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Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of *Hoffman Plastic*, its Predecessors and its Progeny

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This piece focuses on the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. National Labor Relations Board. In Hoffman, the Court held that undocumented workers discharged in violation of the National Labor Relations Act could not recover back pay because the Immigration Reform and Control Act of 1986 (the "IRCA") trumped the National Labor Relations Act (the "NLRA"). This holding threatened the rights of undocumented workers in other contexts, for if the IRCA could trump the NLRA, then potentially it could be cited as the basis for a broader scale-back of immigrant rights.

We argue that the Supreme Court reached the wrong result in Hoffman because it did not analyze the interaction of immigration and labor law at issue in the case through an implied repeal paradigm. Moreover, we contend

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that application of this framework in the case, and in those cases that preceded it, would have lent clarity to this body of law and laid a solid groundwork for lower court judges, who have so far been unsuccessful in grappling with Hoffman's dubious reasoning.

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I.
INTRODUCTION

On March 27, 2002, the United States Supreme Court issued an opinion that portended a great shift in employment and immigration law. In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, the Court held that undocumented immigrant workers could not recover back pay for unearned wages as a remedy for discharge in violation of the

National Labor Relations Act (the "NLRA").[1] Unfortunately, the *Hoffman* decision offered little of value in a troubled area of the law. The reasoning of both the majority and dissent was unsatisfying; the opinion provided a result, but little guidance. The reason for this was that in *Hoffman*, and in the precedent on which it relied, the Supreme Court failed to base its analysis on the doctrine of implied repeal. As we will argue, had the Court adopted this framework in the *Hoffman* case and in prior precedent, and applied long-standing and widely accepted canons of statutory construction relating to implied repeals, the legal doctrine in this area would have been much clearer.

Implied repeal analysis arose out of the common law as a way for courts to adjudicate cases where they are called upon to resolve the uncertainty that is created when a legislature has enacted two statutes that potentially conflict.[2] The reason that this paradigm is appropriate in *Hoffman* is that the decision was not based solely on the NLRA, but rather it turned on the interaction of the NLRA with the Immigration Reform and Control Act of 1986 (the "IRCA"), which seeks to prevent the employment of undocumented immigrants. Because granting undocumented immigrants the right to back pay as a remedy under the NLRA would effectively condone violation of the IRCA, the Supreme Court reasoned that providing such awards "to illegal aliens runs counter to policies underlying [the] IRCA, policies that the [National Labor Relations] Board has no authority to enforce or administer."[3] The decision to strike down the remedy on this basis, however, lacked broad support within the Court – *Hoffman* was decided by a 5-4 split.[4]

Since the issuance of the opinion, the lower courts have struggled to define its limits, and it has been condemned by legal commentators. Most have criticized the *Hoffman* majority opinion on the same basis as the dissent – arguing that there was no language in the IRCA that mandated the result, that the Court's holding increased the employment of undocumented workers by making them more attractive for employers to hire (because they had no recourse under the NLRA), and that there was no precedent to support the Court's decision.[5]

However, neither the dissent nor the pundits present a particularly satisfying argument. While there is no language in the IRCA that mandates the majority's opinion, there is also no language in the IRCA that supports

1. 535 U.S. 137, 151 (2002).

2. *See, e.g.*, Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503-05 (1936).

3. *Hoffman*, 535 U.S. at 149.

4. *Id.* at 139.

5. *See, e.g.*, Christopher Ho & Jennifer C. Chang, *Drawing the Line after Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473, 488-90, 516 (2005); Christopher David Ruiz Cameron, *Borderline Decisions, Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 10 (2003).

the dissenters. Similarly, the policy argument concerning the impact of back pay on the employment of unauthorized workers is nothing more than a theory without empirical support. Finally, the precedent in this area is not dispositive – the case law supports both sides. Following the two sides is like trying to watch two boxers fight in a dimly lit arena in that it is neither satisfying nor can any meaningful conclusions be drawn from it.

This Article sharpens the analysis of *Hoffman* by recasting it from a case about competing policy concerns and contrasting views of questionable precedent into one concerning the proper outcome when two statutes interact. Using implied repeal analysis in *Hoffman* to answer this question leads to a conclusion contrary to that of the majority – one that is in line with implied repeal precedent and supported by a clear analysis that lends itself to straightforward application by lower courts. Moreover, through application of this framework, we are able to see where the majority and prior cases went wrong, and why the dissent, although its arguments do not seem to hit solid blows, nonetheless has intuitive appeal.

The first part of this Article explains the state of the law prior to *Hoffman* and the *Hoffman* decision itself. After that, we present an argument that *Hoffman* is indeed a case about implied repeal, despite no mention of the doctrine by the Court. Next, we explain and apply the basic tenets of implied repeal and show how their application undermines the majority's argument and buttresses the dissent. As part of this discussion, we address the majority's reliance on precedent, and why it is misplaced. Then we turn to the impact of *Hoffman*. In the section that follows, we detail the struggle that post-*Hoffman* cases have had in attempting to interpret the decision, and explain how much cleaner things would have looked if the Supreme Court had followed our approach. In the final section, we briefly discuss the boundaries of implied repeal, focusing on how the paradigm fits in with other tools of statutory construction, and showing how the dissent's use of legislative history bolsters our conclusion.

II.
LEGAL DOCTRINE LEADING UP TO *HOFFMAN* AND THE *HOFFMAN* DECISION

A. Pre-Hoffman Case Law

Before *Hoffman*, the federal appellate courts were split over the issue of whether back pay could be awarded to unauthorized workers when their employers had violated the NLRA.[6] The Second and Ninth Circuits had

6. *Hoffman*, 535 U.S. at 142 n.2.

held that such workers could recover back pay, while the Seventh Circuit had held the opposite.[7]

This circuit split may be surprising at first blush, in light of the fact that, since 1939, the United States Supreme Court has issued opinions on the general subject of whether employees who had engaged in illegal activities were eligible for remedies under the NLRA.[8] In fact, in 1984, the Court decided a case where a central issue was whether employees who were undocumented immigrants were entitled to back pay.[9] This line of precedent, however, failed to clearly define the law in this area, giving rise to the lack of consensus among the lower courts. Nonetheless, the *Hoffman* majority opinion traced the history of these cases.[10]

It began with two World War II-era decisions, one from 1939 and the other from 1942. In *NLRB v. Fansteel Metallurgical Corp.*, the employer had resisted efforts by its employees to organize a union.[11] In response, some of the employees instituted a sit-in strike, taking over the employer's facilities in the process.[12] The strikers refused to exit the premises, even when required to do so by a state court order, and eventually had to be forcibly removed.[13] The employer then fired all of the strikers, later rehiring only those willing to return to work without union recognition.[14] The National Labor Relations Board (the "Board" or the "NLRB") found that the employer's acts of resistance to the union-organizing activities of its employees and its discharge of some of the employees violated the NLRA. The Board ordered, among other relief, that the strikers who had not been rehired be reinstated with back pay.[15] The back pay at issue in *Fansteel* was quite limited – it was only for the period of time, if any, that the employer delayed granting reinstatement in accordance with an employee's request pursuant to the Board's order.[16] The Supreme Court eventually reversed the Board's order of reinstatement and back pay,[17] but did not analyze the narrower back pay issue. The *Hoffman* majority opinion quoted the *Fansteel* Court's reasoning:

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7. *Compare* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997), *and* Local 512, Warehouse and Office Workers' Union v. NLRB, 795 F.2d 705, 719-20 (9th Cir. 1986), *with* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121-22 (7th Cir. 1992).

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

9. *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).

10. *See Hoffman*, 535 U.S. at 142-46.

11. 306 U.S. at 247-49.

12. *Id.* at 248-49.

13. *Id.* at 249.

14. *Id.*

15. *Id.* at 250-51.

16. *In re* Fansteel Metallurgical Corp., 5 N.L.R.B. 930, 953 (1938).

17. *Fansteel*, 306 U.S. at 262-63 (setting aside the portion of the Board's order calling for reinstatement and back pay).

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, – to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.[18]

The Supreme Court was faced with a similar case three years later. In *Southern S.S. Co. v. NLRB*, the employer ship-owner refused to bargain with the National Maritime Union, which had been certified by the Board as the bargaining representative of the seamen employees.[19] In response, several members of the crew on one of the employer's ships went on strike, refusing to do their jobs, even when ordered to do so by the ship's captain.[20] Although the strikers committed no acts of violence and did not interfere with the ship's business, the ship's captain decided not to rehire five of the strikers after the strike eventually ended.[21] The Board later held that the owner's refusal to bargain with the sailors and the ship captain's failure to rehire the five strikers constituted unfair labor practices violative of the NLRA, and ordered that the employer, among other remedies, reinstate the five strikers with back pay.[22]

The Supreme Court disagreed with the Board, first noting that "[e]ver since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land."[23] Because the strikers were seamen who struck while employed aboard a ship, their actions constituted a mutiny in violation of the Federal Criminal Code.[24] The Supreme Court reasoned that because the remedy granted was inconsistent with federal criminal law in this regard, an order of reinstatement was beyond the bounds of the Board's discretion[25] (the Court overturned, but did not specifically address the propriety of the back pay award).[26] In defense of its holding, the Court in *Southern S.S. Co.* stated: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important [c]ongressional objectives."[27]

The *Hoffman* majority specifically relied upon the above-quoted portion of the *Southern S.S. Co.* opinion.[28]

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18. *See Hoffman*, 535 U.S. at 143 (quoting *Fansteel*, 306 U.S. at 255).
19. 316 U.S. at 32-33.
20. *Id.* at 34-35.
21. *Id.* at 35.
22. *Id.* at 36.
23. *Id.* at 38.
24. *Id.* at 39-40.
25. *Id.* at 46-48.
26. *Id.* at 49.
27. *Id.* at 47.
28. *Hoffman*, 535 U.S. at 143-44.

While both *Fansteel* and *Southern S.S. Co.* suggested that NLRA reinstatement remedies, and perhaps even back pay, would not be available to undocumented aliens, another case decided more recently placed some doubt on that proposition. In the 1984 case *Sure-Tan, Inc. v. NLRB*, the Supreme Court concluded that the NLRA applied to undocumented workers.[29] In retaliation for their union-related activity, the defendant employers in *Sure-Tan* reported five undocumented employees to the Immigration and Naturalization Service (the "INS").[30] The employees left the country to avoid INS sanctions.[31] In adjudicating the dispute that followed, the Court found no conflict "between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act."[32] Nonetheless, the Supreme Court denied reinstatement to the employees on the grounds that they could not legally re-enter the country to return to work.[33] Likewise, the employees could not recover back pay "during any period when they were not lawfully entitled to be present and employed in the United States."[34]

The *Sure-Tan* opinion has been subject to conflicting interpretations. Defendant employers have argued that the plain language of *Sure-Tan* denies back pay to any alien who was "not lawfully entitled to be present and employed in the United States," which includes all undocumented immigrants.[35] Plaintiff employees have countered that the above language, when read in context, is meant to only bar recovery to undocumented workers who have left the United States and could not reenter lawfully.[36] At the time the Supreme Court took up the *Hoffman* case, the Circuit Courts were split with respect to the correct reading of the case.[37]

B. The Hoffman Decision

Hoffman involved an employee, Jose Castro, who was terminated in 1989 by his employer, Hoffman Plastic, after he participated in union-organizing activities at his workplace.[38] The Board found that Hoffman Plastic had violated the NLRA by discharging Castro (and several other employees) "in order to rid itself of known union supporters," and ordered that Castro be reinstated with back pay.[39] On the last day of a hearing to

29. Sure-Tan, 467 U.S. at 892.
30. *Id.* at 887.
31. *Id.*
32. *Id.* at 892.
33. *Id.* at 903.
34. *Id.*
35. *See, e.g., Hoffman*, 535 U.S. at 147.
36. *See, e.g., id.* at 146-47.
37. *See supra* note 7 and accompanying text.
38. 535 U.S. at 140.
39. *Id.* at 140-41.

determine the amount of back pay owed by Hoffman Plastic, however, Castro admitted that he had entered the United States illegally and had used fraudulent documentation in order to obtain employment with the company.[40] Armed with this new information, the employer argued that the order for reinstatement and back pay were beyond the Board's authority pursuant to *Sure-Tan*.[41] An administrative law judge agreed, but the Board reversed on the issue of back pay, choosing to grant this award to Castro, covering the time period between his illicit firing until his undocumented status came to light.[42] The case wound its way from the Board to the lower federal courts for years before it ultimately arrived at the Supreme Court some thirteen years after the worker was fired.[43]

Before the Supreme Court, the parties rehashed the arguments played out in numerous lower courts on the meaning of the key language from *Sure-Tan*: "not lawfully entitled to be present and employed in the United States." The Supreme Court, however, avoided the issue altogether and instead concluded that much had changed since the *Sure-Tan* decision:

> We need not resolve [the *Sure-Tan*] controversy. For whether isolated sentences from *Sure-Tan* definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed.... In 1986, two years after *Sure-Tan*, Congress enacted [the] IRCA, a comprehensive scheme prohibiting the employment of illegal aliens in the United States.[44]

The Court then held that the Board could not award back pay to undocumented workers because doing so contravened IRCA policies, which "the Board has no authority to enforce or administer."[45] Specifically, to further its policy goal of preventing the employment of undocumented workers, the IRCA prohibits employers from knowingly hiring undocumented workers, requires employers to seek certain evidence of work eligibility from prospective employees, and bars undocumented workers from tendering fraudulent papers to obtain employment.[46] Under this comprehensive scheme, to establish an employment relationship with an undocumented alien, either the employer or the alien must breach the

40. *Id.* at 141.

41. *Id.*

42. *Id.* at 141-42. However, the Board did not order Hoffman Plastic to reinstate Castro. *Id.* at 141.

43. *Id.*

44. *Id.* at 147.

45. *Id.* at 148-49.

46. *Id.* at 148.

IRCA.[47] According to the Court, to award back pay for violation of the NLRA in such cases would "trivialize" the IRCA's goals.[48]

Furthermore, the majority argued that an award of back pay to unauthorized immigrant workers "condones and encourages future violations" of U.S. immigration laws.[49] For example, the Court pointed out that it was undisputed that if Castro had left for Mexico, under *Sure-Tan*, he would be ineligible for reinstatement and back pay.[50] Thus, if he were to receive these remedies, it would only be because he had stayed in the United States in violation of the immigration laws.[51] Moreover, because Castro was an undocumented alien, he could not mitigate damages by seeking other employment, as he was required to do, without "triggering new IRCA violations."[52] Thus, the award of back pay would not only sanction past violative conduct, but it would also instigate future transgressions as well.

The *Hoffman* majority further buttressed its conclusion by referring to *Fansteel*, *Southern S.S. Co.* and *Sure-Tan*, arguing that these cases stood for the proposition that "[s]ince the Board's inception, we have consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment."[53] Ostensibly, the fact that Castro tendered fraudulent documents in order to obtain employment caused *Hoffman* to fall in line with these cases.[54]

Finally, in a shallow bow to the NLRA, the Supreme Court concluded that the Board could still hold employers accountable for labor law violations through remedies other than awards of back pay. Specifically, the NLRB could still order that the employer cease and desist NLRA violations and post notices that describe employee rights under the NLRA and detail the employer's prior unfair labor practices.[55]

Writing for the four dissenters, Justice Breyer countered that awards of back pay did not run against federal immigration policy at all.[56] He noted that the underlying rationale for precluding the hiring of undocumented

47. *Id.*

48. *Id.* at 150. Certain lower courts have interpreted the Supreme Court's holding to pertain only to situations where it was the employee who breached the IRCA's mandate, as was the case in *Hoffman*. We discuss the persuasiveness of this line of thought *infra* at Part V.A(2).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 150-51.

53. *Id.* at 143. The Court also cites this line of cases for the proposition that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Id.* at 147. Though this does not lend direct support to the Court's conclusion that the NLRB's order must be overruled in this case, it does set up the framework for the Court's analysis of the issue.

54. *See id.* at 148-49.

55. *Id.* at 152.

