## Ag Scenario

### Ag Scenario – 1AC

#### Exploitation of migrant farmworkers threatens global food security. Safe working conditions boost productivity and stabilize the labor supply against growing pressures.

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3.2. Unique characteristics of employment

Agriculture operating in the global capitalist economic system can only increase its profit rates by reducing the cost of labor due to the peak in production; thus, it is increasingly dependent on profiting from the skimming of the economic value produced by migrant workers. This practice not only forces migrant workers into often inhumane and illegal working conditions but also threatens the stability of the labor supply of the entire global agricultural system due to epidemiological restrictions on international mobility (see e.g., [108]). Informal employment may worsen this situation [30,71]. In several Stud., the literature details the dependence of the agricultural sectors of developed countries on off-farm labor [15,16,18,26,35,40,46,51,98,105,113,115,132,140].

Based on this, for example, most of the seasonal workers in the US come from Mexico. The reason for this is Mexico's low economic growth compared to the US, as well as the labor-absorbing power of the rapidly developing sectors in the US, which are replaced by migrant workers [40]. Coincidentally, large US-based farms, significantly dependent on immigrant labor, are fierce advocates for the easier admission of seasonal workers [18]. Furthermore, nearly half of the migrant workers employed by US crop farms do so without a permit [140]. In many cases, most of the farms employ refugees due to their lower wages or flexible work schedules [20]. According to Avola [4], on the contrary, migrant workers have better employment opportunities in Mediterranean agriculture; however, it means low-skilled and low-paid jobs along with high segregation.

The recent wave of mechanization and digitization, according to American farmers, may and will reduce the use of migrant labor in agriculture [18], but according to German farmers, it will take a long time for machines to completely replace migrant workers. Digitization leads to increased work intensity and harsher working conditions, which further increases dependence on migrant workers who are forced to accept such working conditions [105,121]. Alarcón [2] found that the increase in agricultural mechanization and digitalization is an obstacle to integrating immigrants primarily through agricultural employment.

EU agriculture is also very dependent on migrant (and seasonal) workers: immigrants make up a significant part of the EU labor force employed in agriculture, who are concentrated on larger and more productive farms, and their presence is positively correlated with the productivity of the farms’ labor [26,44,46,98,131]. Being aware of this, the EU created a program for the training of migrants and refugees, which also tries to make it easier for migrants to join agriculture with special training and job search support [7]. This program is much needed, as there is a considerable number of injuries among the growing migrant workforce [16]. There are still great barriers for immigrants to establish their farms (even when land prices are low) due to the lack of connections and various types of capital [48,130]. Great Britain's agriculture is also struggling with a labor shortage, especially after the COVID-19 era, which they try to fill primarily with seasonal workers, mostly migrant workers, whose supply is also limited [1,94].

Some of the articles draw attention to the dangers of agriculture's increasing reliance on migrant workers. According to Molinero-Gerbeau and Avallone [89], in the current phase of capitalism, global agriculture is based on skimming the value produced by cheap migrant workers, even in the face of mechanization. The problem is present in the literature that examines North-America [15,106,143], Australia [113], Great Britain [1,27,121,122] and the EU [2,25,29,33,66,88,89,101,109,118]. For example, the increasing exploitation of Mexican migrant workers employed in the southern states of the US [114,143] often leads to their increasing organization and coordinated strikes [143]. Analyzing Canadian seasonal work programs, Preibisch [106] finds that low-skilled and low value-added workers have difficulty obtaining residence permits and citizenship, and family reunion is not supported. Rosewarne [113] warns about the state of migrant worker exploitation in seasonal labor-dependent Australia. In Great Britain, agricultural migrant workers face several types of exploitation, such as additional fees charged by job brokers, poor quality of allocated accommodation, and hazardous working conditions. Schewe and White (2017) found that the influencing factor of labor exploitation is not ownership structure (family or non-family farm), but farm size.

