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Hoffman, Its Progeny, and the Status of Undocumented Workers

Scott C. Murray

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COMMENT

Hoffman, Its Progeny, and the Status of Undocumented Workers

*Scott C. Murray**

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I. INTRODUCTION

Ramon Hernandez of Kent, Washington, was fired after filing several complaints that he did not receive thousands of dollars in unpaid wages.¹ He worked at a local bakery for over two years; his wages were constantly withheld.² Hernandez continued working at the bakery despite his repeatedly ignored complaints.³ Finally, after the sum he was owed reached nearly \$20,000, Hernandez made one final complaint, which led to his termination.⁴ At first glance, Hernandez's situation appears easily resolvable, but his status as an undocumented worker makes an otherwise routine foray into state labor and employment law a matter of national immigration policy. Given estimates that undocumented workers currently comprise five percent of the American workforce, Hernandez's situation is hardly unique.⁵

* Candidate for J.D., University of Wyoming, 2011. I would like to thank the *Wyoming Law Review* Editorial Board, particularly Nick Haderlie, Devon Stiles, Kevin Daniels, and Amy Staehr for their hard work and insightful comments. I would also like to thank my faculty advisor, Noah Novogrodsky, for helping develop the ideas that led to this comment as well as providing guidance throughout the process of composing and refining it. Finally, such an endeavor would be meaningless without the help and support of friends and family. I give many thanks to all of those who offered their tremendous support and encouragement along the way.

¹ Patrick Oppmann, *Illegal Immigrants Struggle to Receive Back Pay*, CNN.COM (Oct. 28, 2009), <http://www.cnn.com/2009/CRIME/10/27/illegals.back.pay/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See Julia Preston, *11.2 Million Illegal Immigrants in U.S. in 2010, Report Says; No Change from '09*, N.Y. TIMES, Feb. 2, 2011, at A15 (citing a study estimating 8 million of the 11.2 million illegal immigrants living in the United States are part of the American workforce).

The United States legal system continues to struggle with the daunting task of defining the rights and obligations of those lacking proper documentation living and working within its borders. The debate over immigration is largely rooted in discussions concerning the fate of the undocumented labor force.⁶ The seminal case, *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,⁷ only confuses the already tenuous legal distinctions between documented and undocumented workers.⁸ In effect, *Hoffman* created a system that leaves undocumented workers—on the basis of their immigration status—without the remedies available to their authorized counterparts.⁹ Under *Hoffman* and its progeny, undocumented workers remain protected by labor and employment laws but lack the ability to pursue the legal remedies normally available to legal workers, thus placing them in an ill-defined legal space.¹⁰

As recent events in Arizona, Oklahoma, Utah, and other states indicate, enforcing immigration laws has become a heated issue at the state level as well.¹¹

⁶ See *id.* (noting both the high percentage of undocumented immigrants in the workforce and the debate over the Obama Administration's workplace-oriented immigration policies).

⁷ 535 U.S. 137 (2002).

⁸ See Thomas J. Walsh, *Hoffman Plastic Compounds, Inc. v. NLRB: How the Supreme Court Eroded Labor Law and Workers Rights in the Name of Immigration Policy*, 21 LAW & INEQ. 313, 339 (2003).

⁹ Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1401 (2009) (“*Hoffman* constructs a world in which citizens are allowed to seek redress for incidents of discrimination, relegating unauthorized workers to a lawless remedial realm to match their lawless existence in the community.”).

¹⁰ See *Hoffman*, 535 U.S. at 153–54 (Breyer, J., dissenting) (noting the manner in which denying the National Labor Relations Board remedial power will snub undocumented workers); *Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (“*Hoffman* did not specifically foreclose all remedies for undocumented workers under the [NLRA] or other comparable federal labor statutes . . .”); see also Oppmann, *supra* note 1 (noting in some cases where the traditional remedies are not available, undocumented workers have resorted to protest politics, effectively shaming employers into compliance with labor and employment laws).

¹¹ See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 869 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3498 (2010) (affirming the district court's determination that an Arizona statute, which allows the State to revoke business licenses upon a showing that a business employed undocumented workers, is facially valid); *Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742 (10th Cir. 2010) (holding federal immigration law preempted an Oklahoma law designed to curb illegal immigration through various employment verification standards and by making it a discriminatory practice to discharge a citizen or legal worker while knowingly retaining an undocumented worker); *Reyes v. Van Elk, Ltd.*, 56 Cal. Rptr. 3d 604, 618–19 (Ct. App. 2007) (holding “the prevailing wage law and the post-*Hoffman* statutes are not preempted by the IRCA,” therefore allowing plaintiffs to bring such claims despite their undocumented status); *Piscitelli v. Classic Residence by Hyatt*, 973 A.2d 948, 961 (N.J. Super. Ct. App. Div. 2009) (holding no express or implied private right of action is available against businesses employing undocumented workers); see also Lee Davidson, *Senate Okays Utahns Sponsoring Immigrants*, SALT LAKE TRIBUNE (Mar. 23, 2011), <http://www.sltrib.com/sltrib/home/51389489-76/bill-immigration-niederhauser-senate.html.csp> (discussing a bill that circumvents the federal immigration process and allows immigrants to live and work in Utah provided they pass a background check and health screening, among other things).

Groups like the Minuteman Project—whose goals consist of raising public awareness of what they label an ongoing “illegal alien invasion” and advocating for enforcement of immigration laws—increase the visibility of the debate, as well as exacerbate the rancorous divide it creates.¹² A poll conducted in May of 2010 indicated fifty-three percent of respondents felt “illegal immigrants making low wages might make U.S. employers less willing to pay American workers a decent wage.”¹³ There is continuing pressure to address these issues at both the state and national levels.

Currently, the minimal rights afforded undocumented workers are in danger of erosion.¹⁴ Case law indicates the United States Supreme Court has created a hierarchy of national policies placing immigration status over considerations of civil liberties and human rights.¹⁵ The privileging of immigration law and policy above the policies of labor and employment law parallels a shift in the United States from a territorial conception of membership to a status-centric approach.¹⁶ This effectively creates a population of undocumented workers whose immigration status potentially eliminates protections under labor and employment laws.¹⁷

¹² Jim Gilchrist, *An Essay by Jim Gilchrist*, 22 GEO. IMMIGR. L.J. 415, 416 (2008) (discussing the goals of the Minuteman Project from the perspective of one of the group’s co-founders); see James Duff Lyall, *Vigilante State: Reframing the Minuteman Project in American Politics and Culture*, 23 GEO. IMMIGR. L.J. 257, 258 (2009) (noting the substantial impact the Minuteman Project and similar groups have on the debate surrounding immigration).

¹³ Lydia Saad, *Americans Value Both Aspects of Immigration Reform*, GALLUP (May 4, 2010), <http://www.gallup.com/poll/127649/Americans-Value-Aspects-Immigration-Reform.aspx>.

¹⁴ See *Flores v. Albertsons, Inc.*, 2002 WL 1163263, at *5 (C.D. Cal. 2002); D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 872 (2010) (arguing that courts increasingly use status as a basis of assigning rights, oftentimes to deny certain rights traditionally protected under a territorial approach); Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1153–54 (2009) (discussing the “steady chipping away” at rights of undocumented workers in both employment and other contexts); Shahid Haque, Note, *Beyond Hoffman Plastic: Reforming National Labor Relations Policy to Conform to the Immigration Reform and Control Act*, 79 CHI.-KENT L. REV. 1357, 1359 (2005) (noting the uncertainty of undocumented workers’ rights in the wake of *Hoffman*).

¹⁵ See Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers: Advisory Opinion*, 99 AM. J. INT’L L. 460, 461 (“[O]nce an employment relationship is established with an undocumented worker, ‘the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment.’” (quoting *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 134 (Sept. 17, 2003))); Núñez *supra* note 14, at 821 (commentating immigration status “often displaces territorial presence as the ultimate determinant of membership”).

¹⁶ See Núñez, *supra* note 14, at 851–52 (noting the *Hoffman* majority held awarding a remedy afforded by labor laws runs afoul of the policies underlying immigration law).

¹⁷ See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002); *Davila v. Grimes*, No. 2:09-CV-407, 2010 WL 1737121, at *2 (S.D. Ohio Apr. 29, 2010) (“[T]he Court recognizes that Plaintiffs [sic] status in this country may impact his claim for lost future wages.”).