56. *Id.* at 155 (Breyer, J., dissenting).

workers was to diminish the attractiveness of illegal immigration in the first instance, because it is the possibility of employment "which like a 'magnet' pulls illegal immigrants toward the United States."[57] According to Breyer, there was no basis to believe that the availability of a back pay remedy under the NLRA would encourage illegal immigration "for so speculative a future possibility could not realistically influence an individual's decision to migrate legally."[58] If anything, the unavailability of this remedy for undocumented immigrants would actually encourage the hiring of such individuals: because the "denial lowers the cost to the employer of an initial labor law violation... [i]t thereby increases the employer's incentive to find and to hire illegal-alien employees."[59] And this increased demand for undocumented workers would, in turn, lead to more illegal immigration – exactly what U.S. immigration policy tries to prevent.

In response to the majority's reliance on precedent, the dissent pointed to *ABF Freight System, Inc. v. NLRB*,[60] in which the Supreme Court affirmed an award of reinstatement and back pay even though the employee had committed perjury during the Board's enforcement proceedings.[61] Like Castro, this employee had violated the law, but in *ABF* the Court was still willing to enforce NLRB remedies. Justice Breyer also addressed the cases that the majority laid out in support of its opinion. He distinguished *Sure-Tan* by reading the decision narrowly – that is, only preclusive of remedies to unauthorized immigrants who have left the country.[62] In addition, he attempted to distinguished *Fansteel* and *Southern S.S. Co.* on the basis that:

> ... [I]n both earlier cases, the Court held that the employees' own unlawful conduct provided the employer with "good cause" for discharge, severing any connection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay.
>
> By way of contrast, the present case confers a discharge that was not for "good cause."[63]

Finally, the dissent criticized the majority opinion on a procedural point. It accused the justices of deciding the case based on their own opinions, rather than properly deferring to the Board's conclusions.[64] Later in this Article, we will engage the Court's debate and seek to harmonize the precedent leading up to *Hoffman*. But first we must explain and justify the framework on which this analysis can be based.

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57. *Id.* (Breyer, J., dissenting).

58. *Id.* (Breyer, J., dissenting).

59. *Id.* at 155-56 (Breyer, J., dissenting).

60. 510 U.S. 317 (1994).

61. *Hoffman*, 535 at 157 (Breyer, J., dissenting).

62. *Id.* at 159 (Breyer, J., dissenting).

63. *Id.* at 158-59 (Breyer, J., dissenting) (citations omitted).

64. *Id.* at 160-61 (Breyer, J., dissenting) (citing A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 412-14 (1995)).

III.
WHY IMPLIED REPEAL ANALYSIS IS APPROPRIATE IN *HOFFMAN*

As we will explain in greater detail in Part IV, the clarity and force of the *Hoffman* opinion could have been improved greatly by the use of well-established and commonly-used canons of statutory construction concerning implied repeal. However, before we can begin that part of the analysis, we must explain why the principles of implied repeal should have been applied in *Hoffman*, for the most basic criticism of our approach is that *Hoffman* had nothing to do with implied repeal.

The doctrine of implied repeal guides courts in situations where two statutes enacted by the same legislature—in this case, Congress—potentially conflict.[65] Where resolution of the potential conflict is unclear, as, for example, when Congress is silent on the inconsistency, the courts must interpret the statutes in order to resolve the ambiguity. And this is where implied repeal analysis is implicated. In this regard, the rules of implied repeal are nothing more than canons of statutory construction meant to assist courts in divining the legislature's intent. The basic doctrine is relatively simple: in cases of such conflict, the more recently enacted statute is, under certain circumstances, read to amend or repeal those portions of the earlier statute that are inconsistent. As we discuss in Part IV, however, there are additional and, for the purposes of this Article, very significant nuances to this doctrine. But for now we only need to understand that for the canons of statutory construction concerning implied repeal to apply, the case at hand must be about the potential conflict between two statutes enacted by the same legislature.

A. The Resolution of Statutory Conflict in Hoffman

One could argue that implied repeal analysis should not be applied in *Hoffman* because the case did not involve a conflict between two federal statutes. Instead, one could cast the case as concerning the bounds of agency discretion or, at best, a conflict between agency action (the Board's order awarding back pay) and a federal statute (the IRCA). The *Hoffman* majority itself stated that the case centered on "the Board's discretion to select and fashion remedies for violations of the NLRA."[66] Certainly, the holding in *Hoffman* focused on the Board's powers: the Court specified that "the award [of back pay to an undocumented worker] lies beyond the bounds of the Board's remedial discretion."[67] Even the dissent and critics

65. Where two statutes may conflict, but one statute was enacted by Congress and the other by a state legislature, the doctrine of federal preemption guides courts. Preemption is based on the Supremacy Clause of the Constitution and is thus guided by a different set of rules than those that define implied repeal. This doctrine is explored in greater detail in *infra* Part V.B(2).

66. 535 U.S. at 142.

67. *Id.* at 149.

of the *Hoffman* opinion have chosen to focus their arguments on the role of the agency rather than on the issue of statutory conflict.[68] For this common reading of the case to be correct, it means that *Hoffman* must have either been about (1) whether a federal agency (the NLRB) acted within the bounds of the authority granted to it by the federal statute that the agency administers (in this case, the NLRA), or (2) whether the NLRB had taken action contrary to the dictates of a statute over which it had no administrative authority, namely the IRCA.

But neither of these interpretations stands up to scrutiny. First, despite the majority's suggestion that the case revolved around the Board's discretion under the NLRA, that could not have been the basis of its opinion. *Sure-Tan*'s holding that the NLRA applied to unauthorized aliens, and the analysis underlying that holding, strongly suggested that the NLRA by itself posed no obstacles to the award of remedies to unauthorized aliens for unfair labor practices.[69] This aspect of *Sure-Tan* was left untouched in *Hoffman*.[70] Nor was there anything in the NLRA itself that limited the Board's ability to grant back pay awards to undocumented workers when the Board found that employers had violated the statute.[71] The provision of the NLRA that granted authority to the Board to order reinstatement and award back pay merely required that the Board take into consideration the policies of the statute: "[T]he Board shall... cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]..."[72] Thus, the issue in *Hoffman* would have been an easy one if the Court had merely been asked to review whether the Board's order was in compliance with the NLRA; clearly, it was.[73]

Therefore, the basis for the majority's reasoning in *Hoffman* must have been that the NLRB's award of back pay to an undocumented worker was inconsistent with a statute that the Board did not administer, namely the

68. *See, e.g., id.* at 153 (Breyer, J. dissenting) ("[T]he Board has especially broad discretion in choosing an appropriate remedy for addressing such violations."); Robert I. Correales, *Did Hoffman Plastic Compounds, Inc., Produce Disposable Workers?*, 14 BERKELEY LA RAZA L. J. 103, 143-47 (2003) (arguing that NLRB in *Hoffman* did not "trammel" upon a federal statute).

69. *See Sure-Tan*, 467 U.S. at 891-92 ("We first consider the predicate question whether the NLRA should apply to unfair labor practices committed against undocumented aliens. The Board has consistently held that undocumented aliens are 'employees' within the meaning of § 2(3) of the Act. . . . Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'").

70. *See* 535 U.S. at 146-47.

71. *See* 29 U.S.C. § 160(c) (2006).

72. *Id.*

73. *See, e.g.*, NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344 (1953) (addressing the NLRB's power to award remedies under the NLRA).

IRCA.[74] From this, one could argue that the *Hoffman* case did not implicate two conflicting statutes, but merely the conflict between an agency action on the one hand and a federal statute on the other.

Though this may be a factually correct statement of what happened in *Hoffman* – it was, after all, the Board that ordered the problematic back pay remedy – this interpretation fails to address the heart of the issue. As discussed above, the Board acted perfectly in line with the statute that governs its activities, the NLRA. Therefore, the conflict was not really between the agency and the IRCA, but rather between the NLRA's grant of such authority to the Board and the IRCA.

A closer look at the Court's holding best illustrates how the case was truly about this statutory conflict. Even though the reasoning of *Hoffman* was vague, the result was unambiguous – the majority removed the Board's power to order back pay to undocumented workers under any circumstances. [75] The *Hoffman* majority placed no qualifiers when it stated that "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," and that the Board "[lacks] authority to award backpay."[76]

This holding essentially adds a clause to the National Labor Relations Act. There is no dispute that the NLRA grants the Board broad, general powers to award back pay and itself poses no specific impediment to the award of back pay to unauthorized immigrants. At the same time, the IRCA does not specifically prohibit granting such awards. Therefore, the only way for the Supreme Court to have reached the result it did in *Hoffman* was to look past the plain language of the IRCA, and interpret the statute to add the words "except in the case of undocumented workers, who may never be awarded back pay" at the end of the provision of the NLRA that grants authority to the Board. Inferring that a previous statute should be amended based on a subsequent statute is exactly the result of the doctrine of implied repeal.

Consider, for example, if Congress were to pass a powerful "at-will employment" law that unconditionally guaranteed an employee's right to quit his or her job, and concomitantly, an employer's right to discharge an employee, at any time for any reason. In a specific case, the Board finds that an employer has discharged an employee in order to thwart unionization of the workplace in violation of the NLRA, and orders the employer to reinstate the employee with back pay. The Supreme Court now takes up the case and holds that the Board's order trenches upon the new

74. *See, e.g.*, 535 U.S. at 147 ("The *Southern S.S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield.").

75. *See id.* at 149.

76. *Id.* at 151-52.

federal law and that the Board's order and award must be vacated. The Supreme Court makes clear that any order of reinstatement or award of back pay by the Board would be inconsistent with the new at-will employment law, but that the objectives of the NLRA can still be met through the use of cease and desist orders and a requirement that employers post notices setting forth employees' rights under the NLRA and detailing the employer's past unfair practices.

The underlying issue here is the tension between the NLRA and the hypothetical at-will employment law. On the basis of the at-will employment law, the Supreme Court has ordered the complete removal of the authority and discretion granted to the Board by the NLRA to order reinstatement and award back pay. To allow the Court to hide behind the argument that it was merely adjudicating the propriety of the Board's order would make no sense and only obscure the arguments, for the case is not really about the Board's exercise of its authority and discretion. Rather, it is about whether one federal statute may be amended on the basis of another federal statute. There is simply no principled way to distinguish this case from ours.

Moreover, failure to acknowledge the statutory conflict and to focus instead on agency action opens the door to arbitrary and incoherent case law. Because most statutes today involve implementation by a governmental entity, it would be all too easy to turn any conflict between two statutes into a conflict between agency action and a statute. Suppose, for example, that after Castro is fired but before he could file a complaint with the Board, the INS orders that he be deported to Mexico under the IRCA. In his defense, Castro argues that his rights under the labor laws have been violated, and that under such circumstances, he is entitled under the NLRA to seek remedies. Deporting him would destroy the value of certain remedies, such as reinstatement, and therefore interfere with the NLRA's protection of collective bargaining rights.

In such a case, the INS's actions would trench upon the goals and policies of the NLRA, a statute which it has no authority to administer. In *Hoffman*, the NLRB's order was purportedly struck down for exactly this reason, implying that the INS order should likewise be overridden. But this result would not align with *Hoffman* itself: in this hypothetical, the goals and policies of the NLRA would be favored over those of the IRCA, instead of vice versa, even though only the procedural posture—and not any substantive aspect of the dispute—has been changed. By wording its decision as a limitation on agency discretion in the face of competing statutes, the Court invites such inconsistency.

Alternatively, suppose that Congress had not entrusted administration of the NLRA to the Board, but instead, as it does with many statutes, left it to private parties to enforce the statute and to the courts to adjudicate disputes. Assume Castro files suit in federal district court on the basis of

Hoffman Plastic's NLRA violations. Finding that the NLRA has been violated, the federal district court orders that Castro be paid back pay. The Supreme Court could hardly argue that the case was one about whether the federal court's actions trenched upon the IRCA. If it could do so, no implied repeal cases would ever reach the Supreme Court, since almost every Supreme Court case concerning potentially conflicting statutes involves lower court activity no different than what the Board did in *Hoffman*. Thus, for the purposes of determining whether a case implicates implied repeal analysis, to make a distinction between agency action taken pursuant to a statute and the requirements of that statute itself invites only confusion and inconsistency.[77] Making this distinction also runs counter to a line of Supreme Court cases that has discerned a conflict between two statutes even where agency action is involved.

B. Supreme Court Precedent Regarding Potential Statutory Conflict Manifested Through Agency Action

In situations similar to that found in *Hoffman*, the Supreme Court has seen fit to focus on potential statutory inconsistency rather than agency discretion. For example, in *NLRB v. Bildisco & Bildisco*, a distributor of building supplies voluntarily declared bankruptcy under Chapter 11 of the Bankruptcy Code.[78] Applicable provisions of the federal bankruptcy code allowed the debtor-distributor to reject executory contracts if the rejection would help the company reorganize.[79] A collective bargaining agreement covered part of the debtor's work force, and there was no dispute that this agreement constituted an executory contract.[80] The debtor failed to meet several obligations under the collective bargaining agreement and ultimately requested permission from the bankruptcy court to reject it.[81] Meanwhile, the company's resistance to the contract caused the union representing the covered employees to bring charges under the NLRA.[82] The Board found that the debtor had violated the NLRA by unilaterally

77. A final example should make the point in a way that will require little imagination. Suppose that Congress enacts a federal law that allows the Federal Bureau of Investigation ("FBI") to conduct warrantless searches of the homes of those persons, who, in the FBI's opinion, pose a terrorist threat. The FBI makes its best effort to differentiate persons who pose a terrorist threat from those who do not, and does not use the new law indiscriminately. Nonetheless, it conducts a warrantless search of a home, and the owner is outraged and brings suit against the FBI. There is little doubt that the case would be viewed as a clash between the new law and the Fourth Amendment to the Constitution, and not a conflict between the FBI's actions and the Fourth Amendment.

78. 465 U.S. 513, 517 (1984).

79. *Id.* at 521.

80. *Id.* at 517-18, 521-22.

81. *Id.* at 518.

82. *Id.* at 518-19.

changing the terms of the collective bargaining agreement and by refusing to negotiate modifications of the agreement with the union.[83]

Despite the fact that the case could have been viewed as one involving the conflict between the Board's findings and the Bankruptcy Code, the majority, dissent, and subsequent commentators all understood the case to be about a potential conflict between the NLRA and the Bankruptcy Code.[84] In fact, without explicitly referring to implied repeal analysis, the majority spent almost the entire opinion attempting to reconcile the two statutes,[85] and held that the newly enacted provisions of the Bankruptcy Code trumped the NLRA only when the two statutes were irreconcilable.[86] The procedural posture of *Bildisco* was similar to *Hoffman*, and it would have been easy for the Court and commentators to focus on the Board's actions in the case. The fact that no one did so is telling.

Nor is *Bildisco* an isolated case. In *Silver v. New York Stock Exchange*, plaintiff Silver owned two securities brokerages, neither of which were members of the New York Stock Exchange (the "NYSE"), but which traded with NYSE members through direct wire connections.[87] Pursuant to rules promulgated by the NYSE, the members sought the NYSE's approval of the wire connections.[88] The regulatory body disapproved the wire connections, and pursuant to its rules, all of the members were required to disconnect the wires from Silver's brokerages.[89] Silver then brought suit, alleging violation of Sections 1 and 2 of the Sherman Act.[90] The NYSE argued that the alleged antitrust violations had been dictated by its rules, which had been properly registered and approved by the Securities Exchange Commission pursuant to the Securities Exchange Act of 1934.[91]

The Supreme Court was then faced with the issue of whether an individual, specific action, taken pursuant to a rule, which was promulgated pursuant to a federal statute, was in conflict with another federal statute.

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83. *Id.* at 519.