Due to their vulnerability, immigrants are considered a well-controlled workforce [1,27,89]. The phenomenon replicates in various European countries [29,66,88,101,109]. Paying smugglers and getting in debt is also part of migrant workers entering developed countries [101]. However, an American example shows that higher agricultural activity may lower crime rates [21]. All this is driven by competitive pressure in the global agricultural market led by the rise of large food retailers, which producers try to meet by minimizing wage costs, and the exploitable migrant worker sector contributes to this.

In general, off-farm labor related literature focuses on state temporary off-farm labor programs. Australia and New Zealand introduced special labor mobility programs, however, their employment impact is rather small [73,96,103,135]. In Spain, there are off-farm labor programs planned at the regional level, which create the legal framework for the employment of foreign workers in agriculture but, as mentioned before, they can still be considered a vulnerable group [39]. Migrant workers are legally required to return home after work is completed, thus preventing their settlement and integration into the Spanish economy [70]. The situation is similar with Canadian temporary off-farm labor programs [106,135], migrant workers come to pre-designated companies which had to assure the Canadian government that they cannot fill vacant positions with Canadian workers. In addition, migrant workers cannot bring their families with them, leading to higher utilization of workers by exclusion of family social activities. Regarding Canadian programs, Reid-Musson [110] notes that family farms limit the mobility of their employed migrant workers, further reducing their place of employment choice. In contrast to these examples, local producers in Italy never initiated the establishment of such programs, so they never appeared. Therefore, the southern regions of Italy are characterized by deregulated immigrant employment in agriculture [33,42]. Corsi and Salvioni [24] found that since past labor is a strong indicator of current off-farm work; policies should focus on education and the promotion of personal skills to foster off-farm employment.

Many Stud. discuss the positive aspects of seasonal work and outline structures in which seasonal work can be beneficial to both the farmer and the seasonal worker [43,50,67,90,95,137]. Nehring and his co-authors (2005) point out that in the United States, seasonal workers contribute significantly to increasing agricultural efficiency. In addition, American seasonal workers are more inclined to choose beef and chicken farms as jobs, as these places have lower economies of scale and, therefore, a greater demand for seasonal workers whose work is valued higher [43]. Migrant workers running their farms in the US are found to often operate sustainably and organically, but lack the education and resources to apply for the organic producer certificate [84]. Labrianidis and Sykas [67] discovered that Albanian migrant workers working in Greece can afford multiple trips due to the proximity of the countries, which helps their social progress. An interesting phenomenon in French agriculture is that full-time workers are being replaced by seasonal (even daily) employees [50]. Nye [95] deals with a special version of seasonal work in which the worker provides not only the work itself but also the tools themselves as a contractor; thus, this type of seasonal work offers the entrepreneur a higher bargaining position. Community-supported agriculture distributes the work among consumers who want to benefit from agricultural products [137].

The problem of farmers turning to off-farm work became important with the outbreak of the COVID-19 epidemic, when closures were introduced, which also limited mobility between countries. In the end, the EU or the USA was forced to make an exception to the measures restricting mobility for migrant workers [80,117]. Although this allowed agricultural production to continue, it led to COVID-19 outbreaks linked to migrant workers in several EU member states. Seasonal workers were particularly impacted by the lockdown measures related to the pandemic [117], and according to some Stud., there was an increase in bargaining power for employed workers [112]. In such circumstances, the role of social workers is essential [45]. The inhuman working conditions of the migrant workers exacerbated the problem. In the past, there was already a proposal to tie EU agricultural subsidies to fair working conditions, but this was rejected by the European Council. This should be renegotiated, as, in many cases, better rules and wages could lead to better housing, well-being and health conditions [25,117].

3.3. Differences between genders and gender equality

In recent years, the fewest publications have been published on gender and gender equality in developed conuntries. It is clear from the literature that women carry out monotonous, less appreciated, and less profitable agricultural activities. It was also observed that more women work in organic farms than in conventional agriculture. However, the increased participation of women cannot be explained by the ‘feminine’ values present in organic farming, for example, a higher level of attention and more care [52]. Shreck et al. [123] refuted that organic farming is more socially sustainable than conventional farming. Women who work in organic farming cannot secure the incomes and benefits available to workers in other sectors. Bernal [9], however, points out that women workforce in ecological farming leads to better economic results due to the characteristics of women and facilitates population settlement as well by providing flexible work hours.