Further, it runs contrary to the policies behind the labor, employment, and immigration laws purportedly informing court decisions.¹⁸ In order to further these policies and place undocumented workers in a clearly defined and coherent legal framework, Congress should amend the Immigration Reform and Control Act of 1986 (IRCA) to include language that expressly forbids immigration law from trumping other legal regimes.¹⁹

This comment begins by discussing the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).²⁰ These statutes—and the definitions contained within them—are at the center of an increasingly ambiguous interaction of labor, employment, and immigration law. After analyzing these statutes and associated case law, this comment discusses the IRCA, which makes it unlawful for employers to employ undocumented workers.²¹ After the passage of the IRCA, American courts began applying the NLRA and the FLSA with an eye to immigration law, an interaction that culminated in the United States Supreme Court's decision in *Hoffman*.²² This comment analyzes *Hoffman* and its progeny, noting the potential danger in the continued application of *Hoffman*'s reasoning.²³ Analysis of the relevant statutes and case law reveals that by relegating undocumented workers to a legal realm in which remedies are scarcely available, the courts ultimately undermine the policies behind immigration, labor, and education law, thereby leaving the responsibility for correcting the confusing state of the law to Congress.²⁴

II. BACKGROUND

This section begins by explaining the labor and employment laws relevant to the discussion of the rights of undocumented workers.²⁵ It then considers a number of cases focusing on provisions of those laws affecting undocumented workers.²⁶ This section then discusses immigration law and a handful of related cases before examining the leading case in the area, *Hoffman Plastic Compounds, Inc. v. National*

¹⁸ See *Hoffman*, 535 U.S. at 153 (Breyer, J., dissenting) (opining that awarding an undocumented worker a back pay award would further the goals of both labor and immigration laws).

¹⁹ See *infra* notes 183–85 and accompanying text.

²⁰ See *infra* notes 29–49 and accompanying text.

²¹ See *infra* notes 50–95 and accompanying text (discussing employment and labor law cases); *infra* notes 96–100 and accompanying text (discussing immigration law, particularly the IRCA).

²² See *infra* notes 102–10 and accompanying text (discussing several cases leading to *Hoffman*); *infra* notes 111–24 (discussing *Hoffman*).

²³ See *infra* notes 136–78 and accompanying text.

²⁴ See *infra* notes 179–85 and accompanying text.

²⁵ See *infra* notes 29–49 and accompanying text.

²⁶ See *infra* notes 50–95 and accompanying text.

Labor Relations Board.²⁷ Finally, this section examines the traditional methods of assigning rights to immigrants as well as the implications of membership in obtaining rights.²⁸

A. *Labor and Employment Law*

Largely as a response to the Great Depression of the 1920s, Congress passed the NLRA in 1935.²⁹ In the NLRA's policy declaration, Congress addressed the problems that spurred the legislation, claiming unequal relationships between employers and employees affected commerce because employers were able to maintain substandard wages and working conditions.³⁰ Congress implemented a policy designed to eradicate those obstacles by encouraging collective bargaining and granting workers the right to organize.³¹ The NLRA stabilized the workplace by supporting unions and regulating the relationships between labor and management.³² Additionally, the NLRA created the National Labor Relations Board (NLRB) to administer and implement the provisions of the statute.³³

The NLRA expressly defines employees' rights regarding labor activity.³⁴ The statute states that every employee has the right to self-organization, union activity,

²⁷ See *infra* notes 96–110 and accompanying text (discussing immigration law, generally, and a select group of cases); *infra* notes 111–24 and accompanying text (discussing the *Hoffman* decision).

²⁸ See *infra* notes 125–35 and accompanying text.

²⁹ ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 75 (14th ed. 2006).

³⁰ 29 U.S.C. § 151 (2006). The NLRA contemplates the lopsided relationship between employers and employees:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.

³¹ *Id.*

³² Christopher Brackman, Note, *Hoffman v. NLRB, Creating More Harm than Good: Why the Supreme Court Should Not Have Denied Illegal Workers a Backpay Remedy Under the National Labor Relations Act*, 71 *UMKC L. REV.* 717, 718 (2003) (discussing the genesis of the NLRA); Haque, *supra* note 14, at 79 (noting the NLRA's focus on "labor-management relations of businesses engaged in interstate commerce").

³³ 29 U.S.C. §§ 153–156; see Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 *BERKELEY J. EMP. & LAB. L.* 223, 229 (2005) (indicating that the policies of the NLRA deem the manner in which workers are treated as central to a democratic society); Brackman, *supra* note 32, at 718.

³⁴ 29 U.S.C. § 157.

and collective bargaining.³⁵ Furthermore, employees generally have the right to refrain from engaging in such activities.³⁶ The NLRA also describes unfair labor practices, which it then empowers the NLRB to prevent through cease and desist orders, reinstatement of employment, back pay, and possibly injunctive relief.³⁷ As such, in order to receive the protections of the NLRA, one must be an employee.³⁸

The definition of “employee” is a source of much legal and political dispute. Under the NLRA, “employee” is a defined term and encompasses “*any* employee.”³⁹ The statute goes on to enumerate a list of seven exceptions to the otherwise expansive definition.⁴⁰ Notably, none of the listed exceptions mention undocumented workers or immigration status.⁴¹

In the seventy-five years since the NLRA’s passage, numerous decisions by the NLRB and American courts have addressed the manner in which the NLRA is applied to undocumented workers.⁴² Many of these cases have struggled to locate undocumented workers within the definitional framework of the NLRA, particularly on the issue of whether undocumented workers are “employees” under the statute.⁴³ While labor laws like the NLRA deal with workers and their collective relationships with management, employment laws protect the individual rights of

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* §§ 158, 160.

³⁸ *Id.* § 157.

³⁹ *Id.* § 152(3) (emphasis added). The definition includes those individuals whose employment was terminated because of any unfair labor practice or labor dispute:

The term “employee” shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

Id.

⁴⁰ *Id.* The exceptions include agricultural laborers, domestic servants, individuals employed by their parents or spouses, independent contractors, supervisors, a person employed by an employer subject to the Railway Labor Act, and any other person employed by an employer that does not meet the statutory definition of “employer.” *Id.*; see also *id.* § 152(2); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (noting that undocumented workers are not among the listed exceptions to the definition of “employee”).

⁴¹ 29 U.S.C. § 152(3).

⁴² Ellen Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?*, 15 HOFSTRA LAB. & EMP. L.J. 11, 12 (1997); see, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002); *Sure-Tan, Inc.*, 467 U.S. at 891.

⁴³ See, e.g., *Sure-Tan, Inc.*, 467 U.S. at 891–92; *Del Rey Tortilleria, Inc. v. NLRB*, 967 F.2d 1115, 1118–19.

employees.⁴⁴ The FLSA, one of the preeminent employment laws, has experienced a similar trajectory as the NLRA with respect to undocumented workers.

Congress passed the FLSA three years after signing the NLRA into law.⁴⁵ It provides employees with such protections as minimum wages and maximum hours to curb labor conditions that erode the “minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁴⁶ Like the NLRA before it, the FLSA defines “employee” in a specific, albeit broad manner.⁴⁷ Generally, the FLSA’s definition includes all individuals employed by employers.⁴⁸ Within the listed exceptions, there is no mention of undocumented workers, illegal aliens, or immigration status.⁴⁹

B. *Cases Leading to Hoffman*

Both the NLRA and the FLSA were passed within a few years of each other as a part of the New Deal legislation.⁵⁰ As such, the policies behind the statutes are similar, and both employ extremely broad definitions of “employee.”⁵¹ Accordingly, courts have used one statute’s definition of employee to give context to the other and often use the definitions interchangeably within the context of immigration.⁵²

⁴⁴ See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2688 (2008) (stating the traditional view “that labor and employment law constitute dichotomous, and in a fundamental respect incompatible, regulatory regimes”). Compare MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 33 (6th ed. 2007) (noting that while collective bargaining is important to employment law, employment law addresses “individual rather than collective rights”), with BLACK’S LAW DICTIONARY (9th ed. 2009) (defining labor law as “governing the relationship between employers and employees, esp. law governing the dealings of employers and the unions that represent employees”).

⁴⁵ Compare National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)), with Fair Labor Standards Act, ch. 676, § 1, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

⁴⁶ 29 U.S.C. § 202.

⁴⁷ *Id.* § 203(e).

⁴⁸ *Id.* § 203(e)(1) (“Except as [otherwise] provided . . . the term ‘employee’ means any individual employed by an employer.”).

