA increased the Border Patrol staff by 50% and allocated additional funding to support deportation procedures and the apprehension of undocumented immigrants. Although the increased Border Patrol budget was not as significant as the changes made in the mid-1990s, the focus on

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12 Chishti 4.
more intensive border protection in the IRCA marked a significant shift in U.S. immigration policy at the time.

The crux of the IRCA, however, was the addition of employer sanctions that explicitly addressed the employment of undocumented immigrants. With this change, the IRCA modified the INA in a crucial way. The Act placed sanctions on employers who knowingly hired unauthorized workers, who continued to employ unauthorized persons, and who hired workers without verifying their legal status or authorization to work. These three sanctions varied in extremity, with the known hiring of unauthorized workers holding the highest penalty. In order to avoid extreme burdens on employers, the document verification process was streamlined by the implementation of the I-9 form. The IRCA intended to place the burden of verification solely on the employers, with the purpose of “[dissuading] employers from pulling illegal immigrants into the country for employment.” Employers remained unhappy about the fraud provision in the IRCA and for the following ten years after the Act’s enactment, the fraud sanctions were progressively weakened.

**Amendments to the IRCA**

The increased use of fraudulent documentation and the larger scale implementation of employer sanctions prompted lawmakers to add two amendments to the IRCA relatively soon after the Act was enacted. Congress enacted the Sonny Bono amendment (Section 274A) that alleviated employers from some responsibility

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for documentation verification. Employers were allowed to “correct ‘technical or procedural’ I-9 employee verification to comply with employment verification documents if they resulted from an initial “good faith” effort to comply.” That is to say that employers were only required to verify documents to the degree that they looked reasonably real, and could not be punished if they verified fraudulent documents. What became known as the “good faith clause” gave employers a “safe harbor” for hiring undocumented workers as long as they did not “knowingly hire” them.

In response to the decreased sanctions on employers’ verification processes, Congress added Section 274B of the INA, or the Unfair Immigration Related Employment Practices Provision (1991), that protected against discrimination based on national origin. This anti-discrimination provision was set up to prevent aggressive documentation verification by employer, on the basis of a worker’s racial or linguistic differences as non-white Americans. The employers were not allowed to ask for excessive documents or different versions of documents if they were presented with plausible documents in the first place. As stated earlier, employers were only required to make a ‘good faith’ effort to verify work authorization documents. The combination of the good faith effort clause and the anti-discrimination provision made for complicated conflicts between employers and immigrant employees. For example, a unscrupulous employer could verify an undocumented immigrant’s legal status and claim that the documents presented to them were reasonably valid and

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17 Saucedo 1514.
therefore be exempt from punishment for the illegal hire. On the other hand, an employer who chose to extensively vet an immigrant employee on the basis of their immigration status could be subject to punishment under the anti-discrimination provision.

With the addition of this provision, Congress argued “if there is to be sanction enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs.”19 The provision created the Office of Special Counsel to oversee and investigate immigration-related discrimination claims. It is important to note that section 274B does not protect undocumented workers from citizenship or national origin discrimination because those protections would run counter to the IRCA’s prohibition of employment for undocumented workers. The provision protects against discrimination because of national origin or citizenship status, which includes immigrants who are authorized to work, LPRs or what the document calls “intending citizens.”20 In order to qualify for protection under the provision, a work-authorized immigrant must also show ‘intent’ with regards to becoming a citizen. On its face, this seems to be a transparent definition that would include most legal immigrants. However, many immigrants (including LPRs who live most of their lives in the U.S.) do not intend to become citizens and never proceed with citizenship adjustment. The anti-discrimination provision of the IRCA offered another opportunity for legal immigrants to protect

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20 Bendremer and Heiden 1029.
themselves against unfair labor practices, but did not address protections for undocumented immigrants.

**The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996**

In the early 1990s, undocumented immigration increased by 400,000 persons per year and anti-immigrant sentiments became more popular due to economic strife and general xenophobia. Many Americans believed that Mexican or Central American immigrants working in the United States that the government had deemed “illegal” were just that – illegal aliens who had committed a “criminal” act. The unlawful entry of thousands of people made many people feel that the morality of the country was in question, and that large influxes of immigrants threatened the national identity of the United States. Thus, increased Border Patrol, mass deportations, and stricter legalization regulations took hold.

During this period, problems with employment verification amplified. With more and more undocumented workers using false documents or documents that belonged to someone else, President Clinton signed the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996. The Act was extremely complex because it was a combination of two bills that addressed legal immigration and illegal immigration separately. It was divided into seven sections and was over 200 pages long. Generally, the sections dealt with improvements to border control, enforcement against alien smuggling and document fraud, deportation procedures, enforcement of employment sanctions, restrictions on benefits for aliens, and other miscellaneous

provisions.\textsuperscript{21} The overall character of the Act was restrictive, as it imposed many more sanctions that the original IRCA and specifically targeted undocumented immigrants.

The increased border protection provisions allowed for a massive budget increase for the Immigration and Naturalization Services (INS), and approved a 12 million dollar wall at the U.S. border near San Diego. Title I of the Act also outlined increased penalties for illegal entry, including higher fines and criminal convictions for unauthorized immigrants who flee from INS officers. Some of the heightened security measures for entry included biometric identification cards (fingerprints), and an automated entry-exit control system aimed at tracking alien movements across the borders. Title II outlined the increased penalties for document fraud and added alien smuggling to the list of racketeering charges in the United States. This addition called for an increase in the number of Assistant US Attorneys that were cleared to investigate possible alien smuggling cases. Title III focused heavily on deportation procedures that constituted a massive overhaul of the deportation system and increased penalties for unlawful entry. The Act imposed “bars to admissibility” on unauthorized immigrants who had not entered the country legally and overstayed nonimmigrant visas. Immigrants who had been in the country unlawfully for less than a year would be barred from legal entry for 3 years, and those who had stayed over a year would be barred for 10 years.\textsuperscript{22} Title III also outlined an expedited process of determining inadmissibility that allowed INS officers to “unilaterally rule” that an


\textsuperscript{22} “IIRIRA 96” 1.
immigrant was violating the IIRIRA and order removal proceedings without judicial review. This facet was extremely controversial because while it attempted to streamline deportation processes, it essentially undermined the judicial system’s power with regards to immigration law. Overall, Title III was written in broad strokes and eliminated many avenues for appeals and judicial review for immigrants.

Titles IV and V directly target the actions and “responsibility” of undocumented immigrants by outlining a large number of new “criminal alien laws” and new grounds for deportation. The new criminal convictions that could make an immigrant deportable ranged in severity, and the majority of them were low-level misdemeanors that were considered aggravated felonies under immigration law.

Title VII of the IIRIRA addressed factors of legal immigration, but in reality created more blocks for legalization rather than streamlining the process. Most of the provisions for legal immigration regarded an immigrant’s economic status and health, with one provision excluding immigrants who might become a “public charge” to the state for reasons of failing health, economic hardship, or low education levels. The IIRIRA was one of the most restrictive pieces of immigration law for undocumented immigrants in history, and has directly affected cases that address the relationship between labor law and immigration law at the judicial level that I will discuss in the following chapters.

A crucial component of the IRCA and the IIRIRA is the absence of a provision that criminalizes the work of undocumented immigrants who do not use fraudulent documentation. That is to say, an undocumented immigrant who is hired

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23 “IIRIRA 96” 2.
24 “IIRIRA 96” 3.
by an employer without question of their status and without using false
documentation is not committing a criminal act. Under IRCA, the employment of the
workers by the employer is illegal, but the worker is not violating the law and
therefore is not responsible. Thus, there are no explicit “employee sanctions” outlined in IRCA other than for the use of fraudulent documents to obtain employment. In a 2012 decision regarding the state of Arizona’s ability to criminalize unauthorized work, the Supreme Court emphasized that “[proposal] to make unauthorized work a criminal offense were debated and discussed during the long process of drafting IRCA… [but] Congress rejected them.” Although the decision not to criminalize unauthorized employment was made in part to limit the States’ ability to pass even more restrictive laws for undocumented workers, the absence of explicit criminal statutes for unauthorized work has given the courts more leeway in labor cases as well as providing some leverage to undocumented workers. The IRCA on its own is a complicated piece of legislation, but its key provisions become even more complex when put in conversation with the many other laws that directly affect undocumented immigrants on a daily basis.

The National Labor Relations Act

The National Labor Relations Act, (NLRA) first enacted in 1935, is the act responsible for protecting and regulating labor relations such as union organizing, collective bargaining, and employee rights to striking and protest. It protects

26 My term.
28 Saucedo 1525.
employers and employees from exploitation and unfair labor practices because it is in “the national interest of the U.S. to protect the economy”\textsuperscript{29}. The two most important sections are section 7, which protects the right to self-organization, and section 8, which protects against unfair labor practices. Section 7 outlines the guidelines and rules for collective bargaining, including the organizing of bargaining units, secret ballot elections, and the appointment of employee representatives. Section 8 protects those rights and lays out punishments and repercussions for employers who violate those rights, such as firing an employee for union organizing. The NLRA also protects against the exploitation of employees by unions, and attempts to regulate labor relations such that employers, employees, and unions can work harmoniously for the “protection of the economy”.