Women also tend to leave farming due to their increased resistance to the traditional hard-working “farm-wife” role, or at least to strive for equal recognition within the industry [3,31]. Women’s unpaid family labor is a common characteristic of small and medium-sized farms [61]. Contzen and Forney [23] suggested that inequality is tied to the position on the farm and not gender. They remark that, with mutual recognition, even these asymmetric arrangements can lead to contented working family members. Reissig et al. [111] found that on organic family farms, women are more involved in family work and less in farm work. In terms of intensive and conventional agriculture, the training of the female workforce is decreasing, and the workforce is becoming feminized and segmented, similar to that of developing countries. There are areas, for example, strawberry or kiwi harvesting, where employers are specifically looking for female workers [25,29]. Women are concentrated in socially less valued physical jobs which are characterized by temporary, unstable, very flexible contractual relationships, worse working conditions and lower wages [30,68], and often feel that they are demeaned, dismissed or excluded because of gender [92]. Female workers tolerate repetitive tasks, painful postures and long working hours, and their ability to handle more loads should be emphasized which can be considered a guarantee of good performance. Business strategies and the devaluation of various agricultural jobs directly contribute to developing an unequal and vulnerable social structure [29].

As farm income increases, farmers invest some of the extra income in their children's education, and educated children are less likely to become farmers (see more in subchapter 3.5). Women who have more children, and thus more potential agricultural offspring, are more likely to leave the agricultural sector. Parents who earn a larger share of their income from agricultural activities and social transfers are less likely to send their children to school (e.g., university), especially not girls. Children of women earning low wages also stay in agriculture, with a few exceptions [8,29,129].

The relationship between migration and gender roles is also worth exploring [106]. A significant part of the labor force entering Canadian agriculture is male due to the nature of agricultural work, and in the interest of minimizing gender tensions, employers are looking for men. In Europe, the most sought-after workforce is men between the ages of 20 and 40 [25]. Furthermore, women working outside of agriculture can help avoid potential “cooperative conflicts” with their husbands [49]. The political and corporate attitude, which allows employers to choose the nationality and gender of their migrant workers, results in various forms of racial and gender segmentation. Women also face a challenge when it comes to succession in family-owned wineries in the Cognac region of France [11].

3.4. Wage

Darpeix et al. [26] distinguish three types of employee wages: wages paid to family members, permanently employed workers, and seasonal workers. Using seasonal workers increases flexibility and reduces costs, but this type of labor is not available in all geographic regions. Family labor can replace both types of labor but is typically used to replace the latter. However, there are cases where hiring a permanent employee is cheaper, for example, when the cost of training, turnover, or work supervision is very high. Agricultural employment is characterized by highly discriminatory wages. There is a significant difference between the wages paid to family members, permanent employees, or migrant workers. Furthermore, migrant workers work for hourly and performance wages and generally do not have the same social rights as citizens, which further increases their vulnerability [5,15,[25], [26], [27],29,33,36,38,46,66,90,105,109,113,[120], [121], [122], [123]].

When investigating the illegal employment of Romanian migrant workers in Italy, Domșodi [33] draws attention to the fact that the pressure on efficiency on both the upstream and downstream sides of the agricultural supply chain is so great that the cost of labor matters a lot. Shreck et al. [123] also report that the income of migrant workers working in California decreases in real terms; they are not paid overtime, and they are underemployed in the off-season. In Denmark, it is a regular solution that domestic workers are paid more for the same work than seasonal workers, who also lose out on social services (pension, health insurance) [109].