84. *See id.* at 522-23 ("Obviously, Congress knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that [the Bankruptcy Code section allowing for rejection of executory contracts] apply to all collective-bargaining agreements covered by the NLRA."); *id.* at 535 (Brennan, J., concurring in part and dissenting in part) ("This [portion of the majority's opinion] properly accommodates the policies of the National Labor Relations Act (NLRA) and the Bankruptcy Code. . ."); *see also* Cameron, *supra* note 5, at 12 (noting that in *Bildisco*, "[t]he clash between the two statutes appeared to be dramatic"); Correales, *supra* note 68, at 143 ("In *Bildisco* the Supreme Court addressed the apparent contradictions between the Bankruptcy Code and the NLRA.").

85. *See Bildisco*, 465 U.S. at 523-28.

86. *See id.* at 528-34.

87. 373 U.S. 341, 343 (1963).

88. *Id.* at 344.

89. *Id.*

90. *Id.* at 345.

91. *Id.* at 346-57.

The Court, however, did not view the case as involving a clash between the NYSE's action and the federal statute. Rather, it viewed the issue through the lens of implied repeal: "The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases."[92] In fact, the *Silver* Court specifically relied upon canons of implied repeal:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "it is a cardinal principle of construction that repeals by implication are not favored." Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.[93]

It is hard to imagine a situation in which the action of which the plaintiff complained—the disconnection of the wires—was farther removed from a federal statute. The action in question was taken pursuant to an NYSE rule promulgated pursuant to a federal statute. Nonetheless, the Supreme Court applied implied repeal analysis, properly viewing the case as one involving inconsistency between two federal regimes.

The Supreme Court applied this same framework in *United States v. Philadelphia National Bank*.[94] In that case, two large banks in the Philadelphia area agreed to merge.[95] Federal banking law required that the Comptroller of the Currency approve the merger.[96] In analyzing such transactions, the Bank Merger Act stated that the Comptroller of the Currency must "take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest."[97] Despite receiving reports from the Federal Deposit Insurance Company, the Federal Reserve Board, and the Attorney General that came to the contrary conclusion, the Comptroller approved the merger, finding that the transaction would not have an unfavorable effect on competition and would be in the public interest.[98] The United States then brought suit to enjoin the proposed merger of the two banks, arguing that the transaction violated antitrust laws,

92. *Silver*, 373 U.S. at 347.

93. *Id.* at 357 (citations omitted).

94. 374 U.S. 321 (1963).

95. *Id.* at 323.

96. *Id.* at 332 (citing 12 U.S.C. § 215 (1958)).

97. *Phila. Nat'l Bank*, 374 U.S. at 332 n.8 (quoting 12 U.S.C. § 1828(c) (1963)).

98. *Phila. Nat'l Bank*, 374 U.S. at 332-33.

specifically Section 1 of the Sherman Act and Section 7 of the Clayton Act.[99]

The first issue that the Supreme Court discussed was whether "the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the federal antitrust laws."[100] Despite the fact that the lawsuit was instituted to enjoin a specific merger and that the action being attacked was the Comptroller's approval only of this specific merger, the Court did not treat the issue as being one about the clash of federal law and agency decision-making.[101] Rather, the Court based its analysis on the doctrine of implied repeal. In finding that the antitrust laws were left unscathed by the Bank Merger Act, the Court noted that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."[102]

From the foregoing, we can see that the Supreme Court has seen fit to focus on the potential clash of two statutes even when one of those statutes is manifested in the case in the form of agency action.[103] Looking past agency involvement, and instead focusing on the true issue—the conflicting statutes that led to the agency's controversial decision in the first place—therefore is not only the cleanest way to adjudicate such disputes, but is also an approach grounded on Supreme Court precedent.

IV.
APPLICATION OF IMPLIED REPEAL ANALYSIS IN *HOFFMAN*

A. The Canons of Implied Repeal

Having shown that *Hoffman* was really a case about two potentially conflicting federal statutes, we may now apply implied repeal analysis. As we will argue below, application of the rules of implied repeal points us

99. *Id.* at 323, 333-34 (citation omitted).

100. *Id.* at 350 (citations omitted).

101. For purposes of this analysis, the Comptroller was treated as a federal agency, as section 1828(c) placed him in the same category as the FDIC and the Federal Reserve Board, all three of which were referred to as "the agency" by the statute. *See id.* at 328; 12 U.S.C. § 1828(c).

102. *Phila. Nat'l Bank*, 374 U.S. at 350-51 (footnotes omitted).

103. Admittedly, neither *Philadelphia National Bank* nor *Silver* is on all fours with *Hoffman*. *Hoffman* addressed the question of whether a subsequent statute impliedly repealed an agency's authority granted by a previous statute, while *Philadelphia National Bank* and *Silver* addressed the question of whether a subsequent statute that granted a regulatory body authority impliedly repealed a previous statute. However, the general principle from *Philadelphia National Bank* and *Silver* can easily be applied to *Hoffman* – where the issue is whether a federal statute clashes with agency action taken pursuant to a different federal statute, the court should avail itself of the doctrine of implied repeal. Also, as we have argued above, whether the agency action is attached to one or the other statute is a matter of chance rather than design. *See supra* Part III.A.

toward the correct resolution of the case, helps analyze the arguments of both the majority and the dissent, and provides better guidance to the lower courts. However, before delving into all of this, it is first necessary to set out the tenets of implied repeal analysis and discuss briefly whether they make sense.

We begin with the often-quoted maxim that implied repeals are disfavored.[104] Perhaps the most trenchant criticism of this rule is that it is the most quoted and least used. Because it is rarely applied, at least in an explicit manner, it could be argued that it has no meaning. This, however, overstates the matter because, even if this canon is not explicitly relied upon, it does have an effect on implied repeal analysis. First, it requires that all arguments in favor of implied repeal be viewed with a skeptical eye.[105] Second, it stands for the proposition that in cases where a judge is of the opinion that the arguments for and against implied repeal are equally or almost equally strong, the judge should err on the side of not finding implied repeal. To this end, the Supreme Court in *Posadas v. National City Bank of New York* noted that "the intention of the legislature to repeal must be clear and manifest."[106]

A second tenet of implied repeal is that it may only be found when (1) two statutes are irreconcilable, or (2) when the later act was clearly intended to cover "the whole subject of the earlier one" and "is clearly intended as a substitute."[107] The first condition is an extension of the "reconciliation principle," a general rule of statutory construction that requires that two potentially conflicting statutes, to the extent possible, be interpreted so that they can coexist.[108] In the implied repeal context, this principle requires that before one statute is held to repeal another, a court must find more than a possible conflict between the two statutes at issue and more than a conflict merely between their purposes. Instead, the two statutes must be logically and physically impossible to apply at the same time. The Supreme Court has stated it thusly:

> Irreconcilable conflict" [means] that there is a positive repugnancy between them or that they cannot mutually coexist. It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two

104. *See, e.g.*, Branch v. Smith, 538 U.S. 254, 273 (2003); Radzonower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); Morton v. Mancari, 417 U.S. 535, 549 (1974); Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936).

105. *See Branch*, 538 U.S. at 293 (O'Connor, J., concurring in part and dissenting in part) (noting that the Supreme Court had not found an implied repeal in twenty-eight years, and outside of the antitrust context, had not found an implied repeal in eighty-six years).

106. *Posadas*, 296 U.S. at 503.

107. *Id.*; *see Radzonower*, 426 U.S. at 154; *Branch*, 538 U.S. at 273.

108. *Posadas*, 296 U.S. at 503.

> statutes are capable of co-existence, it is the duty of the courts... to regard each as effective.[109]

In another case, the Court explained that "[r]epeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary."[110]

Finally, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[111] The courts should only find implied repeal of federal laws in such instances when it is clear that Congress intended for the broader statute to overrule the more specific.[112] The reasoning behind this rule is that Congress, in drafting the more general statute, will almost never be considering how that statute is to apply in specific contexts.[113] The courts are thus safe in assuming that Congress, not having thought about how a general statute applies to a narrow situation, could not have meant for the more general statute to impliedly repeal the more specific one.[114]

Of course, these rules are not positive law, but merely canons of statutory construction meant to provide assistance to courts in their attempts to ascertain legislative intent in the face of silence or ambiguous statutory language. Although these rules are now deeply entrenched in common law, it is nevertheless prudent to determine whether they still have a sound basis. Some commentators have argued that these canons are unrealistic because they posit an omniscient legislature, or at least one fully familiar with all federal statutes.[115] According to this explanation, implied repeal is based

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109. *Radzonower*, 426 U.S. at 155. *See also* Wilmot v. Mudge, 103 U.S. 217, 221 (1880) ("When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.").

110. *Silver*, 373 U.S. at 357.

111. *Radzonower*, 426 U.S. at 153; *see also Mancari*, 417 U.S. at 550-51.

112. *Radzonower*, 426 U.S. at 153; *see also Mancari*, 417 U.S. at 550-51.

113. *Radzonower*, 426 U.S. at 153 (citing T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 98 (2d. ed. 1874)).

114. *Radzonower*, 426 U.S. at 153.

115. *See* Edwards v. United States, 814 F.2d 486, 489 (7th Cir. 1987) (doctrine against implied repeals "presumes . . . legislative omniscience"); Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105, 156 (1997) ("The doctrine [of implied repeal] rests on the questionable assumption that the legislature was aware of the older statute, and did not explicitly repeal the older statute because it wished the statute to continue to have some effect."); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1212 (1990) ("It is also suggested, more naturalistically, that the members of the legislature are presumed to act in full knowledge of the existing state of the law. While the implicit subject matter of the fiction is thus variable, the resort to fiction is recurrent."); Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) ("Maybe [the foundation for the doctrine of implied repeal] is that whenever Congress enacts a new statute it combs the United States Code for possible inconsistencies with the new statute, and when it spots one, it repeals the inconsistency explicitly. But this would imply legislative omniscience in a particularly uncompromising and clearly unrealistic form . . .").

on the presumption that the legislature, being completely aware of all previous statutes as it drafts new ones, explicitly repeals any old statutes of which it no longer approves.[116] This assumption that the legislature is entirely cognizant of the implications of its every action explains why implied repeal doctrine calls on courts to interfere with legislation only in exceptional circumstances.[117]

The above criticism is a valid attack on one potential underpinning of implied repeal. This does not mean, however, that the doctrine lacks foundation, for it finds support in other more defensible theories as well. For example, some of the theoretical foundations that underpin the textualist approach to statutory interpretation could also explain implied repeal doctrine. One idea behind the textualist approach is that it is impossible to determine what the legislature, as a whole, intended aside from the words of the statute.[118] Therefore, courts should avoid modifying statutes in the absence of clear indication that the legislature in question intended to do so.[119] This concept readily translates to implied repeal: it can be argued that it is because courts lack insight into legislative motivations that implied repeal analysis calls on courts to avoid repeal unless it is physically or logically impossible to apply both statutes at the same time.[120] Moreover, the framework of implied repeal, by providing specific guideposts for the interpretation of potentially conflicting statutes, makes it harder for courts to inject their own policy preferences into such difficult cases – a result very much in line with textualist thought.[121]

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116. *See* Bell, *supra* note 115; Moglen & Pierce, *supra* note 115; Posner, *supra* note 115.

117. *See* Bell, *supra* note 115; Posner, *supra* note 115.

118. *See, e.g.*, Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

119. Michele Homsey, *Employment Discrimination in the Public Sector: The Implied Repeal of Section 1983 by Title VII*, 15 LAB. LAW. 509, 538 (2000) ("[B]asic notions of separation of powers should prevent the judiciary from effectively repealing [statutes] without congressional authorization.") (citing Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 410 (1982)).

120. *See Mancari*, 417 U.S. at 551 ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

121. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 287 (1985); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 92 (1984) ("Even the best judge will find that the imagined dialogues of deceased legislators have much in common with today's judges' conceptions of the good."); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62 (1988) ("The use of original intent rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court.").

Alternatively, one could posit that a legislature is not aware of all of its laws when it is drafting a new statute, but that it values the work of its predecessors and recognizes the benefits of continuity in the law. Admitting that it is nearly impossible for a legislative body to recognize and deal with all potential conflicts between a new law and all those that preceded it, the doctrine of implied repeal does nothing more than require the courts to do what the legislature in question would have done had it been omniscient – to reconcile a new law with all previous laws to the greatest extent possible and to only repeal a conflicting statute where this is an absolute impossibility.[122] This is nothing more than a legislative version of the common law system's reverence for precedent and adherence to the doctrine of *stare decisis*.[123]

A fuller discussion of the philosophy of statutory construction doctrine is beyond the scope of this Article. Whatever the merits of the various positions supported by knowledgeable commentators, however, it is sufficient to note for our purposes that the rules of implied repeal listed above have been widely adopted by the federal courts, including the Supreme Court, and are supported by reasonable arguments.

B. Implied Repeal and the Right Result in Hoffman

When *Hoffman* is viewed through the lens of implied repeal, the analysis becomes significantly easier and clearer. With some guiding principles set out by long-standing precedent, we can avoid the largely untethered analysis indulged in by both the majority and dissent. First, because implied repeals are disfavored, we start our analysis with a skeptical eye to the Court's holding – that the IRCA repeals that provision of the NLRA granting the Board authority to award back pay to unauthorized aliens.[124] In case the arguments are equally strong, we will err on the side of not finding implied repeal. However, as we shall see below,

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122. *See* Louis Fisher, *Statutory Construction: Keeping a Respectful Eye on Congress*, 53 S.M.U L. REV. 49, 61 (2000) ("When statutes conflict, the courts should (and do) make an effort to protect both legislative objectives."); *id.* at 62 ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance . . . [this would lead] to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation."); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 475 (1989) ("This principle is a product of a set of beliefs about the legislative process – in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration another program that was likely the product of sustained attention.").

123. This idea too has been subject to criticism – with one commentator noting that "there is no basis for this imputation of congressional purpose, and the opposite inference is if anything more plausible – that the enacting Congress cares more about its statutes than those of previous Congresses." Posner, *supra* note 115, at 813. However, Judge Posner did not put forward evidence to support this assertion.

124. *Hoffman*, 535 U.S. at 151.

the arguments are not equally strong, and in fact, point towards not finding implied repeal.

Next, an implied repeal may only be found where there is either an irreconcilable conflict or the subject matter of one statute completely encompasses the subject matter of the other.[125] The IRCA and NLRA deal with very different topics, and there is no serious argument that they overlap in any substantial manner.[126] One can confidently say, therefore, that the latter prong of the test does not allow for a finding of implied repeal.

The question then becomes whether the statutes are "irreconcilable." As discussed above, a finding of irreconcilability requires that both laws under consideration be given effect to the extent possible; implied repeal may be found only where the two statutes cannot logically or physically be applied at the same time.[127] This somewhat abstract framework can be further refined through an analysis of the Supreme Court's jurisprudence with respect to reconciliation. This case law shows that courts will go to great lengths to harmonize two statutes despite significant tension between them.

Allen v. McCurry, for example, involved the question of whether 42 U.S.C. § 1983, which allows plaintiffs to bring federal civil rights claims for violations of their Constitutional and federal statutory rights, repealed by implication 28 U.S.C. § 1738, which requires federal courts to give state court judgments the same preclusive effect that the state court judgment would have in the state courts from which the judgment issued.[128] In *Allen*, the plaintiff had been previously charged with possession of heroin and assault with intent to kill and tried in state court.[129] Before the criminal trial, the plaintiff moved to suppress certain evidence as having been gathered in violation of the Fourth Amendment; the state court judge excluded some of the evidence but allowed other evidence to be admitted,[130] and the plaintiff was eventually convicted.[131]

After this trial, the plaintiff brought a civil rights lawsuit in federal court pursuant to 42 U.S.C. § 1983, in which the plaintiff renewed allegations that the police officers had violated the Fourth Amendment when they gathered evidence in connection with the original case.[132] The federal trial judge held that 28 U.S.C. § 1738 required that the court apply

125. *See supra* Part IV.A.

126. *See, e.g., Hoffman*, 535 U.S. at 149 (conceding that the IRCA is silent with respect to back pay awards under the NLRA).

127. *See supra* Part IV.A.

128. 449 U.S. 90, 96-97 (1980).

129. *Id.* at 92.