The NLRA is protected and enforced by the National Labor Relations Board (NLRB), which consists of three branches, the General Counsel, the Board, and the regional offices. The NLRB’s main functions are dealing with violations of the Act and to improve or change the Act based on current labor related issues. The General Counsel is appointed by the president and serves as the final authority on behalf of the Board with regard to investigations and complaints.\textsuperscript{30} The GC advises the NLRB on updates in legislation and issues reports on the general procedures of the Board. The Board consists of 5 members that “[decide] cases involving charges of unfair


\textsuperscript{30} Office of the General Counsel 2.
labor practices and determines representation election questions that come to it from the Regional Offices.”

The majority of the cases brought to the NLRB involve violations of section 7 or section 8 protections and the results of the cases are generally issuing cease and desist orders, reinstating wrongfully terminated employees, and granting backpay.\(^{32}\) While the NLRB has the remedial authority to grant the aforementioned remedies, cases that are appealed by either the plaintiff or the defendant are adjudicated in the federal appeals courts. Importantly, the NLRA is not a criminal Act, which means that the remedial efforts for violations are not and cannot be punitive in any way.

**The NLRA and the Immigration Reform and Control Act**

In any cases involving labor relations, the issue of immigration becomes especially relevant. Immigrant laborers comprise about 17% of the workforce and are overrepresented in industries such as manufacturing, agriculture, and food service.\(^{33}\) With the exception of agriculture, many of the industries with the highest numbers of immigrant workers rely heavily on union organization and labor relations protections in order to combat wage discrimination, exploitation, and unfair practices. Thus, low-skilled laborers benefit from labor protections because these issues affect them more dramatically. The NLRA represents one point where labor law and federal

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31 Office of the General Counsel 33.
32 Office of the General Counsel 36.
immigration regulation come into contact, and for undocumented workers the NLRB can be a crucial agency for their protection, or lack thereof.
CHAPTER II: Hoffman and Its History

Sure-Tan, Inc. v. NLRB

The most important case regarding the NLRA and undocumented immigrants prior to the enactment of the IRCA was Sure-Tan, Inc. v NLRB (or Sure-Tan) (1984). The ALJ and the NLRB first saw the case, and after the initial decision the defendant filed for an appeal to the Seventh Circuit Court of Appeals. In 1983, the Supreme Court granted certiorari and issued a precedent-setting decision that would influence the courts for years to come.

In December of 1976, John Surak, president of Sure-Tan, a leather-processing firm, reported five of his employees to INS (Immigration and Nationalization Services) in reaction to the employees’ unionization and authorization for collective bargaining. Surak objected to the union election arguing that the majority of the voters were undocumented. The NLRB’s director rejected the objections and instated the union as the collective-bargaining representative for the workers. In retaliation, Surak sent a letter to INS asking for an investigation into the workers’ legal status. The workers, who were indeed undocumented, were subsequently arrested by INS and offered voluntary departure in lieu of formal deportation. The workers left the country.

36 Sure-Tan, Inc. v. NLRB 3.
directly after the arrests. After the workers had returned to Mexico, the NLRB’s Acting Regional Director filed complaints with Sure-Tan about the various unfair labor practices that had taken place after the union election. A month after the workers’ departure, Sure-Tan issued letters of reinstatement to each worker that were to remain open until May 1\textsuperscript{st}, 1977, approximately a month after the letter was sent. This offer of reinstatement was contingent on the fact that the workers’ reinstatement “would not subject Sure-Tan to any violations of the United States immigration laws.”\textsuperscript{37}

The case was first heard by the ALJ because of the violations of Section 8 rights under the National Labor Relations Act brought up by the Regional Director. The ALJ found that the employer did violate the Act by interfering with the employees’ right to organize. The Board adopted the ALJ’s ruling and determined that involving INS on the sole reason that the workers were engaged in protected union activity was indeed in violation of the NLRA, citing the reporting as a “constructive discharge.”\textsuperscript{38} Thus, the NLRB ordered the employer to cease and desist from the unfair labor practice and awarded the employees reinstatement and backpay. However, the NLRB ruled that the workers needed to return to the country legally to be able to receive backpay and reinstatement. The argument followed that in order to avoid conflicts between the INA and the NLRB, the employees’ remedies must be contingent on their “legal reentry” into the U.S., because their legal status overrides

\textsuperscript{37} Sure-Tan, Inc. v. NLRB 11.

\textsuperscript{38} A constructive discharge is defined as any action that makes conditions of employment so unbearable that you have no choice but to resign—or in this case deportation threats. Sure-Tan, Inc. v. NLRB 14.
their availability to work insofar as any time worked in the country without
documentation is null and cannot be used to compute backpay.\textsuperscript{39}

Sure-Tan appealed the case, and upon appeal the Seventh Circuit Court of
Appeals agreed with the NLRB and supported the reinstatement order, but modified it
by extending the offer for 4 years so that the workers could potentially come back
into the country legally. The Court argued that the original period of 6 months as
suggested by the ALJ and the Board was not a reasonable amount of time for the
workers to make plans for legal reentry. While the NLRB had left open the specifics
of the backpay amount until the compliance proceedings, the Court of Appeals
awarded a minimum 6 months backpay as a general remedy for the violation in an
effort to provide some remedial benefit for the NLRA violation. The Court argued
that in order to better carry out the purpose and policies of the Act, they must “set a
minimum amount of backpay which the employer must pay in any event, because it
was his discriminatory act which cause the employees to lose their jobs.”\textsuperscript{40}

In 1983, the Supreme Court granted certiorari and reviewed the case,
upholding some of the previous decisions and overturning others. In an opinion
written by Justice Sandra Day O’Connor, the Court agreed with the NLRB’s original
decision that a violation had occurred and concurred that reinstatement based upon
legal reentry was a valid remedy for the violation. Justice O’Connor maintained that
the reinstatement offer did not pose any conflict between the NLRA and the INA,
specifically because the INA does not make it illegal to hire undocumented

\textsuperscript{39} Sure-Tan, Inc. v. NLRB 11.
\textsuperscript{40} Sure-Tan, Inc. v. NLRB 14, citing Court of Appeals for the Seventh Circuit in
Sure-Tan, Inc. v. NLRB.
immigrants. Further, the reinstatement offer would only be valid if the plaintiffs were legally able to work when accepting reinstatement. In fact, Justice O’Connor went so far as to point out the benefits to the INA’s purpose if the NLRA is upheld in relation to undocumented workers. She stated, “If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened.”

Even after admitting the mutually beneficial outcome of upholding the NLRA, the Supreme Court decided that the Court of Appeals had overstepped its authority by imposing the minimum 6 months backpay because the remedies had to be based on “actual, and [not] speculative” loss of wages for the unfair labor practice. Therefore, the backpay remedy had to be tolled for any time that the plaintiffs were not legally available to work—which effectively rules out any potential backpay. Although Justice O’Connor acknowledged that that ruling would directly affect the workers ability to recover the damages for the unfair labor practice, she also outlined the “equally important Congressional [objective]… of deterring unauthorized immigration that is embodied in the INA.”

Ultimately, the Court argued against the backpay remedy on the grounds that the Court of Appeals “exceed its narrow scope of review” in the decision to offer 6 months backpay. In this instance, the ability to award remedies is only within the NLRB’s authority and so the Court of Appeals’ modification of the backpay order did not reflect the actual consequences of the unfair labor practice. The NLRB has the

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41 Sure-Tan, Inc. v. NLRB 14.  
42 Sure-Tan, Inc. v. NLRB 19.  
43 Sure-Tan, Inc. v. NLRB 16.
authority to “effectuate the policies of the Act”, and the Court of Appeals has the
authority to modify or enforce the NLRB’s findings, but only within the confines of
the policy. The Supreme Court argued that the speculative backpay order did not fall
within the scope of authority of the Court of Appeals and in turn compelled the
NLRB to award a remedy that did not fall under the realm of powers of the Board
itself. The backpay remedy was speculative because it did not correspond with any
evidence of “compensable injuries” for the unfair labor practice, and thus was not in
line with the policies of the NLRA, which require some mitigating evidence pointing
to the wages lost.\textsuperscript{44}

In the concurrence (and partial dissent) of the decision, Justice Brennan and
Justice Powell agreed with most of the decision, but argued against the refusal to
impose a minimum backpay remedy. Justice Brennan pointed to the “disturbing
anomaly” that the Court creates by arguing for the equal treatment of undocumented
workers under the NLRA and then effectively denying them the usual remedies.\textsuperscript{45} He
also argued that the Court’s reasoning for tolling the backpay was inconsistent with
the policies of the NLRA, which prohibits tolling backpay in circumstances where
unavailability to work was caused by the unlawful discharge (or in this case, the
reporting to INS). In his last few paragraphs, Justice Brennan pinpointed the crucial
point of conflict at play in the Sure-Tan decision.