Migrant workers in the UK routinely receive their wages late [27]. From 2021, Germany fixed the minimum hourly wage for seasonal immigrant workers [105]. However, the wage depends only partly on the hours worked, workers earn the other part based on performance, and the performance measurement that results in unfair situations is based on unrealistic expectations [121,122]. In Northern European welfare states, trade unions specifically feared that EU enlargements would depress the wages of seasonal agricultural work. The wage gap between agriculture (and other sectors based on immigrant labor) and other industries strongly supported by trade unions has opened [38,91,109,129]. Mishra and Chang [85] found that income uncertainty in American farm households promotes precautionary savings and household wealth. Jiang and Miller [54] analyzed the wage impact of cannabis legalization in the USA without finding any significant differences in the average wage of the agricultural sector. Furthermore, according to Richards and Rutledge [112], with the increase in bargaining power of workers during COVID-19, agricultural (minimal) wages started to rise, and the higher unemployment benefits increased the equilibrium wages as fewer workers remained in the (agricultural) labor force.

3.5. Education

The rapid development of technology, smart agriculture, and the recording, collection, processing, and proper use of an unimaginable amount of data require different knowledge and skills from agricultural workers than ever before. One of the most essential tools for this is education and training so that professionals with adequate knowledge and experience are present in the sector. With the progressive professionalization of the food industry workforce, next to the demand for manual or low-skilled workers in this sector [68], there is also a need for specialists who can handle and service machines, which requires the development of other skills in education and technology-oriented training [18]. Agricultural consulting and education are the key to improving labor productivity [104,116]. Internship programs can play an important role in this process, as collaborative courses strengthen academia-industry bonds; however, the USDA example shows that only a small percentage of the interns will be long-term employees [32]. Nevertheless, the University Extension Diploma in Food Technology (DEUTA) program is a good example of collaboration between academia and industry [19].

It can be considered a serious challenge that the qualifications of the agricultural workforce are generally lower compared to other sectors [36,46,141], and that the highly qualified workforce does not stay in the agricultural sector for long, mainly due to financial reasons [15,129,132]. One of the critical effects of the increase in farmer's income is that the child(ren) of the producers can receive a higher level of education, because of which they can find a better paid job outside the sector and are less likely to take over their parents’ farm [8,59].

Education makes it easier for immigrants and less educated people to find work in agriculture [7,15,27,59]. Special attention must be paid to the safety training of migrant workers, for whom injury rates are generally higher than for the non-migrant workforce [16]. As family labor is found to be less efficient than hired labor, investing in education and training programs for family members is justified [64,65]. A relationship can be demonstrated between farmer education and the ability of the farm to generate income [8,43]. An educated farmer collects and uses more information, has better access to resources, and is more likely to invest in technology and operate a more modern and efficient farm. Succession is usually not a problem on such farms: the next generation is more willing to take over a well-functioning, modern, and profitable farm. The higher the level of farmer education and the higher the percentage of permanent employees, the smaller the proportion of families involved in the work [26]. Policymakers in the EU should focus on rural development payments for education, as it is found to facilitate the increase in human capital and efficiency [75].

3.6. Productivity

As in other sectors, one of the essential means of increasing profits in the agricultural sector is increasing productivity. Production increases through the optimal use of machines and labor, while costs do not change substantially, resulting in higher profits overall. The labor shortage in developed countries further reinforces the need to increase productivity. The decrease in labor use labor through technological developments requires an increase in workers’ education level [5]. The productivity of agricultural land grows slower than its labor force, and the growth of agricultural productivity lags that of the sectors that produce inputs [62]. Zhengfei and Lansink [142] show that long-term debt has a positive effect on productivity growth in the farming context. In general, agricultural wages show an increasing trend and its main reason is higher labor productivity [6].

The role of agriculture and the food industry is more significant in the new member states of the EU, compared to the old ones, but the productivity in the old member states can be considered higher. In the case of both groups of countries, the opportunities for employment growth are limited [5,58]. Taking into account CAP subsidies, the smallest farms have the best indicators, as the use of labor per unit of area is inversely proportional to the size of the farm. In the case of smaller farms, this means overemployment, which negatively affects workforce’s productivity [13,102]. On the contrary, in the case of American agriculture, the allocation of labor from less efficient to more efficient (typically larger) producers would increase the output and productivity. Agricultural subsidies and programs play a key role in this continent and Europe [43,51,62,69].