⁴⁹ *Id.* Exceptions to the FLSA’s definition of employee include employees of public agencies, intra-family agricultural employees, and volunteers performing services for public agencies. *Id.* § 203(e)(2)–(4).

⁵⁰ See Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 2 (acknowledging both the NLRA and the FLSA were part of the “New Deal labor regime”).

⁵¹ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947); *Patel v. Quality Inn S.*, 846 F.2d 700, 703 n.3 (11th Cir. 1988) (noting the “NLRA’s definitional framework is virtually identical to that of the FLSA”); see Andrew S. Lewinter, *Hoffman Plastic Compounds v. NLRB: An Invitation to Exploit*, 20 GA. ST. U. L. REV. 509, 526 (2003).

⁵² See *Rutherford Food Corp.*, 331 U.S. at 723; *Patel*, 846 F.2d at 703 n.3; Lewinter, *supra* note 51, at 526.

The United States Court of Appeals for the Ninth Circuit addressed the issue of whether undocumented workers fit within the NLRB's definition of "employee" in *NLRB v. Apollo Tire Co.*⁵³ In *Apollo*, an employee's mother made a complaint to the Department of Labor regarding her son's withheld overtime pay.⁵⁴ She was given complaint forms for her son, which she also distributed to other employees.⁵⁵ Six of the seven employees who filed complaints were laid off.⁵⁶ The NLRB issued Apollo Tire a cease and desist order for its unfair labor practices under section 157 of the NLRA.⁵⁷

On appeal, Apollo contended that Congress meant to exclude undocumented workers from its definition of "employee" to avoid running afoul of national immigration policy.⁵⁸ The court disagreed, finding the statutory language, combined with the NLRB's past holdings, clearly placed undocumented workers within the scope of the NLRA.⁵⁹ The court also noted that ruling otherwise would encourage employers to seek undocumented workers as employees, which would certainly run contrary to immigration policy.⁶⁰

The United States Supreme Court addressed this same issue in *Sure-Tan, Inc. v. NLRB*.⁶¹ In *Sure-Tan*, a disgruntled employer asked the Immigration and Naturalization Service (INS) to check the immigration status of several employees after they participated in union activities.⁶² When INS agents visited Sure-Tan's grounds they arrested five employees, none of whom had proper documentation.⁶³ In lieu of official deportation proceedings, the workers were permitted to leave the United States voluntarily and were on a bus for Mexico within a day.⁶⁴ Upon hearing the case, the NLRB determined Sure-Tan violated the NLRA's prohibition of unfair labor practices.⁶⁵ Specifically, in reporting the workers to INS merely for their

⁵³ 604 F.2d 1180 (9th Cir. 1977).

⁵⁴ *Id.* at 1181. Before going to the Department of Labor, she complained to the general manager, who responded by telling her husband that if his wife made a formal complaint she would be killed. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1182.

⁵⁷ *Id.*; see also 29 U.S.C. § 157 (2006).

⁵⁸ *Apollo Tire Co.*, 604 F.2d at 1182.

⁵⁹ *Id.* at 1182–83.

⁶⁰ See *id.* at 1183. Judge Kennedy argued in a concurring opinion that leaving undocumented workers without labor law protections "would leave helpless the very persons who most need protection from exploitative employer practices." *Id.* at 1184.

⁶¹ 467 U.S. 883, 886 (1984).

⁶² *Id.* at 886–87.

⁶³ *Id.* at 887.

⁶⁴ *Id.*

⁶⁵ *Id.* at 888.

support of the union, the NLRB found that *Sure-Tan* violated sections 158(a)(1) and (3) of the NLRA.⁶⁶ As a result, the NLRB issued a cease and desist order requiring *Sure-Tan* to halt its unfair labor practices and ordered reinstatement of the employees with back pay.⁶⁷

The United States Court of Appeals for the Seventh Circuit affirmed the NLRB's order but made several modifications regarding reinstatement and back pay.⁶⁸ The court first determined that reinstatement would only be proper if the workers' presence and work authorization were legal.⁶⁹ Simply put, in order to get their jobs back, the workers must have first entered the United States legally or adjusted their immigration status and obtained official employment authorization.⁷⁰ The court also found the NLRB's decision allowing reinstatement within six months was inadequate and failed to give the employees a reasonable time to arrange for legal entry.⁷¹ The appellate court held that while back pay should not be given for any period of time during which the employees were ineligible to work—which in this case meant the entire duration of their employment—a minimum award must be set in order to "effectuate the policies of the [National Labor Relations] Act."⁷²

The United States Supreme Court affirmed the *Sure-Tan* decision in part and reversed it in part.⁷³ The majority opinion analyzed the NLRA's definition of "employee" to determine whether the provisions of the NLRA applied to undocumented workers.⁷⁴ Acknowledging that the NLRB's construction of the term deserved tremendous deference, the Court nonetheless conducted its own analysis of the statutory language.⁷⁵ It found that undocumented workers plainly fall within the expansive category of "any employee" because they are not among the expressly listed exceptions.⁷⁶ The Court also noted such a construction furthered the policies of the NLRA by "encouraging and protecting the collective-

⁶⁶ *Sure-Tan Inc.*, 234 N.L.R.B. 1187, 1187 (1978). The NLRA states that employees have certain rights of self-organization and labor involvement and that any attempt on the part of an employer to interfere with those rights is a violation. See 29 U.S.C. § 157(a)(1) (2006).

⁶⁷ *Sure-Tan, Inc.*, 467 U.S. at 888–89.

⁶⁸ *Id.* at 889–90.

⁶⁹ *Id.* at 889.

⁷⁰ *See id.*

⁷¹ *Id.* at 889–90 (ordering that the reinstatement offers be both written in Spanish and held open for four years).

⁷² *Id.* at 890 (quoting *Sure-Tan, Inc. v. NLRB*, 672 F.2d 592, 606 (7th Cir. 1982)).

⁷³ *See id.* at 906.

⁷⁴ *Id.* at 891.

⁷⁵ *Id.*

⁷⁶ *Id.* at 891–92.

bargaining process.”⁷⁷ Further, the Court considered whether Sure-Tan’s reporting of its employees to the INS was an unfair business practice, thereby rendering the company liable.⁷⁸ It determined that there are certain occasions in which it is proper for an employer to report an illegal alien—when reporting criminal activity, for example.⁷⁹ In *Sure-Tan*, however, the evidence showed the reporting was solely in retaliation for the employees’ union activity, which was protected by the NLRA.⁸⁰ As such, Sure-Tan’s acts violated the NLRA.⁸¹

Although the majority affirmed the Seventh Circuit’s holding regarding the application of the NLRA to undocumented workers, it disagreed with the appellate court’s remedial modifications to the NLRB’s order.⁸² The Court held that not only did the lower court exceed its authority, but that in doing so it forced the NLRB to act beyond its authority as well.⁸³ Imposing a minimum six-month back pay period, the majority argued, was based entirely on speculation and ran counter to the remedial policies of the NLRA.⁸⁴ Additionally, the appellate court’s modifications regarding the reinstatement orders were determined an intrusion on the significant deference afforded to the NLRB.⁸⁵ The Court held that the NLRB was the appropriate body to fashion remedies, not the courts.⁸⁶ As such, the Court remanded the case to the Seventh Circuit with instructions for it to remand the case back to the NLRB to create a remedial order in compliance with the Court’s opinion.⁸⁷ Justices Brennan, Marshall, Blackmun, and Stevens joined in the decision but disagreed with the majority’s rejection of the remedial modification.⁸⁸ They argued that the Court created a situation in which an undocumented worker entitled to protections under the NLRA could be left without any remedy.⁸⁹

The United States Court of Appeals for the Ninth Circuit addressed the issue again in *Local 512 v. NLRB*, using the *Sure-Tan* decision as a guide.⁹⁰ The NLRB held Felbro, Inc. violated the NLRA by refusing to engage in collective

⁷⁷ *Id.* at 892.

⁷⁸ *Id.* at 894.

⁷⁹ *Id.* at 895.

⁸⁰ *Id.* at 895–96.

⁸¹ *Id.*

⁸² *Id.* at 898–99.

⁸³ *Id.* at 899–900.

⁸⁴ *Id.* at 901.

⁸⁵ *Id.* at 905.

⁸⁶ *Id.*

⁸⁷ *Id.* at 906.