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.\textsuperscript{46}

\textsuperscript{44} Sure-Tan, Inc. v. NLRB 17.
\textsuperscript{45} Sure-Tan, Inc. v. NLRB 22.
\textsuperscript{46} Sure-Tan, Inc. v. NLRB 23.
The Sure-Tan decision was the first major case that addressed these conflicts between the INA and the NLRA—and in many ways was the first high-profile decision that limited undocumented workers’ rights. It set a precedent that emphasized violations of the federal immigration law and the limitations of the NLRA over the equal protection of undocumented workers under labor statutes. Justice O’Connor also highlighted the constrained nature of the Sure-Tan case, stating that,

> The probable unavailability of the [NLRA’s] more effective remedies in light of the practical workings of the immigration laws, however, simply cannot justify the judicial arrogation of remedial authority not fairly encompassed within the Act. Any perceived deficiencies in the NLRA’s existing remedial arsenal can only be addressed by congressional action.47

In the years following the decision, Sure-Tan was used to argue against remedies for undocumented workers and to bring to light federal immigration law violations when deciding cases about undocumented workers. Although immigration law changed drastically in 1986, the Sure-Tan decision has still remained a crucial opener for the immigration law versus labor law debate.

**Pre-Hoffman Decisions**

After the Sure-Tan decision there was an increase in cases involving retaliation and remedies for undocumented workers with regards to NLRA violations. As stated above, the Sure-Tan decision marked the beginning of a split within the Courts regarding backpay remedies for undocumented workers. While Sure-Tan resulted in an unfavorable decision for undocumented workers by denying backpay,

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47 Sure-Tan, Inc. v. NLRB 19.
the provision of legal reentry allowed for a wider reading of the decision. In the
period of time between Sure-Tan and *Hoffman Plastic Compounds, Inc. v. NLRB*48, the next high profile case regarding backpay, Congress enacted the IRCA and two Circuit Courts split their decisions with different readings of Sure-Tan.

In *Local 512 Warehouse & Office Workers’ Union v. NLRB* (Local 512), a group of undocumented workers were fired after engaging in protected union activities. The NLRB found that the employer, Felbro, Inc., violated the NLRA by wrongfully terminating the employees and refusing to honor a collective bargaining agreement.49 The Court ruled in favor of the workers and held that awarding back pay was the only way to successfully enforce cease-and-desist orders and uphold the protections guaranteed by the NLRA.50 It was also emphasized that “[the court] found that the Sure-Tan ruling gave no indication that an employee’s legal status was a relevant factor in determining the availability of a backpay remedy.”51 In addition, the Court cited the Sure-Tan decision by stating that when evaluating a plaintiff’s right to remedial backpay, the Courts must avoid considering “legal status as opposed to availability to work.”52 In the Sure-Tan case, the point of contention was the employees’ unavailability to work due to their ‘voluntary departure’ from the country and the Court argued that backpay could not be calculated for time in which the

50 Rivero 4.
51 Rivero 5.
52 Rivero 4, citing Sure-Tan, Inc. v. NLRB.
workers were unavailable (e.g. out of the country). In Local 512, the workers never left the country and according to the Ninth Circuit, were still ‘available’ for work and thus able to receive their backpay remedies. Following their argument, the remedies would not “encourage illegal reentry into the United States.”

The same scenario was addressed in A.P.R.A. Fuel Oil Buyers v. NLRB (A.P.R.A Fuel Oil Buyers), where a group of undocumented workers were terminated for organization, a clear Section 7 violation of the NLRA. However, in this case the employer knowingly hired the undocumented workers and thus was determined responsible for all remedies to the workers. Agreeing with the Sure-Tan Court, the Second Circuit Court argued that the undocumented workers were covered and protected under the NLRA because of the vague definition of “employee” in the text of the Act. In fact, the House Judiciary Committee report released shortly after the enactment of IRCA expressly emphasized that it “was not intended in any way to limit the scope of the term ‘employee’ under the [National Labor Relations] Act or the scope of the ‘rights and protections as stated in Section 7 and Section 8 of the Act.” In the decision of A.P.R.A. Fuel Oil Buyers, the Second Circuit highlighted that the House Judiciary Committee report “explicitly [disclaimed] any limitations of the Board’s remedial powers” and thus held that the undocumented workers were entitled to the NLRB’s backpay awards and conditional reinstatement.

Local 512 was decided prior to the enactment of the IRCA in 1986, and the Court based its interpretations of the immigration law on the INA text. A.P.R.A Fuel

53 Rivero 5.
55 A.P.R.A. Fuel Oil Buyers Group, Inc., v. NLRB.
Oil Buyers was decided as a direct response to the enactment of the IRCA. Around the same time, a third case came in front of the Seventh Circuit regarding undocumented workers and backpay. In *Del Rey Tortilleria v. NLRB* (Del Rey), the Seventh Circuit Court of Appeals opposed the previous decisions of the other Circuit Courts and denied backpay to the plaintiffs. In Del Rey, the undocumented status of the plaintiffs precluded their right to receive backpay because, according the Court, the workers “[suffered] no harm by being unlawfully discharged from positions that they never legally held.”\(^56\) In this case, the Court dismissed the Supreme Court’s decision in Sure-Tan to allow for backpay remedies *if* the workers could reenter the country legally and prove availability to work. Instead, the Seventh Circuit argued that the simple fact that the workers were undocumented and thus illegally working negated any right to backpay since the work performed was not “legal” in the first place. The Del Rey decision marked a split in the Courts’ readings of Sure-Tan and demonstrates the beginning of the restriction of the NLRB’s remedial powers, a pattern of restriction that continued with the passage of the IRCA and the Hoffman Plastic Compounds decision.

**Hoffman Plastic Compounds, Inc. v. NLRB**

The Supreme Court decision that has colored most case law regarding undocumented workers’ coverage under the NLRA came a number of years after the implementation of the IRCA but was a direct response to the new federal immigration statutes. In *Hoffman Plastic Compounds, Inc. v. NLRB* (Hoffman), a Mexican worker

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56 Seitz 5, citing Del Rey Tortilleria, Inc. v. NLRB and Local 512, Warehouse & Office Workers’ Union v. NLRB.
was wrongfully terminated for participating in a union-organizing campaign at the company. Upon review, the NLRB determined that the employer had violated section 8 of the NLRA, and ordered the three standard remedies: a cease and desist order, an order to post a notice regarding the remedial order, and an order offering reinstatement and backpay to the employees.\textsuperscript{57} At a compliance hearing in front the ALJ, the worker admitted to being an undocumented immigrant and to using fraudulent paperwork to secure employment at Hoffman. At that time, the employer argued that they did not knowingly hire an unauthorized worker, an important fact in the adjudication of this particular case. The conflicts between the IRCA and the NLRA are highlighted when determining the source of the violations. Since the IRCA made it illegal for an undocumented worker to obtain employment using fraudulent documents, the plaintiff in Hoffman explicitly violated the statute. However, IRCA also emphasized the employers’ responsibility to verify every potential employee’s legal status, making it illegal to either do so incorrectly or not at all. Determining the source of the violation becomes even more complicated when fraudulent documents are used, because they may pass verification or be determined to be valid by the employer.

In light of this information, the ALJ asserted that the Board was not able to award back pay to the plaintiff because he had violated the IRCA and never acquired the proper authorization to work, since before he began work at Hoffman and in the 3 and half years since his wrongful termination. In turn, the Board rejected this assertion and argued that a decision that appropriately remedied the unfair labor

\textsuperscript{57} Hoffman Plastic Compounds, Inc. v NLRB 3.
practice while upholding the statutes of the IRCA was the only reasonable approach. The Board asserted that reading the mandates of both laws “in harmony” is crucial “to protect the rights of employees in the American workplace.” 58 In this particular case, the employer did not explicitly know that the plaintiff had used fraudulent documents when he was hired. The knowledge that the plaintiff was undocumented in combination with the fact that the employer still committed an unfair labor practice, led the Board to believe that the remedy had to be tailored to properly address both violations. Thus, the Board awarded the plaintiff limited backpay that would be calculated from the wrongful termination up to the point in which Hoffman and the ALJ learned of their undocumented status. This was an appropriate remedy to the Board because “only after [the point in which the employer learned of the status] could [Hoffman] present a defense that it did not create, and knowingly maintain, an employment relationship with an undocumented immigrant.” 59 According to the statutes outlined in the IRCA, “if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker’s undocumented status.” 60 As stated above, this is crucial to understanding the particular situation that arose in Hoffman with regards to violations committed by either the employer or employee. The ALJ decided that the NLRB was not able to award backpay and reinstatement because the award would conflict with the purposes of the IRCA—of

59 Stanuinas 405.
which the sole purpose is to restrict and limit employment of undocumented immigrants. However, as stated above the NLRB argued against that ruling using the Court’s previous decision in A.P.R.A. Fuel Oil Buyers as an even more extreme example. The difference of culpability in A.P.R.A. Fuel Oil Buyers was addressed and the Board in Hoffman offered a much more limited backpay remedy to the plaintiff than in that case.