130. *Id.*

131. *Id.*

132. *Id.*

collateral estoppel with respect to those issues actually litigated in the prior state court suppression hearing, including the legality of the challenged search, but the Court of Appeals for the Eighth Circuit reversed.[133] The Supreme Court agreed with the district court judge, holding that § 1983 had not impliedly repealed § 1738.[134]

Allen has been criticized by commentators because the Court gave short shrift to the commonly-held understanding that § 1983 was enacted to allow plaintiffs to sue for wrongs committed by state and local officials.[135] To give meaning to this right, the federal courts must always be open to such plaintiffs, for it would be pointless to create a right to protect citizens from the wrongdoings of state and local governments, and at the same time require that those rights be vindicated in state or local courts.[136] However, by applying § 1738 to § 1983 cases, the federal courts were doing exactly that – the plaintiff in *Allen* had no choice but to have his allegations that the Fourth Amendment had been violated adjudicated in the first instance by a state court and, on that basis, had been denied a federal court adjudication of those same allegations.

Despite this criticism, *Allen* is not an extraordinary case when viewed through the lens of implied repeal. The Court's holding that § 1983 did not repeal § 1738 is consistent with the reconciliation principle. It is not logically impossible to apply these statutes at the same time – plaintiffs can raise federal civil rights claims under § 1983, but if the issue has already been adjudicated by a state court, the preclusive rules of § 1738 will come into play. The fact that § 1738 might conflict with § 1983's purpose of protecting individuals from overreaching by state court officials is irrelevant under this framework.

Another case that provides guidance on the issue of reconciliation is *Morton v. Mancari*.[137] In that case, employees of the Bureau of Indian Affairs (the "BIA") who were not Native Americans challenged a provision of the Indian Reorganization Act of 1934 (the "IRA") that gave a preference to Native Americans with respect to hiring at the BIA.[138] It was alleged that the preference conflicted with, among other laws, the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972 (the

133. *Id.* at 92-94.

134. *Id.* at 99 ("Since repeals by implication are disfavored, much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits") (internal citations omitted).

135. *See, e.g.*, Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 827 (1994); Robert H. Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C. L. REV. 59, 62-63 (1984).

136. Redish & Chung, *supra* note 135, at 827.

137. 417 U.S. at 535.

138. *Id.* at 537.

"EEOA").[139] The district court held that the latter statute, having been issued later in time, repealed the former statute.[140] The Supreme Court reversed, but at the same time recognized the tension between the preference provided by the IRA, which "would result in employment disadvantages within the BIA for non-Indians,"[141] on the one hand, and the EEOA's prohibition of discrimination on the basis of race in federal employment, on the other.[142]

In order to defend its holding in the face of this potential conflict, the Court relied on the reconciliation principle. First, the Court interpreted the underlying policy goal of the EEOA as "alleviating *minority* discrimination in employment."[143] This goal, according to the Court was not "irreconcilable" with the IRA, which is "aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group."[144] The Court reasoned that "[a]ny other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians."[145]

What the Court, in essence, is saying is that even if there seems to be both a physical and logical impossibility in applying two statutes simultaneously, they are not necessarily irreconcilable if the goals of the two can be reconciled. In *Mancari*, it would have been impossible for the BIA to grant Native Americans a preference in hiring while at the same time avoiding discrimination on the basis of race. Nonetheless, the Supreme Court chose to interpret the goal of the EEOA as the prevention of racial minority discrimination, rather than any discrimination, in employment. Once the goal of the EEOA was viewed in that light, it was not in conflict with the preference of the IRA. Since the goals of the statutes could coexist, the statutes themselves were no longer incapable of reconciliation.

Finally, in a recent case, the Supreme Court showed the lengths to which it would go to reconcile statutes. *Branch v. Smith* involved representation of the state of Mississippi in the House of Representatives.[146] Pursuant to the 2000 Census, Mississippi lost one seat in the House, dropping from five to four representatives.[147] But the state legislature failed to adopt a plan to redistrict the state to take into account the reduced

139. *Id.*
140. *Id.* at 540.
141. *Id.* at 544.
142. *Id.* at 545-47.
143. *Id.* at 550 (emphasis added).
144. *Id.*
145. *Id.*
146. *Branch*, 538 at 258.
147. *Id.*

number of seats.[148] One set of plaintiffs (the Branch plaintiffs) brought suit requesting that a state court issue a redistricting plan.[149] Another set of plaintiffs (the Smith plaintiffs) brought a separate action asking a federal court to issue a redistricting plan.[150] The two sets of plaintiffs differed on whether the elections should be held by district or should be at-large.[151] At issue was the interpretation of two federal statutes. The first federal statute, 2 U.S.C. § 2a(c), enacted in 1941, stated:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: ... if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.[152]

However, in 1967, Congress enacted 2 U.S.C. § 2c, which required:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment... , there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.[153]

A majority of the Supreme Court admitted that there was "tension" between the two statutes – the 1941 statute seemed to require at-large elections in Mississippi's case and the 1967 statute seemed to forbid such elections, requiring instead that all elections be by district.[154] But rather than find implied repeal, as three justices in concurrence did and as several lower courts had done, the majority rejected the argument that the 1967 statute was meant to replace the 1941 statute.[155] A plurality of four justices argued that the first statute was a stopgap measure only to be applied when the state legislature and the state and federal courts had failed to redistrict pursuant to the 1967 statute, and "the election is so imminent that no entity competent to complete redistricting... is able to do so without disrupting the election process."[156] Two other justices interpreted the first statute as applying prior to the state being redistricted as provided by the law of the state and the second statute as applying after the state had been redistricted

148. *Id.*

149. *Id.*

150. *Id.* at 258-59.

151. *Id.* at 266.

152. 2 U.S.C. § 2a(c) (2006).

153. 2 U.S.C. § 2c (2006).

154. *Branch*, 538 U.S. at 267-68.

155. *Id.* at 273 (Scalia, J., plurality); *id.* at 297 (O'Connor, J., concurring in part and dissenting in part).

156. *Id.* at 275.

as provided by such laws.[157] While both interpretations can be applied as a matter of logic, both suffer from substantial flaws: the plurality's argument is weakened because it required the determination of an unspecified time period at which point the election was "imminent," while the case made by the other two justices suffers because their interpretation of the 1967 statute had almost no textual support. Meanwhile, finding that the 1967 statute had repealed the earlier statute, as three justices had done,[158] required no mental gymnastics. The implication of this case is that reconciliation should be attempted, even if it is difficult and even if a finding of implied repeal would do away with such difficulty.

These cases are all relevant to determining whether the statutes implicated in *Hoffman* were in irreconcilable conflict. First, the majority's focus is on the tension between the NLRB's order and the IRCA's purpose.[159] We have already discussed that the Board's involvement should have been ignored, and that this should have been viewed as a conflict between the NLRA's grant of authority to the Board to award back pay in such circumstances and the purpose of the IRCA. *Allen* makes clear, however, that a conflict of purpose does not lead to the conclusion that two statutes are irreconcilable so long as the statutes at issue can be applied simultaneously.

To determine whether the latter condition is met, we can turn to *Branch* for guidance. This decision tells us that two statutes may be applied simultaneously, and in this way reconciled, even though doing so may require difficult and complex rationalizations. Reconciling the statutes at issue in *Hoffman* does not require us to make questionable analytical steps as in *Branch*, but does require close attention to the operation of the statutes at issue. Where the employer takes measures against its employees that are motivated by a desire to thwart collective action, both the text and the spirit of the NLRA require that such employees be given remedies. The focus of the NLRA is not only to make employees whole, and thus ensure that they face no obstacles to discourage them from organizing, but also to guarantee that the employer does not benefit by its unscrupulous actions.[160] All of this can be accomplished without irreconcilable conflict with the IRCA because it is physically and logically possible to apply both statutes. The undocumented worker may be awarded back pay in order to further NLRA goals as this would require nothing more than the mailing of a check. At

157. *Id.* at 295 (O'Connor, J., concurring in part and dissenting in part).

158. *Id.* at 285 (Stevens, J., concurring in part and concurring in the judgment).

159. Hoffman, 535 U.S. at 149.

160. *See id.* at 154 (Breyer, J., dissenting) ("It is the reasonably certain prospect of a backpay award" that leads employers to "shun practices of dubious illegality.") (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

the same time, the undocumented worker may be made subject to the appropriate IRCA sanctions for running afoul of that statute.[161]

Finally, even if we had not been able to reconcile the application of the statutes, implied repeal would still be unwarranted under *Mancari*. Because the policies of the two conflicting statutes at issue in *Mancari* could be aligned, the Court found them capable of reconciliation. A good argument can be made that the policies at issue in *Hoffman* are likewise capable of coexistence. As Justice Breyer argued in dissent, failure to enforce the NLRA would inevitably make undocumented immigrant workers more powerless to take action to raise their wages and improve their working conditions, thus making them more attractive to employers.[162] This would lead not only to an increase in the hiring of undocumented workers, but presumably, as the demand for undocumented workers rose, it would also increase the volume of illegal immigration.[163] By the same token, enforcing the NLRA would discourage employers from hiring unauthorized workers and perhaps even reduce the incentives for undocumented workers to illegally enter the United States. In this way, the goal of the NLRA (protecting the labor rights of all employees) and the goal of the IRCA (discouraging the employment and entry of unauthorized workers) are in line. Under *Mancari*, this would seem to be enough to avoid a finding that the two statutes are irreconcilable.

The last canon of statutory construction with respect to implied repeal is that a more general statute cannot repeal a more specific one. Here, it would seem that the two statutes are of equal specificity—in fact, both deal with vastly different subject matter—and so this canon may not apply. To the extent that it has any application, however, it points against implied repeal. In *Hoffman*, the majority did not refer to the IRCA for its specific requirements (e.g., that employer and employee must verify work eligibility), but for the more general concept that the government should discourage unauthorized aliens from obtaining employment. This general concept was then relied upon to overturn a specific remedy granted in accordance with the NLRA.[164] Thus, the underlying spirit behind this canon applies here – Congress focused its attention on the more specific task of empowering the Board to grant remedies to all employees in the United States who have been mistreated in violation of the NLRA, and

161. The result would be different if the back pay at issue was for the period after Castro's testimony in which he admits to using fraudulent documents to obtain employment. *See Hoffman*, 535 U.S. at 141. After such time, Hoffman Plastic was required to fire Castro pursuant to the IRCA, which puts the statutes into direct conflict. *See infra* Part IV.C.

162. *Hoffman*, 535 U.S. at 155-56 (Breyer, J., dissenting).

163. *Id.* (Breyer, J., dissenting).

164. *See id.* at 149.

should not be seen to have undone this work when it took on the more general task of deterring the employment of undocumented workers.[165]

In the end, each canon of implied repeal favors judicial restraint. Accordingly, the Board should have been permitted to award back pay to Castro notwithstanding the potential tension between the remedy and IRCA policy.

C. *Implied Repeal and the Conflicting Arguments Raised in Hoffman*

Not only does the implied repeal framework lead us to a more supportable result, but it also provides the basis for a meaningful analysis of the majority and dissenting opinions. The biggest difficulty with the conflicting opinions is that they fail to engage each other in a way that allows the reader to evaluate both sides and choose a winner. For example, the two opinions in *Hoffman* argue whether the availability of back pay awards for undocumented workers "runs counter to" or "trenches upon" the IRCA.[166] The majority's argument that awarding back pay to undocumented immigrants is troubling because it condones and encourages violation of the immigration laws certainly makes sense. At the same time, however, it is difficult to dismiss the dissent's counterpoint that failing to award back pay actually undermines the IRCA because it only makes unauthorized immigrant employees more attractive to employers, and thus encourages more illegal immigration. Without empirical data on the impact back pay has on illegal immigration, which neither side presents, the reader is at a loss to decide whether and to what extent such awards are truly problematic.[167]

Application of implied repeal analysis to the debate in *Hoffman* provides a measuring stick against which the reasoning of the majority and the dissent can be judged. Instead of trying to grapple with their policy arguments and competing interpretations of precedent in the abstract, we can evaluate their points in terms of their persuasiveness in connection with the elements of implied repeal. Going through this exercise shows how the application of the canons of implied repeal effectively rebut the majority's arguments, clarifies what the majority and dissent were likely getting at with their sometimes vague rhetoric, and provides a forum to reevaluate the precedent at issue and the nuances of the Board's back pay order.

The tenet of implied repeal that is particularly relevant to *Hoffman* is the principle that the statutes under consideration should be reconciled if at

165. *Cf. Mancari*, 417 U.S. at 549-51 (general statute prohibiting discrimination in all areas of federal employment did not repeal by implication a more specific statute granting preference only to Native Americans for employment in the Bureau of Indian Affairs).

166. *Compare Hoffman*, 435 U.S. at 147-48, *with id.* at 153 (Breyer, J., dissenting).

167. The lack of empirical data may be an intractable problem. It is hard to imagine how a researcher could isolate the effects of the availability or unavailability of the back pay remedy from myriad other factors motivating violation of US immigration laws.

all possible. This principle immediately calls the majority's central logic into doubt because, instead of letting both the IRCA and the NLRA stand, it effectively repealed the NLRA to address its concern about the NLRA's conflict with IRCA policy. The dissent countered that there was really no such conflict, but there is no way to judge which side is right from a policy perspective. From the perspective of implied repeal, however, this entire debate is irrelevant. Even if the majority was correct that the policies do conflict, since the NLRA and the IRCA are not in physical and logical opposition, this tension does not constitute grounds for repealing the NLRA.

The two sides also clash with respect to the "tension" created by the fact that Castro could not mitigate damages, something legally required in connection with the award he sought, without "triggering new IRCA violations."[168] The majority contended that this demonstrates one way in which the back pay award encourages future IRCA violations.[169] But the dissent countered that this was not a legitimate concern because "the Board is able to tailor an alien's backpay award to avoid rewarding that alien for his legal inability to mitigate damages by obtaining lawful employment elsewhere."[170] At first glance, it appears that the majority gets the better of this exchange – the dissent's response is merely an acknowledgement of the inconsistency between the two statutes.

The flaw in the majority's argument only becomes clear when it is looked at through the prism of implied repeal. Because the mitigation requirement is based on common law and not the NLRA itself,[171] the two statutes can readily coexist. Therefore, there is no need to strike down back pay awards as a result of this concern. Moreover, the tension the court identifies can be addressed by the NLRB on a case by case basis. As the dissent suggested, in fashioning a remedy the Board can take into account an undocumented worker's inability to legally mitigate.

Another problematic debate between the majority and dissent centered around precedent, and in particular, the impact of four cases: *Sure-Tan*, *ABF Freight System*, *Fansteel*, and *Southern S.S. Co.* In *Sure-Tan*, the Supreme Court held that the NRLA applied to undocumented workers, despite immigration policy embodied in the Immigration and Nationality Act (the "INA").[172] The Court held, however, that "employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[173] The majority in *Hoffman* found this

168. *Hoffman*, 535 U.S. at 150-51.

169. *Id.*

170. *Id.* at 160 (Breyer, J., dissenting).

171. *See* 29 U.S.C. § 160(c) (2006).

172. *Sure-Tan*, 467 U.S. at 903.

173. *Id.*

language to count against Castro's case.[174] The dissent responded that the statement did not impact Castro because it had to be read in the factual context of *Sure-Tan*. In *Sure-Tan*, the undocumented immigrant employees had returned to Mexico and, therefore, "[i]n order to collect the backpay to which the order entitled them, the aliens would have had to reenter the country illegally. Consequently, the order itself could not have been enforced without leading to a violation of the criminal law."[175] This stands in contrast to the situation in *Hoffman* where the order could be enforced without requiring further illicit behavior.[176]

The trouble with the dissent's argument is that it oversimplifies matters, and therefore misses the crux of the distinction between *Sure-Tan* and *Hoffman*. The problem in *Sure-Tan* was not that, as Breyer suggests, "the aliens would have had to reenter the country illegally" in order to collect their back pay awards. Rather, it was that the back pay awards were for a time period during which reinstatement was impossible without illegal entry into the United States.[177] Implied repeal analysis elucidates the importance of this aspect of the back pay issue as a basis for distinguishing the two cases.