In developed countries, family farms do not hinder the increase in productivity, which significantly contributed to the optimization of work organization and the continuous reduction of the workforce due to technological development. Increasing labor productivity increases the return of capital investors (and not wages) [50]. Environmental policy-measures also have an impact on farm labor use. Unay-Gailhard and Bojnec [132] showed that agri-environment measures increase the hired labor on crop farms and the family labor on dairy farms. Increasing the productivity of the farm can be achieved in many ways, for example by increasing the level of education of employees, increasing economies of scale, mechanization and technological development, export orientation, specialization, or supporting young farmers [2,18,40,72,89,93,104,118,131].

Groborz and Juliszewski [47] show that tasks performed by women are in greater need of mechanization due to the effort requirement than tasks performed by men. Since labor availability is a critical factor, production contracts also typically increase productivity [118]. Increasing workforce productivity requires an integrated approach and targeted programs [5,34]. Maietta et al. [75] suggest that rural development payments play the most significant role in improving human capital productivity. Sabasi and Shumway [116] also emphasize the human aspect of agricultural productivity, mainly through education and access to health care, as the main drivers of human capital. Yagi and Hayashi [139] found that overwork is unavoidable on both family and non-family rice farms in Japan due to the extra time requirement of coordinating with part-time workers. Konstantinidis [63] shows that even organic farms in the EU are highly mechanized and productivity-oriented, despite the policymakers' rhetoric of organic farming promoting small-scale agriculture. Raimondo et al. [107] also highlight how organic farming increases the efficiency of Italian olive farms. Reissig et al. [111] found that farm couples work longer hours on organic farms than on conventional farms, which might also be motivated by work enjoyment. Overall, the agricultural model in developed countries focuses on productivity, the main feature of which is the reduction of labor use to the greatest extent possible [72].

4. Summary and conclusions

4.1. Summary and synthesis of the findings

The challenges experienced in recent years and decades, including factors such as an aging population, changing consumption patterns and a growing demand for organic foods, have significantly burdened the agricultural sector. Furthermore, the recent, suddenly occurring new challenges (e.g., COVID-19 pandemic, the Ukrainian-Russian conflict) have also heavily affected and tested the agri-food sector. Regrettably, agriculture's importance, for example, in the ratio of total GDP and employment, has declined in developed countries. Based on the two-stage, comprehensive systematic literature review presented in this paper, employment in developed countries’ agriculture is characterized by specific areas of focus: (1) family farming; (2) unique employment characteristics related to migration and mobility; (3) gender issues; (4) wage disparities; (5) educational considerations; and (6) productivity enhancements. The review included the summarization and synthesis of 128 articles. Most of the articles dealt with the United States, followed by the EU (mainly Italy and Poland) in Fig. 5.

According to the results, family farms remain crucial in developed nations’ agriculture despite their decreasing number [60]. The decline comes from the increase in the size of farms driven by efficiency pressures, mainly in developed Europe. In least developed countries such as Romania or Bulgaria, family farming is still prevalent, managed mainly by older, low-educated farmers with family help [81,129]. The drop in family farming is driven by socio-economic factors such as smaller families, educated children leaving agriculture, and an aging farmer population. This complex problem is the crux of agriculture in developed countries. For survival, family farms must improve efficiency, specifically in labor costs. Furthermore, the modernization and high degree of mechanization of family farms have an attractive effect on descendants in terms of staying in agriculture [5]. Agricultural policy should encourage the size of holdings that can support a family by consolidating agricultural land and reducing fragmentation.