After the NLRB made its decision, Hoffman Plastic Compounds filed an appeal to the Court of Appeals, citing the worker’s undocumented status and use of false documents as grounds for the appeal. The Court of Appeals rejected the appeal twice and the Supreme Court then granted certiorari. In a 5-4 decision the Court reversed the NLRB’s decision. In general terms, the Court held that the new provisions set up in the IRCA, precluded the NLRB’s ability to grant backpay because the undocumented immigrant had violated the criminal statutes outlined in the law. The Court argued that the “NLRB lacked the discretion to award back pay to the employee for a period during which he was an alien unauthorized to work in the United States.”

Looking back on previous cases, the Court used Sure-Tan as an example of overreaching remedial power exercised by the NLRB. Although the Court agreed with the previous support of coverage for undocumented workers under the NLRA, they asserted that at the time of Sure-Tan the language of the INA was much more vague with respect to the employment of illegal aliens and therefore NLRA remedies were not directly in conflict with the immigration law. Justice Rehnquist cites Sure-Tan, “for whatever reason, Congress had not ‘made it a separate criminal

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61 Hoffman Plastic Compounds, Inc. v NLRB 5.
offense’ for employers to hire an illegal alien, or for an illegal alien ‘to accept employment after entering the country illegally.’” However, Justice Rehnquist also employs the Sure-Tan decision’s argument with regards to “availability to work” and the employee’s legal status, stating that like Sure-Tan, the plaintiff in Hoffman was not “lawfully entitled to be present and employed in the United States” and thus had no right to receive backpay for anytime that he was “unavailable to work.” In applying this argument to the Hoffman case, Justice Rehnquist points to the relative lack of controversy between the immigration law and the NLRA in Sure-Tan, and argues that the conflicts that are at play in Hoffman must be read with a “wider lens, [and] focused as [they] must be on a legal landscape now significantly changed.”

The Court reversed the Board’s original decision that awarded the plaintiff limited back pay up until the period that the employer discovered they were undocumented because the simple act of obtaining employment as an undocumented immigrant results in “some party directly contravening explicit congressional policies.” Because the plaintiff plainly violated the IRCA by using fraudulent documents to obtain employment, the backpay remedy that would be awarded by the NLRB would “[run] counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.” This reading of the IRCA essentially prohibits any remedies for undocumented workers under the NLRA—even though the Courts at all levels agree that the language of the NLRA does not exclude undocumented

workers. What Justice Rehnquist argues here, is that the “misconduct of illegal alien employees” cannot be erased or discounted when attempting to remedy an employer’s misconduct under the NLRA.\footnote{Hoffman Plastic Compounds, Inc. v NLRB 11.} He even went so far as to say that awarding a backpay remedy “condones and encourages future violations [of the IRCA].”\footnote{Hoffman Plastic Compounds, Inc. v NLRB 11.} The plaintiff in Hoffman, if awarded backpay, would only be able to receive the remedy by committing future violations of the IRCA such as, remaining in the country illegally and mitigating damages while using fraudulent documents or being hired without proper verification.\footnote{Hoffman Plastic Compounds, Inc. v NLRB 11.} In the Court’s final statement for the rejection of the backpay order, Justice Rehnquist stated,

\ldots Allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board’s discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.\footnote{Hoffman Plastic Compounds, Inc. v NLRB 11.}

The Court also attempted to highlight the sanctions that were imposed on the employer (the cease and desist order and the notice to employees), asserting that rejecting the backpay award did not mean the employer “gets off scott-free.”\footnote{Hoffman Plastic Compounds, Inc. v NLRB 11.}

This attempt to reconcile the obvious conflict between upholding the sanctions against employers and respecting the federal immigration law was not sufficient for the dissent. Justice Breyer argued that stripping the NLRB’s remedial powers renders the agency essentially useless in the protection of workers—its main function in
upholding the NLRA. While Justice Rehnquist asserted that the NLRB is precluded from awarding any remedy that is deemed punitive, Justice Breyer highlighted the problematic outcome of limiting the NLRB’s remedial powers.

Without the possibility of the deterrence that back pay provides, the Board can impose only future-oriented obligations upon law-violating employers—for it has no other weapons in its remedial arsenal. And in the absence of the back pay weapon, employers could conclude that they can violate labor laws at least once with impunity (my emphasis).72

Thus, the Hoffman decision stripped the Board of their remedial powers and created a legal circumstance in which employers can violate the labor laws that are supposed to protect workers—even undocumented workers, as expressed in the language of the NLRA. Justice Breyer also emphasized the labor market reaction that could take place if undocumented workers are essentially removed from the list of protected workers. Instead of deterring undocumented employment, denying the Board remedial power could in fact increase the attractiveness of hiring undocumented workers because employers face almost no responsibility when committing an unfair labor practice. Justice Breyer points to the increased danger of backpay denial in cases unlike Hoffman where the employer knowingly hires undocumented immigrants, as well as stating that in “borderline cases” (such as Hoffman), this decision “encourages [employers] to take risks, i.e. to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court’s views) ultimately will lower the cost of labor law violations.”73 Furthermore, the “potential gains for employers who ‘unknowingly’ hire illegal employees may outweigh the minimal risks imposed by immigration laws that are randomly

72 Hoffman Plastic Compounds, Inc. v NLRB 12.
That is to say that under the IRCA, the punishments for undocumented workers are phenomenally higher than those for employers who hire undocumented workers. The line of argumentation from the majority values the federal immigration laws above all labor law, which was met with some criticism in other Courts and in academic literature.

Eduardo Rivero of American University argued that upon review of the legislative history (cases like Sure-Tan and Local 512), there is no precedent that undocumented workers are explicitly excluded from protections under the NLRA and the Supreme Court’s decision in Hoffman was “uncharacteristic and inconsistent.” 75 The Hoffman decision was the first high-profile Supreme Court decision that directly dealt with the conflict between the IRCA and the NLRA, and the majority erred on the side of upholding federal immigration law and the criminal violations that took place under the IRCA, instead of the civil violations under the NLRA. The Court focused on two particular aspects of the conflict: the violation of the IRCA by the undocumented worker and the scope of the NLRB’s remedial power when dealing with IRCA violations. Hoffman set a new precedent for decisions regarding backpay that relied heavily on a narrow reading of the IRCA that prioritizes sanctions against undocumented workers. This decision has since complicated the efforts of undocumented workers to bring cases of NLRA violations to court. Since Hoffman, there have been a few cases that illustrate the complex relationship between the NLRA and the IRCA and indicate that although Hoffman restricted undocumented

75 Rivero, “American Workers Must Settle For Less” 4.
rights, there may be some areas where undocumented workers and their counsel can push back.

**Post-Hoffman Climate**

*Mezonos Maven Bakery, Inc. v. NLRB* (Mezonos) was the first major case to be brought to the Circuit Courts after Hoffman. The litigation for the case, which started in 2003, lasted ten years and made its way through many levels of the court system, most recently coming before the Second Circuit Court of Appeals.\(^76\) The case at the Circuit Court level was called *Palma et. al v. NLRB* (Palma) after one of the workers from the Mezonos case who was petitioning for the appeal. In Palma, the plaintiffs were employed at the bakery for a number of years and had worked at least 25 hours of overtime per week, for which they were not compensated. In this particular instance, the workers were undocumented but the employer had not verified their status—even though he knew that he must do so to comply with the IRCA. The case was originally brought to the NLRB because the plaintiffs were wrongfully terminated for participating in a protected concerted activity. Unlike Hoffman, the undocumented workers did not use or produce any fraudulent documentation in order to secure employment, which would suggest that, in keeping with most readings of the IRCA, the workers are not committing a crime associated with their employment but the employer is violating the law. The ALJ who presided over the Mezonos case, Steven Davis, stated in his supplemental decision that,

> Significantly, IRCA does not make it unlawful for an employee to obtain employment or work in the United States. The only employee conduct made

\(^76\) Rivero, “American Workers Must Settle For Less” 3.
unlawful by IRCA is that he or she cannot tender as proof of documented status fraudulent documents including those which are forged or counterfeit documents of other persons.\textsuperscript{77}

This is a critical distinction because it differs from the Hoffman circumstances and does not necessarily preclude the workers from receiving remedial benefits simply based on their “criminal activity.”\textsuperscript{78}

However, these differences proved to be insufficient for the NLRB. Even after the ALJ recommended backpay stating the different circumstances of Hoffman as reason to award the payments, the NLRB took an extremely broad reading of Hoffman and ruled against backpay. They argued that the workers’ undocumented status generally precluded them from receiving backpay whether they had used fraudulent documents or not. They even went as far to disregard the employer’s violation of the IRCA by hiring workers without proper eligibility verification in the first place.\textsuperscript{79} They employed a blanket argument that focused on the illegality of the “employee-employer relationship”, and used Hoffman as their defense.