Though the Court in *Sure-Tan* did not explicitly apply an implied repeal framework, the issues in the case called for the doctrine just as they do in *Hoffman*.[178] Moreover, the two potentially contrary holdings in the case make sense when viewed through this paradigm. *Sure-Tan's* first holding, that the NLRA applies to undocumented workers, is all but dictated by the principle requiring an irreconcilable conflict between the two statutes at issue in order to find repeal. The Court in *Sure-Tan* all but admitted that no such irreconcilable conflict existed:

> [W]e do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA).... [T]here is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.[179]

Sure-Tan's second holding, that the Board could not grant reinstatement with back pay, can likewise be explained by implied repeal. Because the employees in *Sure-Tan* had returned to Mexico and would have had to re-enter the United States in violation of the INA, the reinstatement remedy authorized by the NLRA would have been in direct and irreconcilable conflict with the INA. The NLRA would have required the

174. *See Hoffman*, 535 U.S. at 141.

175. *Id.* at 159 (Breyer, J., dissenting).

176. *Id.* (Breyer, J., dissenting).

177. *See Sure-Tan*, 467 U.S. at 903.

178. Like *Hoffman*, *Sure-Tan* involved the potential conflict between two federal statutes, the INA and the NLRA.

179. *Sure-Tan*, 467 U.S. at 892-93 (citations omitted).

employees to illegally re-enter the United States, while the INA would have expressly forbidden it. By the same token, it would be illogical to award back pay for a period when the employees could not have been reinstated without violating the INA. The back pay award in *Hoffman*, however, raises no such concerns; it is in no way tied to further criminal conduct.

Breyer's truncated discussion fails to fully capture these substantive grounds for distinction. When both cases are viewed on the foundation of implied repeal, however, the difference between the two rises to the surface – the award of back pay in *Sure-Tan* would have created an irreconcilable conflict, whereas in *Hoffman* it would not.

Similar arguments can be made with respect to the other precedents relied upon by the majority and dissent. In *ABF Freight System, Inc. v. NLRB*, the Supreme Court had upheld an award of reinstatement with back pay to an unlawfully discharged employee guilty of committing perjury during the Board's enforcement proceedings.[180] The majority in *Hoffman* attempted to distinguish *ABF* by noting that (1) "[*ABF*] did not address whether the Board could award backpay to an employee who engaged in 'serious misconduct' unrelated to internal Board proceedings," (2) "the challenged order [in *ABF*] did not implicate federal statutes or policies administered by other federal agencies," and (3) "the employee misconduct [in *ABF*]... was not at all analogous to misconduct that renders an underlying employment relationship illegal under explicit provisions of federal law."[181]

The *Hoffman* dissent ably noted that the majority failed to explain why the first distinction was relevant.[182] However, the dissent's responses to the second and third points are substantially weaker. The dissent argued that the second point was irrelevant because the "Attorney General, whose Department—through the Immigration and Naturalization Service—administers the immigration statutes, *supports* the Board's order" and that "the perjury statute at issue in *ABF Freight* was a statute... administered by another agency," namely the Justice Department.[183] No explanation is given for why the Attorney General's support for the Board's award of back pay makes *Hoffman* analogous to *ABF* and therefore makes the reasoning of *ABF* applicable to *Hoffman*. Furthermore, the fact that the Department of Justice administered the perjury laws was irrelevant. Even if the dissent was correct that the Department of Justice administered the perjury laws,[184]

180. ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 323 (1994).

181. *Hoffman*, 535 U.S. at 146.

182. *Id.* at 157 (Breyer, J., dissenting) ("[T]he Court does not explain why . . . lack of a relationship to Board proceedings matters, nor why the Board should have to do more than take that misconduct into account – as it did here.").

183. *Id.* at 158 (Bryer, J., dissenting) (emphasis original; internal quotations omitted).

184. To say that the Department of Justice "administers" the perjury laws because it has the responsibility to prosecute perjury removes all meaning from the word "administers." By the same

it is unclear how that would lead to the conclusion that *ABF* mandates that the Board's award of back pay in *Hoffman* should stand.

Most difficult to understand, however, is the dissent's counter to the third argument. Its only response to the contention that the employee's action in *Hoffman* "renders an underlying employment relationship illegal," whereas the action in *ABF* did not, does not even engage the majority in debate. Justice Breyer instead noted that the majority's "conclusion rests upon an implicit assumption – the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified."[185] However, the dissent fails to explain how this is a response to the majority's argument.

Viewing the *ABF* case through the prism of implied repeal allows us to grapple with the majority's arguments head on and makes the dissent's statements more explicable. The majority's strongest points, the second and third arguments, relate to the reconciliation principle. When the majority argues that *ABF* did not "implicate federal statutes or policies administered by other federal agencies," it is essentially saying that that *ABF* did not involve a potential conflict between two statutes. Similarly, when it argues that "the employee misconduct [in *ABF* did not] render an underlying employment relationship illegal under explicit provisions of the law," the majority is arguing that the violation of the IRCA in *Hoffman* ("explicit provisions of the law") made the employment relationship illegal, thereby putting the IRCA in conflict with the NLRA, which governs said employment relationship.[186]

Once the majority's arguments are viewed in this light, it is easy to see why they are insufficient to support an implied repeal. The majority's remark that *ABF* involved no other statute administered by another agency turns out to be a red herring, because what the majority meant to argue was that *ABF* did not involve a conflict between the NLRA and a statute other than the NLRA. If *ABF* involved only one statute, the NLRA, then there could be no implied repeal in that case, and *ABF* would indeed be inapplicable to *Hoffman*. But instead of referring to "a federal statute other than the NLRA," the majority referred to "federal statutes... administered by other federal agencies." This led the dissent to posit a pointless argument concerning whether the Department of Justice administers the perjury statute, when all that was required was for the dissent to note that *ABF* involved this second federal statute. Implied repeal analysis would then lead to the conclusion that the two statutes at issue in *ABF* were not in irreconcilable conflict. The employee in *ABF* could be prosecuted for

token, the Department of Justice would "administer" all federal law, since it is the arm of the federal government tasked with the primary responsibility to enforce all federal laws.

185. *Hoffman*, 535 U.S. at 158 (Breyer, J., dissenting).

186. As explained below, this interpretation explains Justice Breyer's cryptic response to the majority's third point.

perjury and the Board could award reinstatement and back pay to that same employee without inconsistency. Application of this framework would reveal, therefore, that *Hoffman* is indistinguishable from *ABF* in the way that matters – it too involved no irreconcilable conflict between the two statutes under consideration.

The majority's third point can be responded to in the same way. It is not important whether the employee misconduct "renders an underlying employment relationship illegal under explicit provisions of the law," but whether such illegality creates an irreconcilable conflict with another statute. Here, the response must be that while the employee misconduct in *Hoffman* did make the employment relationship illegal, it caused no irreconcilable conflict with the NLRA's grant of authority to the Board to award back pay. Viewed through this lens, Justice Breyer's cryptic response to the majority's third point now makes sense: "But this conclusion rests upon an implicit assumption – the assumption that the immigration laws' ban on employment is not compatible with a backpay award. And that assumption, as I have tried to explain, is not justified."[187] Presumably, the dissent means that the distinction made by the majority between *Hoffman* and *ABF* is only relevant if the illegal employment relationship in *Hoffman* is inconsistent with the IRCA, which the dissent argues it is not. However, implied repeal analysis makes the connection between the majority's argument and the dissent's response clearer and provides justification for favoring the latter.

The *Hoffman* majority also relied on two cases—*Fansteel* and *Southern S.S. Co.*—that it claimed stood for the proposition that courts have restricted the Board's authority to award back pay "to employees found guilty of serious illegal conduct in connection with their employment."[188] In *Fansteel*, the Court set aside an award of back pay to employees who had engaged in a sit-in strike that led to a "confrontation with local law enforcement."[189] In *Southern S.S. Co.*, the Court overruled an award of back pay to employees whose strike while onboard their ship had amounted to a mutiny in violation of federal law.[190] The dissent responded to the majority's argument that Castro's illicit conduct caused the case to fall in line with this precedent by noting the following distinction: in *Fansteel* and *Southern S.S. Co.*, "the employees' own unlawful conduct provided the employer with 'good cause' for discharge, severing any connection to the earlier unfair labor practice that might otherwise have justified reinstatement and backpay. By way of contrast, the [*Hoffman*] case concerns a discharge that was not for 'good cause.'"[191] This response is

187. *Hoffman*, 535 U.S. at 158 (Breyer, J., dissenting).

188. *Id.* at 141-42.

189. *Fansteel*, 306 U.S. at 263.

190. *Southern S.S.*, 316 U.S. at 41.

191. *Hoffman*, 535 U.S. at 158-59 (Breyer, J., dissenting) (citations omitted).

unpersuasive, however, because it fails to explain how Castro's entry into the United States and his subsequent production of false work papers to the employer, both in violation of the IRCA, did not similarly "sever" his right to employment and render his employer's labor law violation irrelevant.

Similarly, when the majority suggested that it would be problematic for the Court to "allow [the Board] to award backpay to an illegal alien... for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud,"[192] the dissent's only response was that:

> [T]he award simply requires that [sic] employer to pay an employee whom the employer believed could lawfully have worked in the United States, (1) for years of work that he would have performed, (2) for a portion of wages that he would have earned, and (3) for a job that the employee would have held – had that employer not unlawfully dismissed the employee for union organizing.[193]

This counterargument hardly seems satisfying for it merely takes the methods of the majority and applies them to the Board's and employee's position – making arguments only from the viewpoint of the NLRA, while completely ignoring the policies underlying the IRCA.

Implied repeal analysis provides a more satisfying answer to the majority's argument: that it is irrelevant to the question at hand, which is whether back pay remedies may be awarded to unauthorized immigrant employees. The NLRA allows the award of back pay remedies, and makes no mention of prohibiting such remedies when wages could not have been lawfully earned or when the job in question was obtained by criminal fraud. The only way in which to add such prohibitions to the NLRA is by means of an implied repeal, and an implied repeal may only be found where the two statutes are in irreconcilable conflict. It is not enough, despite the majority's suggestion to the contrary, that the IRCA makes illegal the method by which the employee obtained the job and makes it impossible for any such employment relationship to exist without some illicit behavior. The two statutes can be applied simultaneously without physical or logical impossibility nonetheless.

But this conclusion—that Castro's illegal conduct in *Hoffman* is irrelevant for purposes of implied repeal—creates a further complication. It arguably runs counter to the holdings of *Fansteel* and *Southern S.S. Co.*, which specifically pointed to illicit activities by employees as a reason for denying them relief. Just because our analysis conflicts with the findings of *Fansteel* and *Southern S.S. Co.*, however, does not mean it is wrong. Like *Hoffman*, those cases were really about the potential conflict between the NLRA and other statutes. But just as in *Hoffman*, the Courts overruled

192. *Id.* at 148-49.

193. *Id.* at 160 (Breyer, J., dissenting).

NLRB awards given in connection with conduct that violates the possibly contradictory statute without utilizing the canons of implied repeal. If these opinions had looked at the facts at issue from an implied repeal perspective, they would have come to the opposite conclusions, and would have cleanly aligned with our analysis of *Hoffman*.

The first step in implied repeal analysis is to see whether the doctrine is implicated at all – that is, whether two statutes enacted by the same legislature are in potential conflict. This is actually *not* the case in *Fansteel*, because the trespass and violence committed by Fansteel's employees were violations of state law.

This distinction, however, does not support the Court's holding nor does it put our approach into doubt. Because the result in *Fansteel* was the curtailment of federal law through the operation of state law – reverse preemption, so to speak, there is serious question about whether the decision is correct. While reverse preemption is theoretically possible, such as where Congress explicitly states that federal powers may be limited by state law, nothing in the NLRA, either now or at the time *Fansteel* was decided, explicitly signaled Congressional intent that the NLRA be limited in this way. Lacking express guidance in the statute itself, the Supreme Court *implied* legislative intent to limit the NLRA and the Board's powers under the NLRA pursuant to the following logic:

> We are unable to conclude that Congress [in drafting the NLRA] intended to compel employers to retain persons in their employ regardless of their unlawful conduct, – to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.[194]

Given the text and spirit of the Supremacy Clause, it seems unlikely that that the courts should ever allow implied reverse preemption. But even assuming implied reverse preemption is possible, it surely stands to reason that the standards to find it would be just as high if not higher than the standards required to find implied repeal.

If we apply the standards for implied repeal to this case, we see that the *Fansteel* Court reached the wrong result. The Court first stated that it was "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct."[195] This misconstrues the issue. The real question is whether the two laws are in irreconcilable conflict.

There is no such incompatibility here because, while state law might dictate that the employees be tried criminally for trespass, burglary, assault, battery or similar crimes, and may also allow the employer to bring civil actions for trespass or assault and battery in order to collect damages, there

194. *Hoffman*, 535 U.S. at 143 (quoting *Fansteel*, 306 U.S. at 255).

195. *Fansteel*, 306 U.S. at 255.

is nothing inconsistent about applying both sets of laws. Employees may be reinstated to further the goals of the labor laws, while being punished both criminally and civilly to deter them from committing similar unlawful acts in the future. Of course, the situation might be different where, for example, the state law requires the employees to be discharged or where the operation of state law makes it impossible for the employees to be reinstated, as would be the case if they were imprisoned. There was nothing in *Fansteel*, however, to indicate that to be the case.

But what about the *Fansteel* Court's concern that through application of the NRLA, the employees would receive "immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work"?[196] This tension is also irrelevant because it does not put the statutes at issue in irreconcilable conflict. The fact that these employees could have been fired for their illicit activities had they not been union-related does not suggest that the NLRA should be repealed; instead, it is merely a reflection of what the NLRA does. The statute abrogates the employer's right to discharge, granting the employee reinstatement and recompense where he or she has been discharged for conducting union-related activities, *even if* such discharge would have been defensible had the NLRA not been implicated. Since the NLRA, by definition, grants employees immunity from discharge for engaging in union activities, this concern is insufficient to justify repeal. Thus, under implied repeal or whatever narrower approach may be appropriate, we can see that the Court in *Fansteel* erred.

The Supreme Court faced a similar situation and made a similar mistake three years later in *Southern S.S. Co.*, when it held that the Board could not order the reinstatement of five sailors who had gone on strike in violation of federal criminal law, because "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[197] This case involved the conflict of two federal statutes, and application of implied repeal analysis—specifically, the reconciliation principle—shows that the Supreme Court reached the incorrect outcome. As in *Hoffman* and *Fansteel*, there was no logical reason that the two statutes could not have been applied simultaneously. Having determined that the seamen had been discharged for their union-organizing activities, the Board could require, pursuant to the NLRA, that they be reinstated to effectuate Congress's intent to protect employees' rights to collective bargaining.[198] At the same time, the criminal laws against mutiny would require that the seamen be tried, and if convicted,

196. *Id.*

197. *Southern S.S.*, 316 U.S. at 47 (1942).

198. *See id.* at 36.

face possible fines and imprisonment.[199] There was no showing that Congress's intent was that those charged with mutiny must lose their jobs, and certainly there was nothing in the criminal statute that required the seamen be fired.

The final point with respect to which the dissent and majority clash involves the issue of deference. In a parting shot in the dissent, Justice Breyer notes that "the law requires the Court to respect the Board's conclusion, rather than to substitute its own independent view of the matter for that of the Board."[200] The majority then rejoined with the argument that the Supreme Court had not granted such deference in *Southern S.S. Co.*, *Bildisco* and *Sure-Tan*, and that there was even less reason to do so in *Hoffman*, where the IRCA "not only speaks directly to matters of employment but expressly criminalizes the only employment relationship at issue."[201]

We need not concern ourselves with which side has the better case because this crossfire is irrelevant for implied repeal. Where the question is whether one federal statute trumps another, even if the Supreme Court were to completely disregard the Board's decision, it should nonetheless have applied implied repeal analysis to answer the question. And, even if the Court were to apply the implied repeal standard *de novo* or grant some sort of deferential standard of review to the Board's decision, the NLRA would have been permitted to stand.