⁸⁸ *Id.*

⁸⁹ *Id.* at 911 (“[T]he contradiction in the Court’s opinion is total.”).

⁹⁰ *Local 512, Warehouse & Office Workers’ Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

bargaining.⁹¹ The NLRB—based on its understanding of *Sure-Tan*—modified its back pay order to be conditioned on a showing of the employees’ legal status.⁹² The Ninth Circuit found this reading of *Sure-Tan* misguided.⁹³ *Sure-Tan*, it argued, in no way permitted the NLRB to look at an employee’s legal status in determining his eligibility for back pay.⁹⁴ According to the Ninth Circuit, *Sure-Tan*’s holding merely dealt with back pay to employees unavailable for work—and therefore ineligible for back pay—because they were out of the country with little prospect of legal reentry; their immigration status was incidental.⁹⁵

C. Immigration Law

The primary law governing immigration and related matters is the Immigration and Nationality Act (INA).⁹⁶ The INA remained silent on the issue of employment of undocumented workers until 1986, when Congress passed the Immigration Reform and Control Act (IRCA).⁹⁷ The IRCA made it unlawful for employers to knowingly hire undocumented workers.⁹⁸ Further, it required employers to comply with an employment verification system designed to prevent the employment of undocumented workers.⁹⁹ As such, it created an ostensible conflict between immigration law and the protections previously given to undocumented workers under the NLRA and the FLSA.¹⁰⁰

Courts have interpreted the IRCA in a variety of ways.¹⁰¹ In *Patel v. Quality Inn South*, the United States Court of Appeals for the Eleventh Circuit determined the IRCA did not prevent undocumented workers from receiving protection under the FLSA.¹⁰² It disagreed with the lower court’s contention that in passing

⁹¹ *Id.* at 708.

⁹² *Id.*

⁹³ *See id.* at 716–17.

⁹⁴ *Id.* at 717.

⁹⁵ *Id.* at 716–17.

⁹⁶ 8 U.S.C. §§ 1101–1537 (2006).

⁹⁷ *Id.* § 1324a; *see* Lewinter, *supra* note 51, at 514–15; L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 900 (1988) (observing that prior to the passage of the IRCA, the INA “permitted employers to hire illegal aliens”).

⁹⁸ 8 U.S.C. § 1324a(a)(1)(A).

⁹⁹ *Id.* § 1324a(a)(1)(B).

¹⁰⁰ *See* Harris, *supra* note 97, at 900.

¹⁰¹ *See* Kati L. Griffith, *United States: U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 141 (2009) (noting the uncertainty of the interaction of immigration, labor, and employment law following the IRCA’s passage); *infra* notes 102–24 and accompanying text.

¹⁰² 846 F.2d 700, 706 (11th Cir. 1988).

the IRCA, Congress implicitly altered the FLSA's definition of "employee" by excluding undocumented workers.¹⁰³ The court also determined that while the FLSA and the NLRA are often coextensive, Quality Inn South's argument that *Sure-Tan's* stance on back pay precluded Patel from remedial relief lacked merit.¹⁰⁴ The decisions concerning remedies under the NLRA, the court concluded, had no bearing on the FLSA's remedial scheme.¹⁰⁵

In *Del Rey Tortilleria, Inc. v. NLRB*, the United States Court of Appeals for the Seventh Circuit considered whether an NLRB order requiring an employer issue back pay to several undocumented workers violated the IRCA.¹⁰⁶ The court determined the employees were ineligible to receive back pay under *Sure-Tan* because they were not lawfully permitted to live and work in the United States.¹⁰⁷ The workers were discharged before the IRCA became law, which led the court to acknowledge its holding only applied to pre-IRCA discharges.¹⁰⁸ Despite that limitation, however, the court then stated that the IRCA "clearly bars" the NLRB from awarding back pay to undocumented workers.¹⁰⁹ In 2002, this issue was examined by the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*.¹¹⁰

D. The NLRA Still Applies to Undocumented Workers

In 1988, Jose Castro was hired by Hoffman Plastic Compounds, Inc. to prepare various pharmaceutical products.¹¹¹ Shortly thereafter, Castro and several other employees joined a union-organizing campaign.¹¹² In January of the following year, Hoffman fired Castro and several other employees who also participated in the unionizing activities.¹¹³ Three years later, the NLRB determined Hoffman terminated Castro and four others in violation of the NLRA.¹¹⁴ During

¹⁰³ *Id.* at 704 (finding nothing in the IRCA or its legislative history supporting the notion that Congress intended to limit the scope of the FLSA).

¹⁰⁴ *Id.* at 705–06.

¹⁰⁵ *Id.* at 706.

¹⁰⁶ 976 F.2d 1115 (7th Cir. 1992).

¹⁰⁷ *Id.* at 1121–22.

¹⁰⁸ *Id.* at 1122.

¹⁰⁹ *Id.* In a footnote, the court distinguished *Patel v. Quality Inn South* because in that case the workers were seeking payment for work already performed, not for work that would have been performed. *Id.* at 1122 n.7. Interestingly, the *Patel* court used the same logic to distinguish its holding from *Sure-Tan*. See *Patel v. Quality Inn S.*, 846 F.2d 700, 705–06 (11th Cir. 1988).

¹¹⁰ 535 U.S. 137 (2002).

¹¹¹ *Id.* at 140.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 140–41.

a subsequent hearing before an Administrative Law Judge (ALJ) to determine the amount of back pay Hoffman owed the workers, Castro reported he was neither born nor legally permitted to enter or work in the United States.¹¹⁵ Castro also testified that he used fraudulent documents to gain employment with Hoffman.¹¹⁶ Finding a back pay reward in direct conflict with immigration law, the ALJ refused to order payment to Castro.¹¹⁷ Four years later, the NLRB reversed the ALJ's decision, finding that applying the protections and remedies of the NLRA was "the most effective way to accommodate and further the policies embodied in [the IRCA]."¹¹⁸

The United States Supreme Court held the NLRB correctly applied the NLRA to undocumented workers but erred by granting back pay because immigration policy limited the NLRB's remedial power.¹¹⁹ The majority argued immigration policy demands strict enforcement of laws enacted to curtail employment of illegal aliens; failing to do so would invite more violations of immigration law.¹²⁰ Furthermore, the majority claimed that while immigration policy limited the remedies available to undocumented workers, Hoffman and other similar employers would not go unpunished, reciting a list of sanctions available.¹²¹

Justice Breyer's dissent focused on the practical inadequacy of denying undocumented workers the possibility of back pay because it motivates employers to seek out undocumented workers.¹²² The dissent also noted that applying labor laws equally to undocumented and documented workers would reduce incentive for workers entering the United States without going through the proper channels.¹²³ Essentially, the dissent claimed the majority's attempt to bifurcate the substantive and remedial rights of undocumented workers undermined both labor *and* immigration law.¹²⁴

E. Status-Based Assignment of Rights

The unstable distinction between the rights afforded to documented and undocumented workers is not just a problem of legal definition but also

¹¹⁵ *Id.* at 141.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting *Hoffman Plastic Compounds, Inc. and Casimiro Arauz*, 326 N.L.R.B. 1060, 1060 (1998)).

¹¹⁹ *Id.* at 144.

¹²⁰ *Id.* at 151.

¹²¹ *Id.* at 152.

¹²² *Id.* at 155.

¹²³ *Id.* at 156.

¹²⁴ *Id.* at 153.

of defining membership in a transitional and globalized society.¹²⁵ In general, membership is defined—and thus rights are assigned—through either a territorial or status-based model.¹²⁶ Territorial models treat physical, geographic presence as the basis of membership and its associated rights.¹²⁷ The status-centric approach assigns rights to persons within a given territory according to their immigration status.¹²⁸ Accordingly, in a status-based model, rights are assigned to members of a society based entirely on governmentally sanctioned and distributed labels.¹²⁹ The United States and its immigration laws traditionally follow a territorial-based assignment of rights in which physical presence within the jurisdiction establishes a minimal set of rights.¹³⁰

Some areas of the law are moving toward a more nuanced form of territorial-based membership.¹³¹ In the context of primary education for undocumented children, social factors like community involvement and maintaining family cohesion are usurping immigration status as the determinant factors.¹³² The

¹²⁵ See MICHAEL WALZER, SPHERES OF JUSTICE 52 (1983) (questioning the distinction between residency and citizenship); Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 4–8 (2006) (noting the discrepancy in effective tax rates between undocumented and documented workers based on status “despite their net positive contribution to public coffers”); Núñez, *supra* note 14, at 824–28.