This case caused tension within the NLRB itself, and prompted a supplemental decision by Chairman Wilma B. Leibman and Member Mark Gaston Pearce. Both members were uncomfortable with the Mezonos decision because they believed it went against the purpose of the NLRA and endangered the power of the law. They pointed to the employer violations that were completely overlooked by the NLRB, and argued that ignoring employer violations simply because of a worker’s

\textsuperscript{78} Criminal activity only refers to the “criminal act” of violating the IRCA according to the Government.
\textsuperscript{79} Rivero, “American Workers Must Settle For Less” 3.
immigration status ran contrary to the NLRA’s goals and interfered with the protections of workers from employer exploitation.\textsuperscript{80} They also supported backpay as a viable deterrent for employer violations because it holds employers accountable in concrete terms. Although this argument was made, it did not overturn the NLRB’s decision to preclude undocumented workers from receiving backpay.

Upon appeal, the Second Circuit held the NLRB’s original decision to preclude backpay for undocumented workers. The Court affirmed that the NLRA does not cover undocumented workers due to the ‘illegal’ nature of their employment. The Hoffman argument was again quoted in the Court’s decision, emphasizing “under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”\textsuperscript{81} Thus, there was no plausible way to calculate backpay without potentially contravening IRCA statutes. The Court did recognize the fact that under IRCA undocumented workers who did not use fraudulent documents were not committing a crime, and thus left the question of reinstatement up for discussion. The conditional reinstatement offer remained unresolved because neither the Board or the ALJ addressed the said offer, and did not make any claims as to whether it was precluded or not.

\textsuperscript{80}Rivero, “American Workers Must Settle For Less” 3.
It is clear that the decision in Palma was directly affected by the Hoffman ruling and held the Supreme Court’s decision that undocumented workers are generally not covered by the NLRA. This issue of rewarding remedial backpay for NLRA violations has become one of the most crucial points of conflict between federal immigration law and the labor laws that are in place to protect all workers. Although Hoffman and other cases have set a precedent for rejecting backpay, there are other places where undocumented workers are still able to protect themselves from employment discrimination. However, Hoffman has played a major role in shaping the decisions and discussion surrounding undocumented workers’ rights or lack thereof.
CHAPTER III: Hoffman Extension and Beyond

As shown in the previous chapter, the Hoffman decision set a precedent among NLRA cases that significantly changed the landscape of undocumented workers’ rights. The significance of Hoffman remains unchallenged within the NLRA, but the issue of Hoffman extension has emerged as another critical point of conflict within the courts. There are a number of different labor laws that are intended to protect workers from unfair treatment and discrimination, of which Title VII of the Civil Rights Act and the Fair Labor Standards Act (FLSA) are just a few examples. In the fifteen years since the Hoffman decision, both Title VII and the FLSA have seen cases involving undocumented workers’ rights influenced by the precedent-setting case. The foray of Hoffman’s reasoning into other laws begs the question, is the extension of one precedent under different circumstances viable? In this chapter, I outline the relevant case law for Title VII and the FLSA and how the courts interpreted Hoffman in relation to the differing labor statutes.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act is an easily comparable law to the NLRA and thus has been actively debated in the courts with regards to Hoffman extension. In order to better understand the ways in which Hoffman can or cannot be extended, one must examine the legislative structure of the law itself.

The Civil Rights Act of 1964 was a critical legislative milestone in United States history that has had a direct social impact on millions of Americans. A long overdue response to the racial tension that existed and still exists today, the Civil
Rights Act of 1964 prohibited the discrimination of any individual on the basis of race, color, religion, sex, and national origin.\(^{82}\) During the period between 1943 and 1963, Congress debated over many bills that would have given the NLRB jurisdiction for sex and race discrimination cases, but ultimately agreed upon the Civil Rights Act as an independent amendment that needed its own enforcement agency.\(^{83}\)

In addition to the general anti-discrimination provision, the Act specified particular rights afforded to all persons and prohibited discrimination in the workplace. Title VII of the Act dealt with employment discrimination—a commonplace in the mid-1960s. At the time, the non-white labor force was experiencing an unemployment rate almost twice the size of the white labor force.\(^{84}\) This discrepancy was felt in the labor market and contributed to the formation of the Act. Section 703(a) of the Act that states that it is “unlawful” to

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\text{…fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's race, color, religion, sex, or national origin.}\]

\(^{85}\)In the Act’s early stages, there was much debate over how the Title VII provisions would be enforced. The end result was a compromise between proponents


\(^{84}\) Panach 5.

of federal enforcement and the creation of a separate governing body. Thus, the Act
created a separate enforcement agency, the Equal Employment Opportunity
Commission (EEOC) to regulate and implement the law. However, this agency,
similar to the NLRB in structure, would not have enforcement powers unlike the
NLRB.\footnote{Panach 6.} The federal courts would have authority to adjudicate Title VII cases.
Although first created to implement Title VII, the EEOC currently oversees the
enforcement of many labor laws including the Equal Pay Act of 1963 and the

Title VII cases are adjudicated in a similar fashion as NLRA violations. The
EEOC has Administrative Judges (AJ) who preside over the cases, and make
decisions for damages based on the validity of the case. Title VII cases are technically
civil action suits, so they are both pursued by the EEOC and the plaintiffs themselves
in the District Courts.

The available remedies for Title VII violations are broader than the remedies
available under the NLRA, and include injunction, coverage of attorney fees, punitive
or compensatory damages as well as the typical NLRA remedies of reinstatement and
backpay. The Civil Rights Act Amendment of 1991 included the availability of
punitive or compensatory damages for intentional discrimination. However, punitive
damages were to be determined on a case-by-case basis and were reserved for cases
in which the employer acted with “malice or with reckless indifference to the federal
protected rights of an aggrieved individual.”

This is different from the NLRA because the NLRB has no authority to award punitive damages, only remedial benefits.

For Title VII cases, the plaintiff may file a civil action individually or the EEOC may file a claim. According to the EEOC guidelines, “if an employee wishes to bring a Title VII claim, he or she must satisfy the prerequisite of filing a timely complaint of discrimination with the EEOC.”

At this point, if the plaintiff has filed with the EEOC, the agency investigates the charges and decides whether to file a civil action or to “issue a right-to-sue letter to the complaining party.”

There are two forms of discrimination that can be considered in Title VII cases: disparate treatment and disparate impact. Disparate treatment refers to intentional discriminatory actions made by employers that can be proven by the plaintiff. In disparate treatment cases, once the claim has been brought to court, the plaintiff holds the burden of proof of discrimination. In the event that the plaintiff can prove direct discrimination, the case is classified as a “single-motive” or “mixed-motive” case. A “single-motive” case is characterized by the employer’s failure to present sufficient evidence of legitimate discrimination based on a factor separate from the protected classes under Title VII. The full realm of remedies, including punitive and compensatory damages, is available in “single-motive” cases.

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88 Panach 6.
90 Panach 6.
A “mixed-motive” case analysis allows the employer to prove that the discriminatory action was legitimate, and not related to the any number of plaintiff’s characteristics protected under Title VII. 91 According to Bendremer and Heiden, the employer “… need only introduce evidence that raises a genuine issue of material fact as to whether his employment practices were discriminatory.” 92 Issues of disparate treatment can be both individual and systemic, where the latter covers “pattern[s] or practice[s]” of discriminatory actions of a “repeated, routine or generalized nature” on behalf of the employers. 93 If the employer is able to prove a legitimate reason beyond the discrimination of a protected class, the remedies and damages available are severely limited. Because Title VII allows for remedies meant to “make the plaintiff whole” (i.e. backpay, front pay, and reinstatement) as well as the punitive damages, “mixed-motive” cases do not reward the “make whole” remedies and only award attorney fees and declaratory relief. 94

Title VII cases can also be brought under the disparate impact theory, which focuses on the impact of discriminatory actions on employees. These actions appear “facially neutral” but can be shown to have negative repercussions and a “discriminatory effect.” Disparate impact cases are easier to prove because they do not rely on direct evidence but rather the “consequences of employment practices.” 95 As in disparate treatment cases, the plaintiff must still prove prima facie that the employer’s actions had a significant impact on their employment or their livelihood.

91 Panach, “Two Wrongs” 7.
92 Bendremer and Heiden, “The Unfair Immigration-Related Employment Division” 1041.
93 Panach 7, Bendremer and Heiden 1042.
95 Bendremer and Heiden 1042.
In all Title VII cases, the McDonnell Douglas burden-shifting analysis is used to pass the burden of proof from the plaintiff to employer than back to the plaintiff.\textsuperscript{96} It is important to note that punitive or compensatory damages do not apply to disparate impact cases, and thus the remedies available are strictly remedial.