Finally, the reconciliation principle explains a portion of the Board's holding that makes sense as an intuitive matter, but which neither the majority nor the dissent adequately addresses. In most labor law cases where the Board orders back pay, it orders it for the time period beginning when the employee was discharged and ending when the employee is reinstated.[202] In *Hoffman*, however, the Board ordered that Castro only be allowed back pay until the date on which he testified that he had obtained employment illegally.[203] But assuming Castro was entitled to back pay at all, there is no explanation why Castro's truthful testimony at the hearing before the NLRB could terminate his right to the remedy. If it was the substance of Castro's testimony that cut off his right to benefits (*i.e.*, his explanation that he was not entitled to be employed), then surely that preclusion would relate back to the date on which he was hired – that was the date on which he first violated the IRCA. On the other hand, it is difficult to see how the act of testifying could terminate his back pay rights when his testimony was required by, and consistent with, the law. If

199. *See id.* at 39-40.

200. *Hoffman*, 535 U.S. at 160-61 (Breyer, J., dissenting).

201. *Id.* at 151 n.5.

202. In instances where back pay is awarded but reinstatement is not, the Board normally orders back pay for a "reasonable" period of time.

203. Hoffman Plastic Compounds and Casimiro Arauz, 326 N.L.R.B. 1060, 1062 (1998).

anything, Castro's act of testifying truthfully under those circumstances was laudable.

The result makes sense, however, when viewed through the lens of implied repeal. As we have argued, the IRCA did not repeal by implication the NLRA, and so Castro should have been entitled to back pay. But on the date on which Castro testified that he had obtained employment illegally, he placed the NLRA and the IRCA in direct and irreconcilable conflict with one another. While the IRCA says nothing about back pay, it does make clear that an employer who discovers that an employee is unable to work must terminate that employee.[204] The NLRA's requirement that Castro be given back pay under such circumstances is in logical conflict with this IRCA mandate. Hoffman Plastic could not simultaneously pay back pay to Castro and at the same time refuse to employ him; the two results are incompatible. Because the two statutes are in conflict, the more recent, the IRCA, must prevail. As far as the record shows, the date of Castro's testimony was when Hoffman Plastic first discovered that Castro was not entitled to work and therefore the first date on which the NLRA and IRCA were in direct conflict.[205] The Board's decision to cut off back pay on that date, therefore, is consistent with implied repeal.

Use of the implied repeal framework allows us to better understand and evaluate the debate in *Hoffman.* On the surface, each side ignores the doctrine of implied repeal, and the majority and dissent engage in what appears to be an abstract policy debate mixed in with conflicting interpretations of relevant precedent. To attempt to indulge the Court in this debate is to enter a fog. Once the arguments are viewed in terms of implied repeal, however, the opinions and the precedent on which they rely become much more manageable. This framework bolsters the dissent's arguments, and exposes why those of the majority fail to compel. At the same time, we can see that although the majority opinion may fit in with past precedent, it is only because those cases are similarly flawed. In fact, by continuing to ignore implied repeal in this context, the Court in *Hoffman* failed to clean up this area of the law, and instead laid the groundwork for yet more confusion.

204. 8 U.S.C.A. § 1324a(a)(2) (2008).

205. *Hoffman Plastic Compounds and Casimiro Arauz*, 326 N.L.R.B. at 1062. This reasoning also explains why the Board could not and did not order reinstatement. The IRCA clearly forbids Hoffman Plastic from hiring anyone who was not authorized to be employed in the United States, so a Board order requiring Hoffman Plastic to rehire Castro would be in clear and irreconcilable conflict with the IRCA.

V.
IMPLIED REPEAL AND *HOFFMAN'S* AFTERMATH

A further benefit of using implied repeal analysis to decide *Hoffman* is that lower courts would readily be able to judge the implications of the case in analogous contexts. The majority's analysis lacks this quality. Because the Supreme Court supported its ruling with broad rhetoric and loosely connected supporting arguments, federal and state courts have been unable to convincingly define the extent of the decision's reach. The Supreme Court's failure to provide adequate guidance to lower courts has led to troubled legal doctrine – an outcome that would not have followed from implied repealed analysis.

Hoffman's precise holding applies to a fairly narrow issue – whether back pay is available to undocumented workers as a remedy for employer violations of the NLRA.[206] In this case, the Court does not deduce a powerful common-law rule with clearly wide-sweeping ramifications. On its surface, the ruling's only impact is to narrow the remedial rights of undocumented workers in connection with a single statute.

But the holding does not exist in a vacuum. Because the NLRA is part of an overlapping state and federal employee-protection regime, when the Supreme Court eliminated back pay from the remedies potentially available to undocumented workers under this statute, it called into question whether this award, or even awards that are closely related, should be available under the multitude of other statutes enacted to shelter employees from abuse.

To determine whether the result in *Hoffman* calls for a similar outcome in analogous contexts, lower courts must analyze the rationale underlying the majority's decision. Looking at the result alone provides little guidance. Theoretically, a court should be able to decide whether its case is governed by *Hoffman* or distinguishable from it based on whether the case it is adjudicating contains the legal and factual elements determinative of the outcome in *Hoffman*. For example, the decision in *Hoffman* would weigh strongly against recovery in an action considering workers' compensation awards, if the Supreme Court's logic with respect to the NLRA applied with equal force to that employee-protection regime.

In fact, a look at the Supreme Court's conclusion suggests that the case may indeed be widely applicable outside of the NLRA. The Court's overarching rationale is quite broad – the back pay remedy is foreclosed because providing the award undermines IRCA policy by, in essence, sanctioning the very employment relationship the IRCA was enacted to prevent.[207] If blindly followed, this logic could serve to significantly scale back the labor law remedies available to unauthorized aliens. This is

206. *Hoffman*, 535 U.S. at 149.

207. *See id.* at 150.

because awarding any remedy to undocumented workers as recompense for violation of their rights as employees can be conceptualized as implicitly condoning the illicit employment relationship, and therefore contrary to IRCA goals. It would be a leap of faith, however, for courts to apply this reasoning in each potentially analogous context. Though this language can be logically applied to almost any labor law remedy, there is nothing in the opinion to suggest that this was the intended result, nor is this called for as a matter of *stare decisis*. It would be inadvisable to rely on *Hoffman* to launch a revolution in employment law without a more solid foundation.

Lower courts, for the most part, have agreed. Despite the absence of self-limiting language in the Supreme Court's holding itself, state and federal courts have been mostly, though not wholly, unsympathetic when asked to expand *Hoffman* based upon the universality of its reasoning. Lower courts have repeatedly found that *Hoffman*'s ruling does not impact immigrant rights under anti-discrimination statutes,[208] wage and hour laws,[209] state workers' compensation schemes,[210] or state tort law.[211] At the same time, however, a small group of cases have followed the expansive

208. *See, e.g.*, Rivera v. NIBCO, Inc., 364 F.3d 1057, 1069 (9th Cir. 2004) (expressing "serious doubt" that *Hoffman* is relevant to Title VII claims); Chellen v. John Pickle Co., Inc., 446 F. Supp. 2d 1247, 1286 (N.D. Okla. 2006) (*Hoffman* did not preclude "full and fair compensation for work actually performed" pursuant to undocumented workers' Title VII claims); Avila-Blum v. Casa de Cambio Delgado, Inc., 236 F.R.D. 190, 192 (S.D.N.Y. 2006) (*Hoffman* inapplicable in employment discrimination context).

209. *See, e.g.*, *Chellen*, 446 F. Supp. 2d at 1277-78 (undocumented workers eligible to receive recompense under FLSA for underpayment of wages); Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 321-25 (D. N.J. 2005) (*Hoffman* did not preclude FLSA claim by undocumented immigrants for minimum wage and overtime violations); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499, 501-02 (W.D. Mich. 2005) (*Hoffman* did not render immigration status relevant to FLSA claim for unpaid wages); Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002) (immigration status not relevant to claim for underpayment of overtime) [hereinafter *Flores I*]; Reyes v. Van Elk, Ltd., 148 Cal. App. 4th 604 613-14 (Cal. Ct. App. 2007) (*Hoffman* did not preclude state-law prevailing wage claim by undocumented workers); Singh v. Jutla & C.D. & R.'s Oil, Inc., 214 F. Supp. 2d 1056, 1060-62 (N.D. Cal. 2002) (neither FLSA anti-retaliation claim by undocumented worker nor remedy for unpaid wages precluded by *Hoffman*).

210. *See, e.g.*, Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 330-31 (Minn. 2003) (undocumented worker entitled to temporary disability benefits because IRCA did not specifically preclude such remedy); Cont'l PET Techs., Inc. v. Palacias, 604 S.E.2d 627, 631 (Ga. Ct. App. 2004) (*Hoffman* did not preclude undocumented worker's recovery under Georgia workers' compensation laws); Safeharbor Employer Servs. I., Inc. v. Cinto Velazquez, 860 So.2d 984, 985-86 (Fla. Dist. Ct. App. 2003) (*Hoffman* did not preempt state law workers' compensation scheme as it applies to recovery by undocumented workers).

211. *See, e.g.*, Madeira v. Affordable Housing Found., Inc., 469 F.3d 219, 234-49 (2d Cir. 2006) (*Hoffman* not a bar to undocumented worker's tort claim under New York law); Balbuena v. IDR Realty, LLC, 845 N.E.2d 1246, 1253-60 (N.Y. App. Div. 2006) (*Hoffman* did not preclude New York personal injury action by undocumented worker); Majlinger v. Cassino Contracting Corp., 802 N.Y.S.2d 56, 59-70 (N.Y. App. Div. 2005) *aff'd, Balbuena*, 845 N.E.2d at 1260 (undocumented employee may still recover lost wages for injury after *Hoffman*).

language of *Hoffman* and applied it with respect to analogous employee-protection statutes.[212]

This movement away from *Hoffman* is contrary to the wide-sweeping implications of the majority's rhetoric. What is troubling is that although radical change to immigrant worker rights is not justified based solely on the Court's broad language, for there to be a coherent body of law in the wake of such a decision, courts must justify their failure to adhere to the case through reference to valid points of distinction. In other words, to convincingly get out from under *Hoffman's* shadow, courts must show why the majority's concern about trenching upon IRCA policy is not implicated with respect to the remedy under consideration. Courts have repeatedly tried to do this, but have ultimately failed because the majority opinion did not clearly outline the factors in the case that led to its broad conclusion.

A. Distinguishing Hoffman

In order to differentiate *Hoffman*, lower courts have turned to policy arguments, as well as potential points of distinction arising from factual and procedural aspects of the *Hoffman* case. These cases, however, have not succeeded in deciphering true confines on the majority's rationale.

1. Policy Distinctions

Various courts have voiced disagreement with the majority's chief concern that providing back pay under the NLRA undermines IRCA policy, and have cited this point of contention as a reason to find *Hoffman* inapplicable.[213] One case to voice this sentiment was *Majlinger v. Cassino Contracting Corp.*[214] Here, the court considered whether under New York law undocumented workers were eligible to recover lost wages resulting from a workplace injury.[215] En route to upholding the compensation rights at issue, the court dismissed *Hoffman's* concerns about IRCA policy as follows:

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212. *See, e.g.*, Veliz v. Rental Serv. Corp. USA, Inc., 313 F. Supp. 2d 1317, 1334-36 (D. Fla. 2003) (*Hoffman* foreclosed lost wage recovery in tort action by undocumented worker who tendered false documents to gain employment); Escobar v. Spartan Sec. Serv., 281 F. Supp. 2d 895, 897 (S.D.T.X. 2003) (*Hoffman* precluded back pay award to undocumented workers under Title VII); Rosa v. Partners Progress, Inc., 868 A.2d 994, 997-1002 (N.H. 2005) (undocumented worker may only recover lost U.S. wages in a state tort action upon showing that employer knew or should have known of immigration status when hired; immigration status is, therefore, relevant to such disputes); Crespo v. Evergo Corp., 841 A.2d 471, 475 (N.J. Super. Ct. App. Div. 2004) (after *Hoffman*, undocumented worker not eligible for damages arising from termination in violation of state anti-discrimination law).

213. *See e.g., Madeira*, 469 F.3d at 245-46; *Balbuena*, 845 N.E.2d at 1257-58; Flores v. Limehouse, No. 2:04-1296-CWH, 2006 WL 1328762, at *2 (D.S.C. May 11, 2006) [hereinafter *Flores II*]; Pineda v. Kel-Tech Const., Inc., 832 N.Y.S.2d 386, 391-92 (N.Y. 2007); *Majlinger*, 802 N.Y.S.2d at 66; Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 817-18 (N.Y. Sup. Ct. 2003).

214. *Majlinger*, 802 N.Y.S.2d at 66.

215. *Id.* at 58.

> In our judgment – and in the judgment of many other courts... withholding otherwise available remedies from undocumented aliens would create an incentive for unscrupulous employers to hire them, secure in the knowledge that such employees would have no recourse in pursuing proper wages and benefits or damages for workplace injuries. Such a result would thwart the Congressional objective of preventing American employers from hiring undocumented aliens.[216]

This is the very logic relied upon by the Board in rendering the decision that the Supreme Court overturned in *Hoffman*.[217] The Court, in fact, quoted the Board's proposition that "the most effective way to accommodate and further the immigration policies embodied in [the IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[218] The majority implicitly rejected that rationale when it concluded the opposite – that providing back pay actually undermines the IRCA.[219] Seeing as this logic has been considered and rejected by the Court, restating it cannot serve as a valid way to distinguish *Hoffman*.

A more compelling, though ultimately still unsatisfying, means of distinguishing *Hoffman* is to counter its policy-based holding with offsetting and fresh policy concerns. This was one argument the Ninth Circuit used to distinguish the case in *Rivera v. NIBCO, Inc.*[220] In this case, twenty-three immigrant women brought suit claiming that a job skills test administered only in English was, among other things, a violation of Title VII.[221] The court was called upon to decide whether immigration status was discoverable in a case such as this, and if so, under what restrictions.[222] The employer's argument was that *Hoffman* rendered this information discoverable because it made the issue relevant to available remedies.[223] But the court reasoned that any potential relevance of the information was outweighed by "the particularized harm of the discovery – the chilling effect that the disclosure of plaintiffs' immigration status could have upon their ability to effectuate their rights."[224] In addition, the court went out of its way to express its opinion that *Hoffman* was most likely inapplicable to Title VII.[225]

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216. *Id.* at 66.

217. *Hoffman Plastic Compounds and Casimiro Arauz*, 326 N.L.R.B. 1060.

218. *Hoffman*, 535 U.S. at 143.

219. *Id.* at 149. As discussed in *supra* Part II.B, the dissent also raised this argument to no avail. *Id.* at 155-56 (Breyer, J., dissenting).

220. *Rivera*, 364 F.3d at 1069.

221. *Id.* at 1061.

222. *Id.* at 1061-63.

223. *Id.* at 1062.

224. *Id.* at 1064.

225. *Id.* at 1067.

To distinguish *Hoffman*, the court relied heavily on the gravity of the policy considerations expressed in Title VII.[226] According to the *Rivera* court, the anti-discrimination policies reflected in the statute are of the "highest priority,"[227] and because of this, "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases."[228] This argument, that more important competing policy concerns justify a different result, strikes a chord because it is possible to cast the Supreme Court's holding as a resolution of rival polices: the Board was prevented from awarding back pay to undocumented workers, a remedy designed to effectuate the NLRA's goal of protecting union activities, because the award ran counter to federal immigration policy.[229] Meanwhile, according to the Court, NLRA policies would still be vindicated because the employer would be saddled with other sanctions.[230]

This reasoning is problematic, however, because the *Rivera* court is making a value judgment about the relative import of different federal statutes, which is inherently subjective terrain. It also lacks foundation in *Hoffman* itself – there is nothing in the case that suggests the majority would have been swayed had more central policies been the ones that conflicted with the IRCA.