¹²⁶ See AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY 35–36 (2009) (discussing the manner in which citizenship is the basis for participation in the governance of a given polity); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 390 (2007) (noting the two primary methods of assigning rights “derive from either . . . formal status under law or . . . territorial presence”).

¹²⁷ See Bosniak, *supra* note 126, at 391 (noting the territorial method’s focus on “the normative significance of the physical fact of presence in the national space”); Núñez, *supra* note 14, at 825–26 (distinguishing between territorial and status-based models of membership, noting the former’s use of “geographic boundaries” in distributing rights); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 391 (2010) (“[B]oundary lines not only determine which public resources are ours and which are theirs, but help to define who ‘we’ and ‘they’ are.” (quoting GERALD E. FRUG, CITY MAKING 15 (1999))).

¹²⁸ See WALZER, *supra* note 125, at 43 (noting “full membership” in a country often depends on nationality).

¹²⁹ See Bosniak, *supra* note 126, at 390–91 (discussing the basics of the status-based approach, in particular the role of “a state’s immigration admissions and citizenship allocation systems” in creating various sets of rights depending on one’s status); Cunningham-Parmeter, *supra* note 9, at 1362 (“[A] person’s basket of rights fills as his immigration status formalizes.”); Núñez, *supra* note 14, at 826 (discussing the shortcomings of a status-based approach and its dependence on governmental categorization).

¹³⁰ Núñez, *supra* note 14, at 819; see Cunningham-Parmeter, *supra* note 9, at 1363 (“Regardless of status, there is a floor on the level of protections enjoyed by all persons territorially present in the United States.” (emphasis added)).

¹³¹ See *infra* notes 132–34 and accompanying text.

¹³² See Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (holding undocumented children have the right of access to public education because, *inter alia*, the American education system is instrumental in civic and community engagement); Jacquelyn Hagan, Brianna Castro & Nestor Rodriguez, *The*

issuance of driver's licenses to undocumented workers raises similar issues.¹³³ Labor and employment law, on the other hand, are becoming increasingly status-based.¹³⁴ This shift has serious implications for workers—undocumented or not—as well as employers.¹³⁵

III. ANALYSIS

This section begins by addressing the problems associated with a shift toward a status-based assignment of rights.¹³⁶ It notes the danger of expanding the United States Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. NLRB* and then discusses the unclear legal realm in which undocumented workers now reside.¹³⁷ Further, this section evaluates the parallels between the history of African Americans and women with the current uncertainty faced by undocumented

Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives, 88 N.C. L. REV. 1799, 1823 (2010) (noting deportation “undermines the cornerstone of stated U.S. immigration policy—family reunification”).

¹³³ See STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1225–28 (5th ed. 2009) (noting the debate over whether driver's licenses are meant to enforce immigration laws or maintain public safety by ensuring a minimal level of experience); Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 218–20 (2004) (discussing the legal and societal implications of undocumented immigrants receiving driver's licenses).

¹³⁴ Núñez, *supra* note 14, at 848; see Ellen Dannin, *Hoffman Plastics as Labor Law—Equality At Last for Immigrant Workers?*, 44 U.S.F. L. REV. 393, 412–13 (2009) (discussing the *Hoffman* Court's focus on immigration status as the determining factor as to the availability of remedies and arguing such a focus was irrelevant to the NLRA); Brackman, *supra* note 32, at 725 (noting that protections under the NLRA vary depending on one's immigration status).

¹³⁵ Núñez, *supra* note 14, at 863; see Cunningham-Parmeter, *supra* note 9, at 1363–64 (noting that since *Hoffman*, employers have attempted to expand the Court's holding to further limit the remedies available to undocumented workers); Griffith, *supra* note 101, at 160 (discussing how excluding undocumented workers from union-related activities hurts their legally employed counterparts by diminishing the collective bargaining power of the group).

¹³⁶ See Núñez, *supra* note 14, at 863 (discussing how the encroachment of the status-based approach garners inconsistent and unpredictable legal outcomes and creates a reality in which immigration policy is undermined); Pham, *supra* note 14, at 1119–20, 1153–54 (noting the creation of “a new paradigm, where immigration borders are moving and multiple, affecting all residents, both in the interior and at the boundaries of the United States” and how these borders are detrimental to the rights of undocumented workers); *infra* notes 140–44 and accompanying text.

¹³⁷ See *infra* notes 145–55 and accompanying text (discussing the implications of *Hoffman*); *infra* notes 156–60 and accompanying text (addressing the tenuous nature of life as an undocumented worker); see also David L. Hudson, Jr., *Tales of Hoffman*, 92-DEC A.B.A. J. 12, 12, 14 (2006) (noting the concern that courts have misinterpreted *Hoffman* and expanded its holding too far); Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 157 (2009) (discussing how “undocumented immigrants are perpetually at risk of apprehension, arrest, detention, and deportation”).

workers.¹³⁸ This section concludes with a consideration of potential solutions to the problems created by *Hoffman*.¹³⁹

By failing to provide undocumented workers who are victims of illegal employer actions with any substantial remedy, the *Hoffman* decision embodies a logical disconnect between law and remedy and removes much of the punitive bite Congress delegated to administrative agencies in the NLRA and similar statutes.¹⁴⁰ In doing so, the United States Supreme Court implicitly relegated the undocumented worker to a sub-class of societal membership, which is simultaneously protected by and excluded from the laws of the United States.¹⁴¹ Undocumented workers are protected by the NLRA, but *Hoffman* limits their recourse.¹⁴² Under the current legal regime, immigration status, more than any other categorization or trait, determines the rights of the undocumented worker.

Hoffman and its progeny indicate a shift toward the status-centric approach, which limits the rights of workers based on their immigration status.¹⁴³ Limiting the rights of undocumented workers based on their status tolerates exploitation by unscrupulous employers, allows discrimination based on perceived immigration status, and negatively affects the entire workforce.¹⁴⁴ Further, the shift toward a status-centric approach creates confusion and inconsistencies in other areas of law.

¹³⁸ See *infra* notes 161–73 and accompanying text.

¹³⁹ See *infra* notes 179–85 and accompanying text.

¹⁴⁰ *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 156–57 (2002) (Breyer, J., dissenting) (noting that withholding remedies from undocumented workers “leave[s] helpless the very persons who most need protection from exploitative employer practices”); see Walsh, *supra* note 8, at 333–39 (explaining the *Hoffman* Court’s error in ignoring the congressional intent behind the IRCA and how that error negatively affects the NLRB’s discretionary powers).

¹⁴¹ See, e.g., Núñez, *supra* note 14, at 853–54 (discussing the manner in which *Hoffman* leaves undocumented workers in a “no-man’s-land” by deeming them protected by the NLRA, yet precluding the availability of a remedy); Walsh, *supra* note 8, at 339 (noting a loss of labor law protections affects “an entire class of people”).

¹⁴² *Hoffman*, 535 U.S. at 148–49.

¹⁴³ See Núñez, *supra* note 14, at 849–50; *infra* note 152 and accompanying text.

¹⁴⁴ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984) (“Application of the NLRA helps to assure that the wages and employment conditions of *lawful residents* are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.” (emphasis added)); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737, 739 (2003) (discussing how withholding remedies from undocumented workers “dichotomize[s] two bodies of law, ultimately trouncing worker protections in the name of immigration control”); Griffith, *supra* note 101, at 160; Lewinter, *supra* note 51, at 537; Núñez, *supra* note 14, at 863 (noting how maintaining separate standards for documented and undocumented workers “erode[s] workplace standards for all employees”); Walsh, *supra* note 8, at 339–40.

Undocumented workers live a precarious life in the United States.¹⁴⁵ The promise of better jobs with higher wages attracts workers from all parts of the world.¹⁴⁶ Many of these workers are unable to obtain proper documentation, yet enter the United States nonetheless.¹⁴⁷ Their method of entry is certainly illegal, yet many consider their very existence—not just their physical presence in the United States—illicit¹⁴⁸ and contend that undocumented workers steal jobs from the legal American workforce.¹⁴⁹ Yet these very same workers often fill valuable and needed roles in American society.¹⁵⁰ If the trend toward a strictly status-based

¹⁴⁵ See Cunningham-Parmeter, *supra* note 9, at 1362 (discussing the conditions that attract undocumented workers to the United States as well as the growing hostility toward their presence); Lewinter, *supra* note 51, at 509 (noting while many undocumented workers receive low wages and suffer poor working conditions, they are often afraid to report such abuses for fear of retaliation or deportation).