\textit{Title VII and the IRCA}

As with the NLRA, the implementation of the IRCA altered the interpretation of Title VII’s coverage, especially for undocumented immigrants. Title VII’s statutory language defines “employee” in a similar broad manner as the NLRA, as “any individual employed by an employer.”\textsuperscript{97} However, there are a few key components of the IRCA that can potentially limit the power of undocumented workers to bring claims under Title VII, or at least severely limit their remedial awards. First, as in the NLRA, Title VII requires all employees (i.e. plaintiffs) to mitigate their damages by securing employment during the period in which they are not working or after their termination by the employer. They must make a “reasonable effort” to find employment, and all hours earned during the court proceedings are subtracted from any backpay award.\textsuperscript{98} Under IRCA, an undocumented worker cannot be employed without some party “directly contravening” the policies of the Act, with either the worker providing fraudulent documents or the employer hiring an undocumented worker.\textsuperscript{99} Thus, an undocumented worker cannot legally mitigate their damages without violating the

\textsuperscript{96} Panach, “Two Wrongs” 7.
\textsuperscript{97} EEOC, “Title VII” 2.
\textsuperscript{98} Panach 6-7.
\textsuperscript{99} Hoffman Plastic Compounds, Inc. v. NLRB.
IRCA. This caveat causes conflict in the courts when trying to award appropriate remedies—especially if undocumented workers are technically protected under Title VII.

Second, as discussed in chapter one, the Unfair Immigration Related Practices Provision (Section 274B) was added to the IRCA in 1991 and prohibits employers from discriminating against employees based on their citizenship status. Many lawmakers and academics have debated the efficacy and necessity of Section 274B because of the national origin provision in Title VII. In 1991, the majority of Congress believed that Title VII would be inadequate in the wake of new employer sanctions because it “[did] not expressly protect individuals from private employment discrimination based on alienage or citizenship status.”[100] A statement from the Senate Judiciary Committee argued, “[that] it makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration [or non-citizenship] status.”[101] Critics of Section 274B focused on the availability of national origin discrimination in Title VII, arguing that if an employer were to discriminate against an illegal alien, it would most likely be directed at anyone “who seems foreign” and thus fall under a Title VII national origin or race protection. However, in Espinoza v. Farah Manufacturing Co, “The Supreme Court held that the refusal to hire an individual because of his non-citizenship status does not constitute discrimination on the basis of national origin

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under Title VII.” Thus, proponents of the amendment highlighted the necessity to protect legally authorized workers from employers attempting to evade IRCA violations. Importantly, Section 274B does not protect undocumented workers from citizenship status discrimination because the IRCA strictly prohibits the employment of undocumented persons. Therefore, Title VII has remained the only valid protection against national origin discrimination for undocumented workers.

**Title VII and Hoffman Plastics Compounds**

The precedent-setting Supreme Court case *Hoffman Plastic Compounds v. NLRB* closed the door to remedial benefits for undocumented workers who were wrongfully terminated or treated by employers. Within cases involving the NLRA, Hoffman has been used by defendants to preclude backpay for all undocumented workers, and has caused many lower courts to discuss the issue of NLRA coverage. Due to its similar structure and content, Title VII has shown to be a prime place for Hoffman extension. The implementation of the IRCA and the Hoffman precedent have encouraged employers to argue against coverage for undocumented workers under Title VII.

**Pre-Hoffman, Post-IRCA Landscape**

Even before the Supreme Court decided Hoffman in 2002, some courts addressed the issue of Title VII coverage for undocumented workers using a similar line of thinking as Hoffman. In *Egbuna v. Time Life Libraries, Inc.* (or Egbuna)

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102 Bendremer and Heiden 1034.
(1998), the Fourth Circuit Court of Appeals issued one of the first decisions that interpreted the IRCA with regards to the labor law in question. The case was especially interesting because the Fourth Circuit gave little to no explanation for their decision, and left many succeeding courts in the dark about IRCA interpretation.

Egbuna was a Nigerian national who had worked at Time Life Libraries from June 1989 up until his voluntary resignation in early 1993. At the time of his hire, Egbuna had a temporary work visa that was soon to be expired. Although his work visa expired shortly after being hired, Time Life continued to employ him despite knowing his undocumented status. After his plans to return home changed in 1993, Egbuna sought reemployment by Time Life because they had previously indicated he could be reinstated due to good job performance. When he came back for his job, Time Life refused to reemploy him. Egbuna argued that this refusal was in retaliation for his testimony against the company in a sexual harassment case, in which he was a witness.\textsuperscript{103} Egbuna brought the case to the District court for the Eastern District of Virginia, but did not receive the result that he had hoped for. Time Life Libraries asked for a summary judgment, or a hearing without a full trial, which was granted by the Court. The Court then denied remedies and dismissed the case against Time Life because Egbuna “failed to make a prima facie case for retaliatory failure to hire under Title VII since he could not be qualified for the job an as undocumented alien.”\textsuperscript{104}

Egbuna filed for appellate review, and the Fourth Circuit Court of Appeals actually affirmed the summary judgment. The Fourth Circuit found that not only was Mr. Egbuna unable to make a prima facie case, like the District Court pointed out, but

\textsuperscript{103} Widdison, “Cutting Undocumented Alien Employment” 2.
\textsuperscript{104} Widdison 2.
he was unable to “file a Title VII action due to his undocumented status.” This denial of remedies was based on an extremely general interpretation of the IRCA, and set the stage for lower courts to preclude remedies to undocumented workers under Title VII.

The Time Life decision was lacking in detail and, according to law scholars and critics, failed to address some of the crucial intersections between IRCA and Title VII in relation to the specifics of the case. For example, the Fourth Circuit based their decision on two main factors: that remedies under Title VII are only allowed if the plaintiff was “qualified for employment”, and that awarding remedies would sanction IRCA violations. Looking at the statutory language of Title VII itself can easily complicate the first argument. The Act’s definition of employee does not distinguish between “authorized” employees and other employees. Although the Act does give some room for interpretation of “employee”, it is not sufficient to deny remedies to an undocumented worker solely on the argument that Title VII requires the employee to be authorized. The Fourth Circuit’s assertion that providing remedies would run counter to the IRCA and Title VII is also not properly defended in their decision. The Fourth Circuit also failed to recognize the full realm of damages and remedies available under Title VII. The Court did not offer monetary or punitive damages as a possible remedy, and Title VII clearly states that the prerequisite to recover punitive damages are if the “complaining party demonstrates that the respondent engaged in a discriminatory practice” and makes no mention of whether the complaining party has

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105 Widdison, “Cutting Undocumented Alien Employment” 2.
106 Widdison 2.
to be “qualified for employment.” Both punitive and compensatory damages are not related to actual employment or work performed and thus do not coincide with a plaintiff’s legal status or availability to work under IRCA.

**Hoffman Extension**

In the two years directly following the Hoffman decision, three separate cases confronted the issue of Title VII coverage for undocumented workers. The cases represented a split within the lower courts which highlighted the intricacies of Title VII coverage. In *De La Rosa v. Northern Harvest Furniture* (or *De La Rosa*), the District Court for Central Illinois denied an employer’s motion to compel the plaintiffs’ immigration documents and held that the plaintiffs’ immigration status was not relevant for determining post-termination backpay and other remedies. The plaintiffs filed civil action suits against their employer, citing Title VII violations, Fair Labor Standards Act (FLSA) violations, and Illinois Minimum Wage Law violations. The plaintiffs used four arguments against the relevance of immigration documents for the case, which, according to the District Court decision, included

- (1) the reasoning in *Hoffman* applies only to cases involving the NLRB, and does not apply to the claims involved in this case [...]; *Hoffman* should not be applied here because Defendants are also at fault for failing to verify the immigration status of the employees; (2) even if their immigration status is relevant the chilling effect of requiring Plaintiffs to provide documents confirming immigration status outweighs any relevance; and (4) even if immigration status is relevant to the award of backpay, the time periods for

107 Widdison 3.
which Defendants request documentation are not relevant to the determination of post-discharge backpay.\textsuperscript{109}

The Court then explained that in Hoffman, the Supreme Court focused on the remedial power of the NLRB, which was not exactly the same as the remedial power of the federal courts that enforce Title VII. Unlike in Hoffman, Northern Harvest Furniture did not attempt to verify the workers’ immigration status until after the civil action had been brought, and thus the employers violated the IRCA by hiring the workers without verifying their work authorization. Furthermore, the Court asserted that the relevant period for determining post-discharge backpay had already occurred when the defendants asked the plaintiffs to produce documents. The plaintiffs had been terminated in March of 2001 and had been offered reinstatement in August 2001, so the potential period for post-discharge backpay was between those five months.\textsuperscript{110} The distinction between the remedial authority of the NLRA and Title VII is key to the argument against Hoffman extension. That is to say, that in De La Rosa, the Court recognized that the difference in structure of the laws was significant enough that extending Hoffman reasoning to Title VII cases was not viable.

Interestingly, the Court also highlighted the potential “chilling effect” that producing documents would have on undocumented workers. The chilling effect means that if undocumented workers were required to produce legalization or authorization documents in order to bring a Title VII (or FLSA) case, they would be less likely to report violations of the law out of fear of immigration authorities or potential deportation proceedings. This chilling effect would essentially diminish the

\textsuperscript{109} De La Rosa v. Northern Harvest Furniture 3.
\textsuperscript{110} De La Rosa v. Northern Harvest Furniture 3.
strength of the protective laws like Title VII and the FLSA because it undermines the right of undocumented workers to protect themselves against discrimination, and encourages employers to violate the laws with impunity. The Court in De La Rosa was one of the first to deal with Hoffman extension and highlighted the importance of the different remedial damages available under Title VII.