Finally, the problem with this line of thought is that it fails to unwind the majority's central rationale. The Ninth Circuit's argument points to nothing particular about back pay under Title VII that makes the award of this remedy to undocumented workers in this context any less threatening to IRCA policy. In fact, it is even arguable that the Supreme Court's rationale is stronger in Title VII cases. If the Ninth Circuit is right that protection from discrimination is more important than an employee's right to unionize, then it arguably follows that enforcement of anti-discrimination laws with respect to undocumented workers creates more of an incentive to seek employment in this country than union-related safeguards. This greater incentive would run contrary to the IRCA's goals of preventing such employment relationships. Thus, although *Rivera*'s reasoning is attractive at first blush, it ultimately fails to engage and counter *Hoffman*'s logic, and perhaps even renders it more forceful.

2. *Factual Distinctions*

Courts have also scrutinized the facts giving rise to the dispute in *Hoffman* in order to uncover meaningful ways to distinguish the case.

226. *See id.* at 1069.
227. *Id.* at 1068.
228. *Id.* at 1069.
229. *Hoffman*, 535 at 149.
230. *Id.* at 152.

Under New York law, several courts have attempted to differentiate personal injury awards stemming from an employer's failure to install proper safety devices from the award in *Hoffman*, which these cases point out was merely recompense for discharge.[231] One line of thought is that the NLRA and the IRCA were more clearly at odds in *Hoffman* because termination was at issue. The thinking goes that even though termination may be forbidden under the NLRA if done in violation of labor laws, the IRCA requires that this very action be taken with respect to employees who are known undocumented immigrants. In contrast, there is no such direct conflict with respect to the employer's action in the personal injury context. The employer's breach of New York law by providing inadequate equipment is in no way condoned by the IRCA.[232]

But this logic, that there is somehow less tension between the statutes in cases of physical injury, does not stand up to scrutiny under the circumstances of *Hoffman*. As previously discussed, Hoffman Plastic did not discover Castro's immigration status until long after he was fired for union activity.[233] Thus, at that time, the employer could not have relied on the IRCA to justify its actions. The fact that the IRCA and the NLRA could potentially call for different results is, therefore, irrelevant; in *Hoffman* they did not. The underlying tension at issue was that the employer violated a labor law in connection with an employment relationship criminalized by the IRCA. This is the exact same tension that exists in personal injury cases.

The distinction between actions for personal injury verses those for illicit termination, however, does seem to carry weight at least on an intuitive level – it just seems more unjust to deny recovery when an individual has actually been physically injured. But even assuming this is true, relative injustice is far from a compelling ground on which to distinguish *Hoffman*; in the end, it does nothing to show that lost wages in a tort action are any less troubling to IRCA policy than NRLA back pay awards.[234]

Courts have launched more direct attacks by slicing into the definition of "back pay." The back pay that Mr. Castro sought in *Hoffman* was

231. *See Madeira*, 469 F.3d at 236; *Balbuena*, 845 N.E.2d at 1260; *Majlinger*, 802 N.Y.S.2d at 66.

232. *See Madeira*, 469 F.3d at 236; *Majlinger*, 802 N.Y.S.2d at 66.

233. *Hoffman Plastic Compounds and Casimiro Arauz*, 326 N.L.R.B. at 1062. *See supra* Part IV.C.

234. In the personal injury context, it has been argued that the policy concern with respect to such awards is lessened in cases where the jury has been instructed to take into account immigration status when awarding compensation. *See, e.g., Madeira*, 469 F.3d at 248-49, and *Balbuena*, 845 N.E.2d at 1259. The ostensible rationale is that jurors can adjust awards to reflect the likelihood that the employees would not have been able to continue to earn U.S. wages throughout the time period in question due to their undocumented status. But all this does is acknowledge that employment of undocumented workers breaches the IRCA; it does nothing to ameliorate the Supreme Court's concern. *See Balbuena*, 812 N.Y.S.2d at 453 (Smith, J., dissenting).

compensation for time he could have worked had he not been fired in violation of the NLRA; during the time period at issue, he performed no actual labor for Hoffman Plastic that would have entitled him to compensation.[235] The majority makes a point of this when it chides the NLRB for asking that it award back pay for work that, among other things, was "not performed."[236] The remedy Castro sought can be contrasted with the type of back pay that is commonly awarded as a means of recompense for employer violation of wage and hour laws. In the latter situation, the employee is seeking compensation for work that has already been done. Lower courts have seized on this distinction to justify ignoring *Hoffman*.[237]

Two arguments have arisen to justify distinguishing *Hoffman* on this basis. In *Flores v. Amigon*, a New York district court considered whether immigration status was relevant for recovery under federal and state wage and hour laws.[238] The plaintiff in the case, Maria Flores, sought back pay for her employer's failure to pay proper overtime wages.[239] The court found that *Hoffman* was inapposite because it did not address recompense for earned wages, and "that the policy issues addressed and implicated by the decision in *Hoffman* do not apply with the same force as in a case such as this."[240] The court, however, did a poor job of explaining why policy considerations would be different under state wage and hour laws. Instead, it fell back on the argument that "enforcing the FLSA's provisions requiring employers to pay proper wages to undocumented aliens when the work has been performed actually furthers the goal of the IRCA" [241] in that it eliminates the employer's incentive "to hire an undocumented alien in the first instance."[242] Though this may be true, the majority in *Hoffman* already spurned this rationale when used to defend back pay under the NLRA,[243] and the *Flores* court gave no indication as to why this policy position is any more poignant in the FLSA context.

The court in *Flores* did, however, have another more persuasive argument in its arsenal. As discussed earlier, the majority reinforced its position that back pay awards are contrary to IRCA policy by noting the tension between plaintiffs' mitigation duties when seeking recompense for work not yet performed, on the one hand, and the impossibility of legally doing so in the U.S. when such plaintiffs are undocumented workers, on the

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

236. *Id.* at 149.

237. *See, e.g.*, *Chellen*, 446 F. Supp. 2d at 1278; *Zavala*, 393 F. Supp. 2d at 322-23; *Martinez*, 213 F.R.D. at 605; *Flores I*, 233 F. Supp. 2d at 463-64; *Flores II*, 2002 WL 1163623, at *5; Coma v. Kan. Dept. of Labor, 154 P.3d 1080, 1087-88 (Kan. 2007); *Reyes*, 56 Cal. Rptr. 3d at 75.

238. *Flores I*, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

239. *Id.*

240. *Id.* at 464.

241. *Id.*

242. *Id.*

243. *See supra* Part V.A(1).

other.[244] As the Court explained, the plaintiff in such a case "cannot mitigate damages... without triggering new IRCA violations, either by tendering false documents to employers or by finding employers willing to ignore [the] IRCA and hire illegal aliens."[245]

If the back pay award at issue, however, is for work already performed, then this conflict disappears – the damages for failure to pay proper wages are what they are, and they cannot be mitigated by seeking alternate employment.[246] In these cases, therefore, the tension between back pay and mitigation is relieved, and the Supreme Court's broad pronouncement that back pay trenches upon immigration policy no longer carries quite the same gravity. But is this distinction enough to justify parting ways with *Hoffman*?

A rather strong case can be made that the answer is "no." The mitigation-related argument is one of several threads that the majority loosely ties together on the way to its holding. Only countering this particular argument, therefore, leaves much of *Hoffman's* logic in tact. Most importantly, the Court's central argument—that providing a back pay remedy to an undocumented worker condones an employment relationship illegal under the IRCA—remains relevant irrespective of whether the worker is required to mitigate damages. That being the case, a lower court would likely have to find further distinctions before it could reasonably contend that *Hoffman* has been sufficiently weakened so as to be inapt.[247] This quandary illustrates how the nature of the Court's analysis makes it quite difficult to escape: because it is not based on clear elements, each essential to its ruling, the nearly ubiquitous holding can stand even if particular supporting arguments are defeated.

Nevertheless, lower courts have done their best to pinpoint and pick apart the foundational elements of the opinion. Probably the most thought provoking factual distinction that courts have identified has to do with whether the employer or the employee was responsible for violating the IRCA. Because the employee was the one who breached the IRCA in *Hoffman*,[248] when the employer violates the IRCA (by, for instance, not

244. *Hoffman*, 535 U.S. at 150-51. *See supra* Part IV.C.

245. *Hoffman*, 535 U.S. at 150-51.

246. A form of this argument has also arisen in the personal injury context. Mitigation is irrelevant, it has been argued, when plaintiffs are so injured that there is no hope of mitigation. *Balbuena*, 845 N.E.2d at 1258-59. This distinction is unpersuasive because the Supreme Court in *Hoffman* was concerned with the legal duty to mitigate, which it claimed undermines the IRCA, and not whether it was physically possible in each factual situation.

247. The most compelling way to distinguish *Hoffman* is to rely on multiple relevant factual distinctions. *See, e.g.*, *Madeira*, 469 F.3d at 234-49. Because *Hoffman* posits neither factors nor elements upon which it can be distinguished, however, it is guesswork to determine how dissimilar a case must be in order for it to be truly distinguishable.

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

conducting the proper diligence with respect to immigration status at the time of hiring), courts have argued that *Hoffman* does not apply.[249]

At first glance, this appears to be a valid point. The Supreme Court is focused on protecting immigration policy. It is a compelling intuitive argument to say that compensating an undocumented immigrant who intentionally contravened IRCA rules undermines this policy; to do so, would in essence reward violative conduct. The argument that providing relief is inappropriate is more difficult if it is the employer that commits the violation. If back pay is denied in the latter scenario, then the employer is rewarded for violating the IRCA. Therefore, IRCA policy would arguably be undermined if back pay were *not* awarded.[250]

This point of distinction also finds support in the opinion itself. The Court makes note of Castro's illicit conduct several times,[251] and at one point specifically points out that it "subverts" IRCA policy to reward Castro's "criminally punishable conduct."[252] Moreover, if Castro was not in breach, the Court would no longer be able to argue that its decision fits neatly in with the *Southern S.S. Co.* line of cases, which it claimed stood for the proposition that NLRB awards could be set aside when employees are guilty of illicit conduct.[253] This all suggests that Castro's breach may have been an important piece of the majority's reasoning. If so, a fairly strong argument could be made that cases where the employer was the breaching party are distinguishable.

But it is difficult to discern exactly what role Castro's illicit conduct played in the Court's decision. Although the majority does rely on *Southern S.S. Co.* and similar cases for the proposition that illicit conduct severs an employee's right to NLRB remedies, it also uses these cases for the more general proposition that Board remedies may be overruled when they contravene other statutes.[254] While the former proposition may no longer be applicable in cases where the employee did not tender false documents, the Court's opinion remains somewhat bolstered by the latter. Therefore, precedent, albeit in a more diluted state, supports the Court's opinion irrespective of which party breaches.

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249. *See, e.g., Madeira*, 469 F.3d at 236-37; *Singh*, 214 F. Supp 2d. at 1061-62; *Balbuena*, 845 N.E.2d at 1258; *cf.* Ulloa v. Al's All Tree Serv., Inc., 768 N.Y.S.2d 556, 558 (N.Y. Dist. Ct. 2003) (allowing an undocumented worker to recover certain lost wages, but "not[ing] in passing that, if there had been proof in this case that the Plaintiff had obtained his employment by tendering false documents . . . *Hoffman* would require that the wage claim be disallowed in its entirety.").

250. This is essentially a more focused version of the widely cited policy argument that to deny back pay to undocumented workers is to encourage their employment. When it is clear that it is the employer rather than the employee that commits the IRCA violation, this argument is rendered more forceful. *See Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting).

251. *Id.* at 149-50.

252. *Id.*

253. *Id.* at 143.

254. *Id.* at 147.

In addition, the Supreme Court's other shots at Castro may just have been dicta. What points to this conclusion is language in the opinion that suggests the Court was not focused on assigning blame, but on the illicit nature of the entire employment relationship.[255] It is careful to note the following:

> [I]t is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of [the] IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.[256]

Since the Court points out that IRCA policy is violated any time an undocumented worker is hired, it seems reasonable to conclude that the Court viewed its overarching concern about subverting IRCA policy by providing back pay as implicated in either situation. This reading of the opinion is bolstered by the strong language used in the Court's holding – it purports to preclude the award of back pay generally, not only in cases where the employee tendered false documents.[257] Moreover, viewing the issue more broadly still fits with the majority's argument in that a back pay award nevertheless legitimizes an employment relationship born illegally. Similarly, at least in cases where undocumented workers know they lack authorization to work, even if the employer technically commits the violation, back pay can still be perceived as a reward to undocumented workers for flaunting the IRCA regime by seeking employment in the first place.

In the end, it is difficult to determine to what extent the majority relied on Castro's illegal behavior in reaching its conclusion. Without clear guidance in this respect, we cannot tell whether employer rather than employee misconduct is a valid point of distinction.

3. *Procedural Distinctions*

Finally, cases have distinguished *Hoffman* in settings where workers' rights are raised in private causes of action that are adjudicated in court proceedings.[258] This paradigm is contrasted with the procedural framework underlying the NLRA, where the Board is charged with both enforcing employee rights and adjudicating disputes.[259]

These procedural distinctions, however, are shaky grounds on which to base a departure from *Hoffman*. The first prong of this argument—

255. *See Balbuena*, 845 N.E.2d at 1264 (Smith, J., dissenting); *cf. Ulloa*, 768 N.Y.S.2d at 558 (finding employment relationship with undocumented worker was "tainted with illegality").

256. *Hoffman*, 535 U.S. at 148.

257. *Id.* at 149.

258. *See, e.g., Rivera*, 364 F.3d at 1067-68; *Majlinger*, 802 N.Y.S.2d at 65.

259. *Rivera*, 364 F.3d at 1067-68.

distinguishing based on the litigant—is unimpressive because, whether the Board or the employees themselves initiate proceedings, the Court's theory that recompense to undocumented immigrants trenches upon immigration policy is equally valid. The second prong, meanwhile, which draws a distinction based on the type of decision-making body that adjudicates such disputes, is also unfounded, though it is at least grounded in the rhetoric of the majority opinion. As discussed in Part III, the Supreme Court framed the issue in *Hoffman* as one of agency discretion, emphasizing that the Board had "no authority to enforce or administer" IRCA policies.[260] In pointing to the Board's limited discretion, the case opened itself up to distinction on the basis that, as the *Rivera* court noted in the context of Title VII, "a district court has the very authority to interpret both Title VII and [the] IRCA that the NLRB lacks."[261] The *Rivera* court, in fact, relied on this difference to conclude that "to the extent that *Hoffman* stands for a limitation on the NLRB's remedial discretion to interpret statutes other than the NLRA, the decision appears not to be relevant to a Title VII action."[262]

The trouble with this reasoning is that even though the Court's specific ruling was that the Board had exceeded its remedial authority, there is no reason to think that the policy concerns on which this conclusion was based are not applicable in the Title VII context. The tension between IRCA policy and labor-law remedies still exists irrespective of whether a federal agency or a courthouse grants the award. For a lower court to limit *Hoffman* to the NLRB on this basis is to essentially ignore the underpinnings of the Supreme Court's decision rather than distinguish them.

In the end, despite the efforts of numerous state and federal courts, judges have been unable to convincingly discern the scope of *Hoffman*. This serves as compelling evidence of one essential shortcoming of the majority's reasoning – that it fails to provide clear limits on the far-reaching potential of its holding. Moreover, as courts have struggled through this ambiguity, they have created an ungainly group of cases marked by sometimes questionable logic. *Hoffman's* chief legacy consists of fomenting a body of law that contorts itself like a bonsai tree to avoid the potential implications of the case itself. This was the predictable result of the poorly articulated analysis in the Court's decision. Subsequent courts could either let *Hoffman* revolutionize immigrant rights, which is not necessarily what the *Hoffman* court intended, or they could stretch to find ways to limit its holding. The problematic doctrine that has evolved was written by lower court judges, but they were painted into a corner by the *Hoffman* majority.

260. *Hoffman*, 535 U.S. at 149.

261. *Rivera*, 364 F.3d at 1068.

262. *Id.*

B. *The Precedent-Setting Value of Implied Repeal Analysis*

If the Supreme Court had looked at the issue in *Hoffman* as one of implied repeal, lower courts would have been able to discern the wider implication of its ruling with much greater ease. Moreover, the resulting body of case law would have been more settled and more clearly reasoned.