¹⁴⁶ *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting) (noting the “attractive force of employment, which like a ‘magnet’ pulls illegal immigrants toward the United States”); see Phi Mai Nguyen, Comment, *Closing the Back Door on Illegal Immigration: Over Two Decades of Ineffective Provisions While Solutions Are Just a Few Words Away*, 13 CHAP. L. REV. 615, 623–24 (2010) (noting the most influential factor in undocumented immigration is lucrative job opportunities); see also JEFFREY S. PASSEL & D’VERA COHN, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 21 (2009) (finding that while the majority of undocumented immigrants come from Mexico and other Latin American countries (81%), significant portions of the undocumented population come from Asia (11%), the Middle East (under 2%), and Europe (over 4%)).

¹⁴⁷ See Lipman, *supra* note 125, at 11–13 (discussing how the demand for immigrant workers exceeds the availability of green cards or other forms of obtaining legal immigration status, thereby resulting in large numbers of undocumented workers); Nguyen, *supra* note 146, at 623–24 (noting the economic incentives for entering the United States illegally often outweigh the risks of life as an undocumented worker in the minds of potential immigrants).

¹⁴⁸ See 8 U.S.C. § 1325 (2006) (subjecting an alien that “enters or attempts to enter” the United States illegally to a fine, imprisonment, or both); Legomsky, *supra* note 137, at 144–45 (discussing the ways in which immigration violations are viewed differently from other violations of law). Despite illegal entry being a misdemeanor under 8 U.S.C. § 1325(a), undocumented workers are often considered egregious lawbreakers, and by extension their presence is deemed illegal. Legomsky, *supra* note 137, at 144–45; see also EDMUND CAHN, *Law in the Consumer Perspective, in CONFRONTING INJUSTICE: THE EDMOND CAHN READER* 15, 26 (Lenore L. Cahn ed., 1966) (noting the manner in which the law reduces complex matters to overly simplistic truths using the example of how a juvenile delinquent is labeled a lawbreaker, ignoring “what else he may be”); Cunningham-Parmeter, *supra* note 9, at 1401 (noting how undocumented workers are viewed as violators that threaten “democracy and membership for those lawfully present”).

¹⁴⁹ See Paul Weiler, *Enhancing Worker Lives Through Fairer Labor and Worklife Law in Comparative Perspective*, 25 COMP. LAB. L. & POL’Y J. 143, 147–48 (2003) (claiming illegal immigrants cause a “major competitive problem” for the legal workforce); Brackman, *supra* note 32, at 717 (noting that undocumented workers “flood” job markets, leaving fewer and fewer jobs for legal residents); Nguyen, *supra* note 146, at 619 (observing that many in the United States consider undocumented immigrants a threat to legal job-seekers and a burden on the system).

¹⁵⁰ PASSEL & COHN, *supra* note 146, at iv. Undocumented workers comprise substantial portions of the farming, construction, and food service industries. *Id.*; see also Orrin Baird, *Undocumented Workers and the NLRA: Hoffman Plastic Compounds and Beyond*, 19 LAB. LAW. 153, 160 (noting that forty-eight percent of agricultural workers are undocumented); Cunningham-Parmeter, *supra*

conception of membership continues, undocumented workers will find themselves even further removed from the protections of the laws of the United States.¹⁵¹

Subsequent cases have attempted to extend the *Hoffman* majority's reasoning to broader issues such as the issuance of driver's licenses to undocumented immigrants, inquiries into immigration status during discovery in discrimination suits, workers' compensation, and changing definitions of "employee."¹⁵² This trend further destabilizes the rights of undocumented workers through a presumption that their physical presence in the United States challenges notions of membership.¹⁵³ They are physically present, yet legally invisible; they have

note 9, at 1362 (explaining how undocumented workers are "wanted yet disdained, needed yet derided"); Nguyen, *supra* note 146, at 615 (arguing the historical disdain for immigrants in the United States has been translated into policies focused on stifling illegal immigration).

¹⁵¹ Lenni Benson, *The Invisible Worker*, 27 N.C. J. INT'L L. & COM. REG. 483, 484 (2001). Benson, while discussing the potential pitfalls of focusing entirely on the undocumented worker's immigration status, notes:

Legal definitions not only define who is a legal immigrant but also, by necessity, create the converse—the "illegal" or undocumented workers . . . [They] go far beyond being mere labels, and instead become the building blocks of legal status, creating intentional and unintentional interactions with other laws such as criminal law, family law, tax law, and labor and employment law. These labels . . . give rise to a *class of invisible people*: People who do not fit within the legal system . . . existing in an underground world—a world of invisible workers.

Id. (emphasis added); see Cunningham-Parmeter, *supra* note 9, at 1414 (noting the Supreme Court's portrayal of remedial relief for undocumented workers as the rewarding of illegal behavior threatens to further the decline in undocumented workers' rights); Pham, *supra* note 14, at 1121 (arguing that by requiring proof of immigration status at various junctures within the United States' borders, the trend toward status-based membership threatens to banish undocumented workers from the periphery of society to the exterior).

¹⁵² *Rivera v. Nibco, Inc.*, 384 F.3d 822, 823 (9th Cir. 2004) (Bea, J., dissenting) (arguing that allowing the plaintiff to bar inquiries into her immigration status during pretrial discovery was contrary to federal immigration law); *Sanchez v. Iowa*, 692 N.W.2d 812, 821 (Iowa 2005) (confirming the legality of Iowa's "practice of denying driver's licenses to illegal aliens"); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331–32 (Minn. 2003) (Gilbert, J., dissenting) (arguing that providing disability benefits to an injured undocumented worker would "reward him for staying in the United States illegally and encourage him to violate IRCA by finding further employment"); *Crespo v. Evergo Corp.*, 841 A.2d 471, 476–77 (N.J. Super. Ct. App. Div. 2004) (holding a claim for discriminatory termination brought by an undocumented worker could not survive because her immigration status served as a statutory bar to employment, which precluded any damages pursuant to her termination); see *Hudson*, *supra* note 137, at 12, 14; *Johnson*, *supra* note 133, at 219–20 (noting that courts are hesitant to invalidate laws precluding undocumented immigrants from obtaining driver's licenses).

¹⁵³ See Núñez, *supra* note 14, at 817; Pham, *supra* note 14, at 1152 (noting immigration status now forms the primary division between the people that "belong in our national community" and those that should remain outside because they have not been granted the community's permission to stay); see also Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 335 (discussing the ways in which immigration issues challenge notions of community and communal values).

some minimal rights, but no means of enforcing those rights.¹⁵⁴ Because a status-based approach creates a class of undocumented workers simultaneously included in American society but excluded from its legal system, *Hoffman* and its progeny threaten to push those workers further into the shadows.¹⁵⁵

This dualistic existence leaves undocumented workers in an undefined realm.¹⁵⁶ They have some rights, but not others; the law is unclear.¹⁵⁷ This is known as partial inclusion.¹⁵⁸ An undocumented worker enjoys some basic rights without obtaining any level of official immigration status.¹⁵⁹ Yet this lack of immigration status prevents workers from obtaining and exercising other rights.¹⁶⁰

The partial inclusion of African Americans and women in the United States legal system—often seen as proof that the system merely serves to maintain the status quo of political power—demonstrates the inverse of the undocumented worker’s predicament.¹⁶¹ These groups, unlike undocumented workers, were protected by the immigration regime because they were citizens but were nonetheless denied certain civil rights.¹⁶² Given their status as citizens, however, the progress of women and African Americans had a legal foundation for advancing change unavailable to undocumented workers. In particular, the civil rights movement illuminates the manner in which the legal system addresses groups claiming some form of discrimination.¹⁶³ Generally, such issues are viewed in one of two ways: from the perpetrator perspective or the victim perspective.¹⁶⁴

¹⁵⁴ See Benson, *supra* note 151, at 484; Pham *supra* note 14, at 1163 (discussing how using immigration status as a key to defining membership affects both documented and undocumented workers alike).

¹⁵⁵ See Hudson, *supra* note 137, at 12, 14; Lipman, *supra* note 125, at 1–7 (noting that undocumented immigrants are required to pay taxes yet are barred from government benefits).