Shortly after the lower court decision in De La Rosa, two opposing cases dealing with Hoffman extension showed the conflict within the courts. In Escobar v. Spartan Security Service (Escobar), the Southern District of Texas issued the first decision that extended Hoffman to Title VII cases.111 Ten months after the Escobar decision, the Ninth Circuit decided against extending Hoffman in Rivera v. NIBCO, Inc. (or Rivera). As shown in all the relevant case law, the issue at stake is the availability of backpay for undocumented workers—both under the NLRA and in the Title VII context. In Escobar and Rivera, the Courts demonstrated very different interpretations of the relevant legislation and of previous cases, including the precedent-setting Hoffman.

In January 2001, Enrique Escobar was hired as a security guard for Spartan Security Service and was terminated in July of that year. Escobar filed a Title VII action complaining of sexual harassment by his boss. After Escobar rejected the advances, he “suffered a series of adverse employment consequences.”112 During his employment at Spartan, Escobar was not authorized to work in the United States. While the civil action was being processed however, Escobar received work authorization. As a reaction to Escobar’s status reclassification, the employer filed a

111 Panach, “Two Wrongs” 2.
112 Panach 2.
motion for summary judgment on all the plaintiff’s Title VII claims.\(^{113}\) Spartan relied on Hoffman and Egbuna as their defense against Escobar and his ability to receive backpay if he was an undocumented worker at the time of employment. While the Court dismissed the Egbuna argument because Escobar had since been reclassified as an authorized worker, it found no problem with extending Hoffman reasoning to the Title VII context. The Escobar Court did not fully explain or examine the circumstances of the case and the implications of Hoffman extension. The Court simply asserted that Escobar was precluded from receiving backpay under Hoffman because he “was an undocumented worker at the time he was employed…”\(^{114}\) Although the Court did allow for other remedies under Title VII such as reinstatement and front pay, it quickly and unceremoniously discounted backpay for undocumented workers under Title VII, using Hoffman as the defense.

A little under a year after the Escobar decision, the Ninth Circuit Court of Appeals issued an opposing decision in *Rivera v. NIBCO, Inc.* In Rivera, the plaintiffs were all Latina and Southeast Asian females who had worked for NIBCO between 1997 and 1998. NIBCO required all its employees to take a “basic job skills examination” that was administered in English. Because all the plaintiffs had limited English, they performed poorly on the test and were terminated. Thus, the plaintiffs cited a Title VII violation, claiming that the English-only test was discriminatory toward their national origin and native language. During the proceedings, the attorney for NIBCO began asking Martha Rivera, a plaintiff, about her immigration status.

\(^{113}\) Panach, “Two Wrongs” 2.

Rivera’s attorney quickly called for the dismissal of the deposition, stating that the plaintiff’s immigration status was not relevant to the case. The judge agreed to a protective order against the investigation into Rivera’s immigration status during the proceedings, but did not prohibit NIBCO from conducting their own investigation. The judge cited the “potential chilling effect” that could occur when plaintiffs are compelled to uncover undocumented status. Similarly to the Court in De La Rosa, the Rivera Court was wary of the outcome of denying protections for undocumented workers. Ultimately, the Court affirmed that the possible chilling effect towards undocumented workers’ Title VII claims was greater and more relevant to the case than NIBCO’s desire to investigate immigration status.\(^{115}\)

Escobar and Rivera both address Hoffman under different circumstances. Escobar was a summary-judgment case that relied on a disparate treatment claim, the retaliatory termination of Escobar. Rivera relied on the disparate impact theory to bring the claim because of the negative impact the test had on their opportunity for employment. The case also dealt with the “after-acquired evidence” of Rivera’s undocumented status which brought to light issues of IRCA violation or the potential of Hoffman extension. The Ninth Circuit, however, did not extend Hoffman for the following reasons following Panach’s summary:

\(\ldots1)\) Title VII depends on citizens to act as “private attorneys general” by bringing actions against their employers; \(2)\) punitive damages are available under Title VII, but not under the NLRA, and \(3)\) the NLRA’s enforcement agency, the NLRB, has limited remedial discretion, whereas Title VII is enforced by the federal-court system and thus has no such limitation.\(^{116}\)

\(^{115}\) Panach, “Two Wrongs” 2.  
\(^{116}\) Panach 3.
The three main principles that Ninth Circuit addressed above underscore the differences between the NLRA and Title VII that limit the ability to extend Hoffman. Although the Egbuna and Escobar Courts found little difficulty comparing the laws and denying undocumented workers Title VII remedies, the De La Rosa and Rivera Courts underlined the divergence that ultimately precluded Hoffman extension.

*The Fair Labor Standards Act Pre- and Post-Hoffman*

The Fair Labor Standards Act of 1938 (FLSA), along with the NLRA and Title VII, is a federal labor statute that protects workers from exploitation. The main purpose of the FLSA is to set federal minimum wage standards and overtime pay for all workers in the United States. The Wage and Hour Division (WHD) and the U.S. Department of Labor enforce the Act. The WHD investigates FLSA claims and makes suggestions for remedies and compliance charges. The DOL oversees the distribution of legal remedies to employees, which can be awarded via administrative hearings, or criminal or civil litigation.117 The typical remedies for FLSA violations are unpaid wages called “back wages”, liquidated damages, and civil monetary penalties when appropriate.118

Much like the NLRA, the FLSA definition of “employee” is relatively vague. The Act defines “employee” as “any individual employed by an employer.”119 As Blum highlights, “…the Supreme Court held in *United States v. Rosenwasser*, [that]


118 U.S. Department of Labor.

‘that the use of words “each” and “any” to modify “employee”… leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.’ Thus, the definition of “employee” in the FLSA does not expressly exclude undocumented workers and the majority of courts have held that they are covered.

When compared to both the NLRA and Title VII, the FLSA has some crucial differences that serve to underscore the issues at stake for undocumented workers. The majority of FLSA cases are “settled out of court”, indicating that employers are generally willing to concede a violation and pay the unpaid wages due, rather than contest. This points to the relative strength of the FLSA because a pattern of employers that are less likely to contest indicates a high level of success for employees bringing FLSA claims.

In fact, the only case that has been brought to the Circuit Court level is Patel v. Quality Inn South (1988). In Patel, the Eleventh Circuit Court of Appeals reversed the defendants’ summary judgment based on the plaintiff’s undocumented status. After Patel overstayed his visa, he continued to work at the Quality Inn. The defendants failed to pay him overtime wages so Patel filed an FLSA claim. As a response, the defendants filed a motion for summary judgment, which the District Court granted. The District Court held that undocumented workers could not receive

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121 Blum 2.
unpaid wages because it could find “no authority for the proposition that illegal aliens were protected by the FLSA.”

The Eleventh Circuit did not agree with the District Court’s ruling and reversed the summary judgment. The Circuit Court discredited the District Court’s argument that the Sure-Tan decision precluded undocumented workers from receiving FLSA remedies. The Court asserted that the Sure-Tan case was not applicable because of the difference between the NLRA and the FLSA. In Sure-Tan, the plaintiff was attempting to receive backpay for the period of time after he was employed. Under the FLSA, plaintiffs do not receive backpay for work never performed because the Act does not protect against wrongful termination or retaliation. A plaintiff may only receive back wages for work already performed for which they were never paid. For this reason, the Circuit Court argued that undocumented workers must be able to receive remedies for FLSA violations. This crucial difference actually simplifies the FLSA in terms of undocumented rights. That is to say, the absence of NLRA-style backpay remedies and the relative clarity of the FLSA eliminate many of the conflicts that were present in the NLRA and Title VII cases.

In a subsequent case (see Lucas et al, v. Jerusalem Café, LLC 2013), the District Court for Western Kentucky also underscores the Patel decision’s argument for coverage under the FLSA. The decision quotes the Secretary of Labor on the issue, in which he states, “[applying the FLSA to unauthorized aliens] is essential to achieving the purposes of the FLSA to protect workers from substandard working

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conditions, to reduce unfair competition for law-abiding employers, and to spread work and thereby reduce unemployment by requiring employers to pay overtime compensation.” While there are few higher court decisions that directly deal with the conflict between undocumented workers and FLSA remedies, the aforementioned cases all rest on two diverging lines of argumentation: the statutory language of the FLSA and the interpretation or intent of the IRCA with regards to undocumented immigrants. Because the structure of the FLSA is clear, the courts must turn to the Congressional intent of the IRCA for interpretation of undocumented rights.