As we saw in Part IV, application of implied repeal analysis leads to a conclusion that is precisely the opposite of that reached by the majority – no bar would be imposed on awarding back pay to undocumented workers under the NLRA. But it is not only the final result that is important to lower courts. While this ruling would govern NLRB back pay awards, it is how the decision is reached that would inform its application in analogous contexts.

The issue for cases applying the majority's rationale was to determine whether remedies under various employee-protection statutes trenched upon IRCA policy in the same manner as NLRB-ordered back pay. The trouble arose because the Court's analysis provided few guideposts for making this determination. If *Hoffman* had been decided using implied repeal analysis, then the relevant questions for the lower courts would differ. While debatable policy concerns were the driving force behind the majority's analysis in *Hoffman*, under our analysis, the key was whether the elements of implied repeal were met given the factual and legal context of the case. The direct way for a lower court to discern the impact of our implied-repeal-based ruling, therefore, would be to apply an implied repeal analysis to its case, and see if, based upon such an analysis, an analogous result would be appropriate.

Moreover, as courts focus on each element in order to adjudicate their cases, they would be guided by how the framework was originally applied. For instance, such courts would look to *Hoffman* when faced with similar questions about the meaning of the somewhat cryptic language used in the canons of implied repeal. Before even considering these tenets, however, analyses would diverge depending on whether state or federal law was implicated.

1. *Claims under Federal Law*

Implied repeal analysis in *Hoffman* involves scrutinizing a potential conflict between one federal statute, the NLRA, and another, the IRCA. Therefore, such analysis would be highly relevant when looking at possible incompatibility between the IRCA and other federal statutes, such as Title VII and the FLSA.

In *Rivera*, for instance, the Ninth Circuit considered an employer's argument that *Hoffman* renders evidence of immigration status relevant to the issue of remedies under Title VII, thereby justifying discovery into this

aspect of a plaintiff's background.[263] As discussed above, the court distinguished *Hoffman*, but did so based on questionable reasoning. It concluded that *Hoffman* likely had no bearing on Title VII remedies because, among other things, the policies implicated in Title VII were too important to be trumped by the IRCA.[264]

If the *Rivera* court had been called upon to adjudicate the relevance of immigration status in the wake of our hypothetical *Hoffman* decision, its analysis would have been much more grounded. In holding that the back pay award at issue in *Hoffman* was not precluded by the IRCA, our decision certainly would seem to cut against the employer's argument: if back pay under the NLRA was not impacted by the IRCA, then it would seem likely that Title VII remedies are likewise unaffected. To get a firmer grasp on the true bearing of the case, however, the *Rivera* court would need to look at the analytical process relied upon to reach this result, and determine whether that process indeed leads to a similar conclusion.

That means the court would have to turn to implied repeal analysis. The threshold inquiry under this framework would be whether Title VII and the IRCA are potentially in conflict. In *Hoffman*, this question was made more difficult because the case involved agency action. As we discussed in Part III, this additional layer of complexity may have concealed, but it did not change, the fact that the case truly involved the interaction of the two federal statutes at issue. In *Rivera*, however, we do not need to concern ourselves with this intricacy: because the case was not adjudicated by a federal agency, but rather by the federal court system, the potential conflict between the implicated statutes is even starker.[265] Title VII potentially conflicts with the IRCA because it provides for remedies in connection with an employment relationship the IRCA seeks to prevent.

Having identified the potential conflict, the next question is whether the IRCA carved an exception into the section of Title VII that otherwise makes remedies generally available to all.[266] Application of the reconciliation principle reveals that, in fact, the statute very well may implicitly repeal what Title VII says about certain remedies. The back pay award in *Hoffman* did not create an irreconcilable conflict, and a similar award would be unproblematic in this context as well. It would be consistent with the IRCA to award back pay to an aggrieved undocumented worker under Title VII up until the time that immigration status is

263. *Id.* at 1062.

264. *Id.* at 1068-69. *See also supra* Part V.A(1).

265. *See Rivera*, 364 F.3d at 1061.

266. Title VII makes no exception for undocumented workers when it says that it "shall be an unlawful employment practice for an employer . . . to discriminate against any *individual* . . . ." 42 U.S.C. § 2000e-2(a)1 (emphasis added). Aggrieved parties under Title VII may be entitled to reinstatement and back pay. 42 U.S.C. § 2000e-5(g)1. They also may be entitled to compensatory and punitive damages. 42 U.S.C. § 1981a(a)1 (2006).

discovered. Other remedies, however, may have been overwritten. For example, an award of reinstatement to a worker known to the company to be undocumented would be precluded. This action could not logically coexist with the NLRA, which makes the hiring illegal. Whether the potential conflict with respect to certain remedies renders the issue of immigration status relevant under discovery rules is beyond the scope of this Article. The implied repeal framework, however, at least allows us to attack the issue with a sound foundation, rather than relying on suspect policy considerations.

A similar analysis could be conducted with respect to any other federal statute to which *Hoffman* could potentially apply. The body of law that would result would have a structure and consistency based on implied repeal. This would be a big step up from the shapelessness of the current legal doctrine.

2. *Claims under State Law*

Whenever implied repeal is potentially implicated, courts must first make sure that the doctrine is applicable. Thus, when courts are considering whether our *Hoffman* analysis applies when employers challenge state-law claims, such as those under workers' compensation schemes or those stemming from tortuous conduct, the first question would be whether there is a potential conflict between statutes enacted by the same legislature. Since this is not the case when the IRCA conflicts with state labor laws, implied repeal analysis would be irrelevant to these cases. This does not mean, however, that our decision would be of no use in this context. In fact, despite its technical inapplicability, the implied repeal analysis in *Hoffman* would have a beneficent effect on this body of law.

Since the canons of implied repeal are not relevant, to see what impact the IRCA has on state law, courts should turn to the closely related doctrine of federal preemption. Indeed, even in the current legal landscape, many courts have analyzed *Hoffman*-related issues in this way.[267] For example, in considering whether undocumented workers are eligible for lost wages as compensation for on-the-job injury under New York law, the court in *Majlinger* analyzed whether the remedy was preempted by the IRCA.[268] The case applied the conventional three-pronged test: state law in this case would be preempted if (1) the IRCA explicitly called for preemption, (2) comprehensively occupied the field of state tort law, or (3) was in "conflict" with such laws.[269] The court defined "conflict" to include those situations

267. *See, e.g., Balbuena*, 845 N.E.2d at 1255-60; *Coma*, 154 P.3d at 1085-87; *Madeira*, 469 F.3d at 236-42; *cf. Reyes*, 148 Cal. App. 4th at 613-18 (finding that California statutes enacted in response to *Hoffman*, specifically purporting to protect all California residents, were not preempted by federal law).

268. *Majlinger*, 802 N.Y.S.2d at 61.

269. *Id.*

where it is "physically impossible to comply with both" state and federal law, or where the state law "stands as an obstacle to the full purposes and objectives of Congress."[270] The *Majlinger* court reasoned that the only potential way that federal preemption existed in this case was if back pay offended IRCA policy under the final prong of the so-called conflict preemption analysis.[271]

But the court could not address this issue directly. Because this question is closely analogous to the one focused on by the majority in *Hoffman*, this New York appellate court, and others that have applied the preemption framework, had to deal with the implications of the case on the policy question posed by preemption. And they either had to accept *Hoffman's* broad implications—in this case, federal preemption of state-law lost-wage remedies—or stretch to distinguish it. [272]

Implied repeal analysis would not invite this uncertainty. If *Hoffman* were decided on this alternative basis, one impact would be to inform the federal preemption analysis to the extent it overlapped with the implied repeal framework. For instance, both implied repeal and federal preemption call on a court to look at whether statutes are physically impossible to apply at the same time. How that point was originally adjudicated would provide guidance in this context.

In contrast, courts would directly address those areas where preemption analysis differs from implied repeal. Thus, our analysis would not be implicated when preemption calls on courts to consider whether state law contravenes federal policy. Instead of grappling with *Hoffman's* impact on this analysis, as courts have been forced to do, they would be able to address the question head on. This would provide a benefit in that it would eliminate the need for courts to employ uncertain reasoning in order to avoid the Court's holding. But it also opens the door to potentially divergent results – as we have seen, reasonable arguments can be made on both sides with respect to whether enforcement of labor law remedies runs counter to immigration policy.

The potential for varying conclusions, however, is likely merely a theoretical concern. Because state workers' rights laws are within the realm of health and safety, an area that is traditionally the domain of state law, the already "strong presumption against federal preemption of state and local legislation"[273] is raised another notch. As the Supreme Court has stated, "where federal law is said to bar state action in fields of traditional state regulation, we have worked on the 'assumption that the historic police powers of the States were not to be superseded by [federal law] unless that

270. *Id.*

271. *Id.* at 62.

272. *See id.* at 62-70; *see supra* note 267 and accompanying text.

273. Richmond Boro Bun Club v. City of N.Y., 97 F.3d 681, 687 (2d Cir. 1996).

was the clear and manifest purpose of Congress.'"[274] In light of this high standard, it is unlikely that many courts would find IRCA-related policy arguments compelling enough to justify preemption.[275] In fact, cases that have applied the preemption framework have repeatedly upheld state law[276] even when *Hoffman* provided plenty of support for the opposite conclusion. Realistically speaking, therefore, there is little chance of inconsistent case law even when implied repeal would not be directly applicable.

Indeed, one of the benefits of this framework is that it points courts to this closely related and widely accepted paradigm. Using preemption to analyze a potential conflict between federal and state law is, in essence, the corollary to applying implied repeal to possibly incompatible federal statutes. The majority opinion, in contrast, invites a wholly independent inquiry. The issue that is often presented to courts is whether *Hoffman* precludes awarding certain state-law remedies to unauthorized immigrants; many courts have gone about addressing this issue without mentioning federal preemption.[277] Thus, the Court's analysis in *Hoffman* points lower courts away from the proper analytical framework, and then interferes with that approach if courts are perceptive enough to apply it. Implied repeal, on the other hand, directs courts toward the preemption framework and assists in its application.

By guiding both state and federal courts to application of well-founded canons of statutory interpretation, an implied repeal analysis in *Hoffman* lends both structure and cogency to legal doctrine in this area. While it is impossible to predict every tact a court could take in interpreting how implied repeal or preemption applies to its case, any inconsistencies that could result would likely pale in comparison to the disorder we have today.

VI.
BOUNDARIES OF THE IMPLIED REPEAL PARADIGM

As we have discussed above, the doctrine of implied repeal and its attendant rules are valuable in casting light on the *Hoffman* case and the

274. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (citations omitted).

275. The heightened preemption analysis also quells another concern about the precedent that would follow a decision based on implied repeal. State and federal laws overlap to a great extent in this area. Despite their similarity, however, state laws would be judged in terms of preemption, while federal laws would be judged under implied repeal. This means that there is the potential to reach different results with respect to statutes alike in substance. However, because preemption and implied repeal are so similar when applied to this area of the law, it would be unlikely for such a problematic result to actually occur.

276. *See, e.g.*, *Madeira*, 469 F.3d at 239; *Coma*, 154 P.3d at 1087; *Balbuena*, 845 N.E.2d at 1259; *Majlinger*, 802 N.Y.S.2d at 66.

277. *See, e.g.*, Rosa v. Partners in Progress, Inc., 868 A.2d 994, 996-1002 (N.H. 2005); Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 330-31 (Minn. 2003); Cano v. Mallory Mgmt., 760 N.Y.S.2d 816, 816-18 (N.Y. Sup. Ct. 2003).

precedent upon which it was built. Application of this paradigm in *Hoffman* also provides a sound foundation upon which later case law can be based. But while implied repeal analysis has proved useful with respect to the legal doctrine in this area, there are important limitations on both the weight that should be afforded to an implied repeal analysis and the contexts in which it is appropriate for use.

Implied repeal is a framework meant to provide courts with guidance in the oftentimes difficult task of determining the intent of the legislature in cases where the statutes it has written potentially conflict. It should be ignored when the legislature's intent with respect to the conflicting statutes is clear.[278] And even where Congress's intent is opaque, the implied repeal rules should be used with other tools of statutory construction; along with other interpretive canons, courts should take into account the text, purpose, and legislative history of a statute.[279]

The *Morton v. Mancari* case,[280] discussed in Part IV.B, is one example of how multiple pieces of evidence may come into play in rendering a decision in difficult cases like these. There, the Supreme Court was faced with a potential conflict between the Indian Reorganization Act of 1934, which granted Native Americans a preference in hiring for positions at the Bureau of Indian Affairs, and the Equal Employment Opportunity Act of 1972 (the "EEOA"), which prohibited racial discrimination in federal employment.[281] In addition to conducting an analysis based on the rules of implied repeal, the Court also reviewed the legislative history of the statutes. In holding that the latter statute did not repeal the former, the Court adverted to the fact that the Civil Rights Act of 1964, the statute amended by the EEOA, included an express exemption permitting employment preferences for Native Americans by businesses located on or near reservations – an exemption the EEOA did not disturb.[282] The Court

278. *Branch*, 538 U.S. at 285 (2003) (Stevens, J., dissenting) ("When Congress clearly expresses its intent to repeal or to pre-empt, we must respect that expression"); J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 155-56 (2001) (Breyer, J., dissenting) (canons of implied repeal have no relevance where Congress explicitly amends one statute in another statute). *See, e.g.*, Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 189-93 (1968) (no implied repeal where legislative history and text of subsequent statute made clear that Congress meant to simplify management of area under one agency and argument of implied repeal would necessarily create complex, dual agency management of area).

279. *See* Sunstein, *supra* note 122, at 405 (defending the use of canons of statutory construction in conjunction with "traditional sources of interpretation: text, structure, purpose, congressional intent, and legislative history"). *But see* Posner, *supra* note 115, at 820 (calling for de-emphasis of canons). Nor must the Court leave its common sense aside. *See, e.g.*, *Branch*, 538 U.S. at 296 (O'Connor, J., concurring in part and dissenting in part) (arguing against finding implied repeal because that would lead to conclusion that "Congress repeatedly enacted two completely conflicting provisions in the same statute.").

280. *Mancari*, 417 U.S. at 535.

281. *Id.* at 537.

282. *Id.* at 545-48; *see also Branch*, 538 U.S. at 287-90 (Stevens, J., concurring) (referring to legislative history to show an intent to repeal).

reasoned that since this exemption was left unaltered, it was highly unlikely that Congress implicitly intended to repeal the federal statute providing for similar preferences.[283]

Similarly, in analyzing *Hoffman*, we ought not to ignore other sources of statutory interpretation. For example, the *Hoffman* dissent quoted a House Report on the IRCA that stated that the statute would not "undermine or diminish in any way labor protections in existing law, or... limit the powers of federal or state labor relations boards... to remedy unfair practices committed against undocumented employees."[284] The majority attempted to dismiss this piece of legislative history as the opinion of a few members of one committee of one house of Congress and argued that, in any case, it shed little light on the issue of back pay.[285] While this may be true, and while the committee report by itself may not be enough to defeat a finding of implied repeal, when placed together with the above analysis it lends further support to the argument that no implied repeal should have been found in *Hoffman*.

VII.
CONCLUSION

Applying implied repeal analysis to this area of the law has a profound impact. If *Hoffman* and the precedent on which it relied had been decided based on this paradigm, gone would be the ungrounded and often confusing arguments found in the majority and dissenting opinions, and an unstructured body of law would be replaced with one guided by well-established principles of statutory interpretation. The subtext of the common law in this area is the inconsistency between labor law and immigration law. By acknowledging this issue and confronting it directly, implied repeal analysis is able to analyze this conflict with much greater clarity.

283. *See Mancari*, 417 U.S. at 547-48.

284. *Hoffman*, 535 U.S. at 157 (2002) (Breyer, J., dissenting) (citing H.R. REP. NO. 99-682, pt. 1, at 58 (1986)).

285. *Hoffman*, 535 U.S. at 149 n.4.