¹⁵⁶ See Núñez, *supra* note 14, at 853.

¹⁵⁷ See Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 40 (2008).

¹⁵⁸ Cunningham-Parmeter, *supra* note 9, at 1403.

¹⁵⁹ See Cunningham-Parmeter, *supra* note 9, at 1363; Núñez, *supra* note 14, at 819.

¹⁶⁰ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

¹⁶¹ See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.C.L. REV. 323, 327–28 (1987) (“[L]egal ideals are manipulable and [the] law serves to legitimate existing maldistributions of wealth and power . . . [which] rings true for anyone who has experienced life in non-white America.”).

¹⁶² Cunningham-Parmeter, *supra* note 9, at 1402–03.

¹⁶³ See Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 525–26 (2000) (noting the traces of racial discrimination present in immigration law and policy); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 *passim* (2010) (analogizing the discriminatory effects Jim Crow laws had on African-Americans to contemporary anti-immigration laws’ effects on Latinos).

¹⁶⁴ See generally Alan Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW 121 (David Kairys ed., 1990) [hereinafter Freeman I] (using the victim/perpetrator framework

The perpetrator perspective, a dominant force in American jurisprudence, is employed when laws are crafted to detect and punish individual violators.¹⁶⁵ The perpetrator perspective assumes that society as a whole is functioning properly and that “all we need do is identify and catch villains.”¹⁶⁶ In the context of civil rights this meant that by passing legislation, which focused on racist violators of civil rights laws, the rest of society no longer bore any responsibility for the deeply ingrained and residual problems of racism.¹⁶⁷ Yet a legal regime focused solely on apprehending and punishing a particular perpetrator often overlooks the actual problem.¹⁶⁸

to analyze Supreme Court antidiscrimination doctrine from the 1950s through the 1980s); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1977) [hereinafter Freeman II]. Edmund Cahn discusses an analogous dichotomy. See CAHN, *supra* note 148, at 15–31 (explaining the “imperialist” and “consumer” perspectives). Cahn’s “imperialist” perspective assumes the point of view of government officials and seeks to instill efficiency and order. *Id.* at 17, 24. The “consumer” perspective, on the other hand, analyzes a law or principle according to the perspective of its targeted audience and how it affects the community. *Id.* at 25.

¹⁶⁵ See Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579, 597 (2010) (acknowledging the law’s “deep investment” in the perpetrator perspective and how it weakens the law’s ability to effectively address discrimination); Freeman I, *supra* note 164, at 125 (noting the dominant role of the perpetrator perspective); Namoi Murkakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 LAW & SOC’Y REV. 695, 700–01 (2010) (describing the perpetrator perspective); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 676 (2005) (noting the manner in which employment discrimination law is characterized by the perpetrator perspective).

¹⁶⁶ Freeman I, *supra* note 164, at 125; see Jerry Kang, *Implicit Bias and the Pushback from the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–47 (2010) (noting the perpetrator perspective’s erroneous focus on “the misfiring neurons in a few pathological individuals”); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1069 (2010) (noting “when conceptualized as bad acts by bad persons,” conceptions of racism and discrimination overlook “disparate social outcomes”); Nielson & Nelson, *supra* note 165, at 676 (“[L]aw has the more limited purpose of remedying specific intentional wrongs, rather than redressing systemic aspects of discrimination and inequality . . .”).

¹⁶⁷ See Freeman II, *supra* note 164, at 1073–74 (discussing the assumption that outlawing a practice indicates that practice was a deviation from the norm, which in turn implies the status quo precludes the practice). Accordingly, by simply passing anti-discrimination laws, society believes it is reinforcing an already existing norm. See *id.*; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 325 (1987) (describing the perpetrator perspective mindset that if the law no longer discriminates, society is not responsible for a group’s “subordinate position”); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 311–12 (1990) (“[We] can claim the mantle of innocence *only by denying the charge of racism*. We as white persons and nonracists are innocent; we have done no harm to those people and do not deserve to suffer for the sins of the other, not innocent white people who were racists.” (emphasis added)).

¹⁶⁸ See CAHN, *supra* note 148, at 26 (noting how the law would benefit greatly from a “sensibility to human impacts”); Kang, *supra* note 166, at 1147 (arguing the perpetrator perspective is overly narrow and that society should look beyond “individual pathologies”); López, *supra* note

The victim perspective is concerned with the social conditions associated with a problem instead of the individual violators of a particular law.¹⁶⁹ When social conditions plaguing an adversely affected group of people persist despite passage of a new law designed to prevent such conditions, that law is deemed ineffective.¹⁷⁰ Instead of focusing on violations, the victim perspective proposes adopting laws and policies that effectuate change in social conditions.¹⁷¹ Thus, the victim perspective looks to actual results in the day-to-day lives of an adversely affected group, while the perpetrator perspective presupposes that the work has been done: as soon as the legislation was signed into law, society changed.¹⁷²

The *Hoffman* decision reinforces the perpetrator perspective. Under *Hoffman*, the undocumented worker's entry and presence renders him the original perpetrator.¹⁷³ As such, the illegal immigrant, having never attained legal status, is always and already violating the rule of law. This reductive approach portrays an overly narrow-sighted depiction of the undocumented worker by fixing his identity to an illegal presence, by making him a perpetual perpetrator.

166, at 1069 (noting the perpetrator perspective “is neither natural nor obvious . . . [and] ultimately supplanted a developing structural conception of racial hierarchy”); Rebecca Davis, Comment, *Opportunistic Hate Crimes Targeting Symbolic Property: When Free Speech Is Not Free*, 10 J. GENDER RACE & JUST. 93, 104 (2006) (“When society views the hate act as ‘rational’ or as a ‘logical’ extension of a crime in process, rather than extreme or deviant, society itself ‘contributes to and reinforces the social environment that makes the practices seem useful or sensible to perpetrators.’” (quoting Lu-in Wang, “Suitable Targets”? *Parallels and Connections Between “Hate” Crimes and “Driving While Black”*, 6 MICH. J. RACE & L. 209, 235 (2001))).

¹⁶⁹ See Arkles et al., *supra* note 165, at 597 (describing how the victim perspective views the problem as “those conditions of actual social existence as a member of an underclass”); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 970 (2002) (noting, in the context of racial discrimination in police searches, that the victim perspective is not concerned with individual “bad cop[s],” but rather with how race shapes the societal interactions between “police officers and nonwhite persons”); Freeman II, *supra* note 164, at 1053 (“[T]he problem will not be solved until the conditions associated with it have been eliminated.”).

¹⁷⁰ See Freeman I, *supra* note 164, at 125; Lawrence, *supra* note 167, at 324 (arguing that anti-discrimination laws focused solely on culpably racist individuals lead “us to think about racism in a way that advances the disease rather than combating it”).

¹⁷¹ See Freeman II, *supra* note 164, at 1053 (noting actions to remedy racial discrimination should be centered around “affirmative efforts to change the condition”). Similarly, Cahn’s “consumer perspective” requires a consideration of the needs of those affected by the law. See CAHN, *supra* note 148, at 27.

¹⁷² See Freeman I, *supra* note 164, at 1053 n.16 (discussing the differences between the two perspectives); Cecil J. Hunt, II, *Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 509–10 (2006) (noting the victim perspective “focuses on the injury or loss suffered by the victims,” while the perpetrator perspective “reinforces the notion that racism is primarily a function of individual actors”).

¹⁷³ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 150–51 (2002) (noting the plaintiff’s presence was in itself a violation of the law); Cunningham-Parmeter, *supra* note 9, at 1414 (discussing how focusing on immigration status at the expense of other statuses is harmful).

If the undocumented worker is depicted as the perpetrator—if by his mere presence he is the signifier of problems resulting from illegal immigration and deemed to be illegal—then society no longer bears the responsibility of addressing the problems underlying illegal immigration.¹⁷⁴ If membership derives solely from one's immigration status, then the problems of illegal immigration will not simply remain unfixed; they will become exacerbated.¹⁷⁵ The status-centric approach frames the issue of the undocumented worker's rights in such a way that punishing and excluding those undocumented workers would solve the much larger problems of illegal immigration.¹⁷⁶ Yet by dissuading workers from demanding (or at least denying their ability to exercise) employment rights, this approach encourages employers to continue hiring undocumented workers.¹⁷⁷ If an employer can violate labor and employment laws knowing an undocumented worker has fewer means of legal retribution, she would be more likely to hire an illegal worker than his legal counterpart.¹⁷⁸ In this way, the entire workforce is affected.