Afterword

What does it mean? Congressional Intent of the IRCA

As shown in the two previous chapters, the conflict between federal labor statutes and the IRCA rests on many factors: the structure and language of the labor laws in question, the specific details of each case, and the interpretation of the IRCA. The FLSA cases serve as a great starting point for understanding the Congressional intent debate because the structure and judicial history of the FLSA shows a generally unchallenged support of undocumented worker coverage. The cases involving the NLRA and Title VII are more difficult to navigate because the statutory language and the provisions of both laws are decidedly less straightforward (see Hoffman, Sure-Tan, A.P.R.A. Fuel Oil Buyers, and De La Rosa).\textsuperscript{124} While the issue of Congressional intent is present in most of the cases for the NLRA and Title VII, it becomes marginalized by the limitations of the labor law statutes. However, Congressional intent is still a much-debated topic within the courts and points to the future of undocumented workers’ rights.

The Congressional intent debate rests on two opposing positions that focus on the interpretation of the IRCA and the potential incentives or outcomes that the IRCA influences. The first position asserts that the IRCA was enacted to limit undocumented employment and sanction employers for hiring unauthorized workers and employees for falsifying work authorization. Because of these provisions, allowing undocumented workers to receive labor protections and benefits while

\textsuperscript{124} See pg. 29-47 for references.
violating the IRCA would undermine the effectiveness of the Act and incentivize undocumented employees to continue to work without authorization. The second position essentially argues the opposite. Proponents of undocumented workers’ coverage under labor statutes argue that the employer sanctions in the IRCA are intended to limit undocumented employment while also protecting the workers themselves. They assert that the labor statutes and the IRCA must be understood as complimentary, insisting that denying remedies incentivizes employers to hire and exploit undocumented workers. This debate is still at the forefront of most case law regarding labor statutes and undocumented workers. Although the Supreme Court in Hoffman set a precedent that employed the anti-workers’ coverage position, the Courts have actively pushed against that decision for the last fifteen years. In this afterword, I look at the state of the debate within all three labor laws.

In Hoffman, the Supreme Court asserted that the IRCA’s criminal statutes prohibiting unauthorized employment limited the NLRB’s remedial authority. The Court stated that the “NLRB lack[s] the discretion to award backpay to the employee for a period during which he was an alien unauthorized to work in the United States.”125 In terms of the Congressional intent debate, the Supreme Court in Hoffman took the position that violations of the federal immigration law precluded any NLRA remedies and that awarding remedies would actually incentivize undocumented workers to continue violating the IRCA.126 We see a similar line of argumentation in post-Hoffman cases like *Mezonos Maven Bakery v. NLRB*. In Mezonos, the NLRB emphasized the importance of the Board’s remedial authority for enforcing the

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125 Hoffman Plastic Compounds, Inc. v. NLRB.
126 See chapter 2, p. 32 for reference.
NLRA. Although the Board ruled against backpay for undocumented workers based on the Hoffman decision, some members of the Board were hesitant to accept this decision as a positive outcome. They reiterated that backpay is a viable deterrent of employer violations, and denying remedies could create a pattern of employer violations that go unchallenged.

In Title VII cases, Hoffman has been used to substantiate denying remedies to undocumented workers as well. In *Egbuna v. Time Life Libraries*, the court denied backpay remedies to the plaintiff based on undocumented status, stating that as an unauthorized worker he was “[unable] to make a prima facie case for retaliatory failure to hire under Title VII.” In *De La Rosa v. Northern Harvest Furniture*, the court issued an opposing decision to that in Egbuna, arguing that an employee’s immigration status is not relevant for determining Title VII protection. The De La Rosa court used the structural differences between Title VII and the NLRA to prohibit Hoffman extension into that context. The different remedial authority of the laws, as well as the adjudication system for Title VII was significant enough for the court to deny the defendants’ motion to extend Hoffman. However, in *Escobar v. Spartan Security Service*, the Court unilaterally ruled against backpay for the plaintiff because his undocumented status precluded him from receiving benefits. This decision was not supported by direct evidence of the Congressional intent of the IRCA but rather based on the Court’s loose interpretation of the law. These examples from both the NLRA and Title VII case law point to the difficulty of IRCA interpretation as it has played out in the courts. Both incentive arguments have been

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used in cases with varying contextual intricacies, and yet the courts still struggle to find a definitive answer on the Congressional intent of the IRCA.

While the relevant case law for the NLRA andTitle VII shows that the details and complexities of the labor laws are crucial for the denial or approval of backpay remedies for undocumented workers, the FLSA case law highlights the Congressional intent debate more clearly.

Prior to the enactment of the IRCA, lawmakers consistently reiterated the necessity of protection for undocumented workers under the FLSA. Under the Carter administration, Labor Secretary Ray Marshall insisted that enforcing labor and wage standards for undocumented workers would decrease the economic incentive to hire unauthorized workers. In his report for the Interagency Task Force on Immigration Policy he stated that,

[…it] would be anomalous to allow an employer to benefit from violations of protective labor laws on the basis that his employee lacked the right to employment. That would encourage the hiring of illegal employees, for the employers would realize a financial advantage by hiring illegal migrants, while being immune from prosecution. This double advantage would provide employers with a substantial incentive to prefer illegal migrants over legal workers.128

This explicit support of the FLSA by the Executive branch and Congress remained strong even after the implementation of the IRCA in 1986. In fact, the IRCA allocated funds to the Wage and Hour Division of the DOL with the express purpose of supporting FLSA enforcement for undocumented workers.129 As noted in the Patel v. Quality Inn South decision, this allocation of funds “[makes] little sense in Congress had intended the IRCA to repeal the FLSA’s coverage of undocumented

129 Blum 6.
aliens."^130 With the complications of the remedial authority of the NLRA and Title VII absent from the FLSA, it becomes clear that the Congressional intent of the IRCA is the only mitigating factor for potential denial of protection for undocumented workers.

In Patel, the District Court used the recently passed IRCA to support the denial of rights to undocumented workers. The Court’s argument was based on the new provisions of the IRCA, and the potential incentives for immigrants if they were protected and covered by the FLSA. The Court’s statement points to interpretations of the IRCA:

The IRCA was intended to remove an economic incentive for illegal entry into the United States… and to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country. Thus, the IRCA was designed to the correct or ameliorate those provisions of the INA which in effect condoned and encouraged undocumented aliens to enter this country to work. This court’s decision holding that an illegal alien cannot obtain a remedy for violations by his employer of the provisions of the FLSA is fully consistent with the objective of federal immigration law as now amended.\textsuperscript{131}

This passage perfectly underscores the difficulty of IRCA interpretation. The District Court’s decision relied on a broad reading of the recently passed IRCA, and did so based on a very limited understanding of the law’s provisions and intentions.

The Circuit Court’s reversal of the District Court decision was based on the principle that the vague definition of “employee” in the FLSA does not exclude undocumented workers. However in the decision, Judge Vance also highlighted the issue of Congressional intent in his statement that,

\textsuperscript{130} Patel v. Quality Inn South 3.
\textsuperscript{131} Patel v. Quality Inn South 3.
Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens... [and that] the FLSA’s coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage.\textsuperscript{132}

Judge Vance also argued that while granting protections to undocumented workers may seem counterintuitive to deterring illegal employment, he “[doubts…] that many illegal aliens come to this country to gain the protection of our labor laws.”\textsuperscript{133} In this statement, Judge Vance underscores the incentives of the IRCA in relation to undocumented workers. He employs the argument that if Congress intended the IRCA to deter undocumented employment, that intention would be undermined by the denial of workers’ protections. After examining the Congressional intent debate within the FLSA cases, it becomes clear that the courts are still actively discussing both arguments.

While many courts have argued against backpay remedies or coverage for undocumented workers using their interpretation of the IRCA (see Hoffman, Sure-Tan), the evidence for Congressional intent has been based less on direct quotations or examples. The proponents of coverage, however, consistently cite the House Education and Labor Committee Report on the IRCA from the 99\textsuperscript{th} Congress in 1988:

In addition, the committee does not intend that any provision of [the IRCA] would limit the powers of State or Federal labor standards agencies such as ... the National Labor Relations Board, the Equal Employment Opportunity Commission, [and] the Wage and Hour Division of the Department of Labor ... in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counter-productive of our intent to limit the hiring of

\textsuperscript{132} Patel v. Quality Inn South 5.
\textsuperscript{133} Patel v. Quality Inn South 5.
undocumented employees and the depressing effect on working conditions caused by their employment.\textsuperscript{134}

This report has been cited in cases involving all three laws (see Hoffman, Lucas, Egbuna, Patel etc.), and displays a different intent than the Supreme Court’s interpretation in Hoffman. Even if the constraints of each specific labor statute were significant enough to limit remedial powers, such as in Hoffman, it seems excessive to deny remedies to undocumented workers on the basis of the Congressional intent of the IRCA when it is explicitly stated otherwise. Although cases like Hoffman set a precedent for denying remedies, we can see that courts of all levels are pushing back against the Hoffman argument and turning to the Congressional intent of the IRCA for answers. However, until the Supreme Court speaks to the issue and accurately addresses the consistently elusive intent of the IRCA, the courts will continue to split decisions and the rights of undocumented workers will remain unclear.

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