To address the problem at its root, energy must first be devoted to stabilizing the current system. Given the uncertainty of a status-centric approach to assigning rights to undocumented workers, bestowing the rights afforded to all documented workers on those without proper documentation would strengthen the system.¹⁷⁹

¹⁷⁴ See Dannin, *supra* note 134, at 400–03 (noting that in *Hoffman*, the United States Supreme Court shifted blame from the NLRA-violating company to the undocumented worker victim); Freeman I, *supra* note 164, at 1055 (discussing how the perpetrator perspective allows others in society to “not feel any personal responsibility for the conditions associated with discrimination”).

¹⁷⁵ See Freeman I, *supra* note 164, at 1055 (noting that society feels a strong resentment for bearing the costs of eradicating discriminatory conditions, particularly when those costs are traditionally imposed on guilty parties); Hagan et al., *supra* note 132, at 1822–23 (noting stricter immigration enforcement adversely affects business, families, and communities).

¹⁷⁶ *Hoffman*, 535 U.S. at 150 (“Indeed, awarding backpay in a case like this not only trivializes immigration laws, it also condones and encourages future violations.”).

¹⁷⁷ See Griffith, *supra* note 101, at 140–41 (noting the negative effects of the current immigration scheme as being “catastrophic for the labor rights of immigrant and U.S. workers” (emphasis added) (quoting Rebecca Smith & Catherine Ruckelhaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEG. & PUB. POL’Y 555, 557 (2007))); Lewinter, *supra* note 51, at 537 (arguing that *Hoffman* allows employers to violate labor laws and encourages exploitation of undocumented workers).

¹⁷⁸ See Lewinter, *supra* note 51, at 537; Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 U.C.L.A. L. Rev. 1963, 1964 (2007) (“[M]any employers actually prefer to hire immigrants rather than U.S. workers, believing that the former are more easily exploitable.”). Employer preference for undocumented workers has given rise to a new breed of discrimination claims brought by U.S. workers against employers thought to hire according to immigration status. See Bloomekatz, *supra*, at 1985.

¹⁷⁹ See Núñez, *supra* note 14, at 853–54 (discussing how immigration status has “seeped” into many areas of the law, creating complex “new dimension[s]” of litigation); Walsh, *supra* note 8, at 339 (discussing how workers have historically depended on the labor and employment laws to maintain consistent working conditions); Brackman, *supra* note 32, at 728 (noting that *all* employees are affected when an alien is prohibited from exerting certain rights).

Giving undocumented workers equal rights in the employment sector would deter discriminatory labor practices and improve conditions for all workers by removing incentives for employers to hire undocumented workers or utilize illegal practices.¹⁸⁰ With that in mind, it may also discourage those considering illegal entry from doing so.¹⁸¹

Solutions to problems created by and related to withholding remedial rights from undocumented workers may come in several forms. Courts could limit the holding of *Hoffman* to a very narrow set of factual circumstances. This approach, however, would nonetheless allow employers to hire and discriminate against undocumented workers.¹⁸² Given the statutory origins of the problem, a legislative solution would provide a more thorough treatment.

The legislature should amend IRCA to include language expressly preventing immigration status from trumping rights otherwise afforded under labor and employment statutes. The legislative history behind IRCA supports such a clarification of the statute's scope and limitations.¹⁸³ In doing so, Congress could dispel the ubiquitous confusion regarding the interaction between the IRCA and the NLRA, FLSA, and other statutes.¹⁸⁴ Further, express language will bolster the policies supporting the various statutes by simultaneously discouraging behavior those statutes aim to curb.¹⁸⁵

¹⁸⁰ See Walsh, *supra* note 8, at 338–39 (asserting that excluding undocumented workers from the protections of labor and employment laws would “open the floodgate for serious abuses by employers along with a depression of wages”); Brackman, *supra* note 32, at 729–30 (discussing the problems associated with denying undocumented workers remedies under the NLRA); Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation*, 19 HOFSTRA LAB. & EMP. L.J. 351, 376 (noting labor and employment law’s dual goals of deterring violations and compensating victims).

¹⁸¹ See *Hoffman*, 535 U.S. at 155–56 (Breyer, J., dissenting) (noting that withholding back pay “could not significantly increase the strength of [the] magnetic force” that attracts undocumented workers to the United States); Harris, *supra* note 97, at 928–29 (noting that enforcing both immigration and labor laws will weaken employer incentives to hire undocumented workers).

¹⁸² See Lewinter, *supra* note 51, at 537 (noting the *Hoffman* decision “rewards employers who hire workers that they suspect have falsified documents by allowing these employers to flout NLRA protections without sanction”).

¹⁸³ H.R. REP. NO. 99-682 (II), at 5758 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5758 (“[T]he committee does not intend that any provision of this Act would limit the powers . . . to remedy unfair practices committed against undocumented employees . . .” (emphasis added)); see *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988) (noting that in section 111(d) of the IRCA, “Congress specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented workers”).

¹⁸⁴ See Nguyen, *supra* note 146, at 639 (noting the confusion in lower courts since the United States Supreme Court’s decision in *Hoffman*).

¹⁸⁵ See *Hoffman*, 535 U.S. at 153 (Breyer, J., dissenting) (“[I]t reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent.”).

IV. CONCLUSION

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the United States Supreme Court could have clarified an extremely confused area of the law. Instead, it blurred the relationship between immigration, labor, and employment law even further.¹⁸⁶ The NLRA and other statutes have specific definitions of “employee,” all of which are extremely broad.¹⁸⁷ Immigration law remained silent on the issue of undocumented workers until Congress passed the IRCA.¹⁸⁸ In *Hoffman*, the Court focused on the illegal presence, employment, and continued stay of an undocumented worker, citing national immigration policy as the impetus for this focus.¹⁸⁹ The Court’s decision pushed undocumented workers further into the netherworld of illegal immigration by depriving them of legally prescribed remedies.¹⁹⁰ In reality—and contrary to the majority’s contention—the holding in *Hoffman* did not bolster workers’ rights and immigration policy; it undermined them by focusing solely on immigration status.¹⁹¹

Concern over the effects of illegal immigration on American job markets remains a hot-button political issue as well as a source of much legal contention.¹⁹² As efforts to combat a perceived torrent of illegal immigrants are taken up by the states,¹⁹³ the federal government remains undecided on how to proceed. Unless corrected, the disconnect between labor, employment, and immigration law will only lead to greater uncertainty. Issues ranging from employment verification systems and collective bargaining to driver’s licenses and the right to education will remain unsettled. In order to harmonize these statutory frameworks, Congress should act to provide undocumented workers with the full protections of labor and employment laws and expressly forbid the IRCA from allowing immigration status to preclude the remedies Congress sought to provide.¹⁹⁴

¹⁸⁶ See Garcia, *supra* note 144, at 744 (noting the *Hoffman* Court “highlighted the ineffectiveness of immigration law, and labor law’s inability to protect all workers”); *supra* notes 140–60 and accompanying text.

¹⁸⁷ See *supra* notes 29–95 and accompanying text (discussing these statutory frameworks).

¹⁸⁸ See *supra* notes 102–10 and accompanying text (discussing relevant immigration statutes and case law).

¹⁸⁹ See *supra* notes 111–24 and accompanying text (discussing *Hoffman*).

¹⁹⁰ See *supra* notes 145–51 and accompanying text.

¹⁹¹ See *supra* notes 143–85 and accompanying text (discussing the dangers posed by *Hoffman* to immigration, employment, and labor laws).

¹⁹² See, e.g., Tamar Jacoby, Editorial, *Immigration Reform: A State-by-State Approach Might Break the D.C. Logjam*, LATIMES.COM (Mar. 25, 2011), <http://articles.latimes.com/2011/mar/25/opinion/la-oe-jacoby-utah-20110325>; *Your World with Neil Cavuto: Interview with Wyoming Senator John Barrasso* (Fox News Network television broadcast Aug. 2, 2010), available at http://www.youtube.com/v/RO5OdtgROiA?f=videos&app=youtube_gdata (discussing illegal immigration, Senator Barrasso stated, “The American people don’t want these folks, who are criminals, who have come to this country illegally . . .”).

¹⁹³ See *supra* notes 11–13 and accompanying text.

¹⁹⁴ See *supra* notes 179–85 and accompanying text.