However, global capitalist agriculture seeks to increase profits by cutting labor costs, leading to reliance on exploiting migrant workers for economic gain. This not only subjects migrant workers to inhumane and illegal working conditions [106,114], but also jeopardizes the stability of the global agricultural workforce due to mobility restrictions during epidemics. Governments must find a solution to ensure a predictable food supply through the management of human labor in the future. Seasonal work can benefit farmers and workers in specific structures [43,67,95]. For example, in Great Britain or Canada, a special type of work allows contractors to bring their tools and offer a stronger bargaining position for better wages and conditions, contributing to work sustainability and stability [1,94]. In countries with high wages, strong mechanization and automation are being implemented to replace repetitive, low-value-added work. However, with mechanization, the digital surveillance of workers is also spreading, which could lead to even greater exploitation of migrant workers Fig. 3,Table 10,Table 5,Table 6,Table 7,Table 8,Table 9.

The least amount of research has been done on the topic of gender (in)equality in developed countries. Women's jobs in agriculture are increasingly devalued (e.g., monotonous jobs) and require less and less high-level education. As a result of migration, a significant number of men appear in developed countries’ agriculture, and the increase in the number of women can only be observed recently [25,106]. It is not surprising since, due to the typical physical load of most agricultural work, most employers are specifically looking for male workers. In the case of women, a clear turning point can be the acquisition of higher education, which allows them to occupy higher positions.

Based on the results, agricultural wages show severe discrimination, with significant disparities between wages paid to family members, permanent employees and migrant workers. Low-skilled labor leaves agriculture when wages increase in the industrial sector. Migrant workers often earn lower hourly and performance-based wages and lack the same social rights as citizens, exacerbating their vulnerability [15,25,36,66]. Seasonal labor offers flexibility and cost savings but may not be accessible everywhere. Family labor can replace both but typically replaces the latter. In some cases [33], hiring a permanent employee may be cheaper, for example, when training, turnover, or supervision costs are high.

As a result of technological development (e.g., mechanization, automation, robotization), different kinds of knowledge and skills are needed [18,68] and professional education is generally valued. The problem is that the educational level of the workers in agriculture is typically lower than in other sectors [36,46]. Higher education helps attract agricultural labor but typically results in higher income within the sector. For family farms, encouraging generational change can concentrate the proper education, skills and capital in the hands of a single family in the long term. EU policymakers should prioritize rural development subsidies for education, as this has been shown to foster human capital growth and improve efficiency [75]. Moreover, attracting young people to work in agriculture is key to the development of the sector [[14], [76]]. Technological progress means that short-term, highly practice-oriented training is needed to meet rapidly changing needs. Innovation and know-how are the basis of modern agriculture and the food industry and should be the foundation for future training programs. Secondary and higher education in agriculture should be effectively involved in various R&D activities in which theoretical and practical knowledge can be successfully combined.

Indicators used to measure productivity (value produced by the workforce, gross added value, and agricultural income) are projected onto the labor unit (annual labor unit). Consequently, productivity increases when the value of production increases and/or the use of labor decreases. The tools to increase productivity are production concentration, optimization of the production structure, development of technology (technical innovations that save labor), and support of young people/farmers to start or continue agricultural activities. The family farming model does not prevent the increase in productivity at all. Processing raw materials is essential to increase added value. One of the main outcomes of this research is the close link between the identified themes. Having skilled workers requires education and training. This is important for family farms and even for seasonal workers. Skilled workers should be paid better regardless of their gender. Higher productivity is based on advanced methods including precision agriculture and precision technologies cannot be applied without skilled workers. However, the time aspect of the different policy measures should be highlighted. Even a single support program, such as investments in physical assets, can enhance productivity in the short term. While different types of training are short- or medium-term measures, changing the education system according to the specific need of the sector requires more time. Although fairer wages can be introduced instantly, they are closely linked to higher productivity. Table 11 provides an overview of the identified themes, and the main findings related to them.

#### Food shortages cause extinction.

Julian Cribb 23, Ph.D., Principal of Julian Cribb and Associates, Fellow at the Australian Academy of Technology and Sciences and Engineering, former Director of National Awareness at the Commonwealth of Scientific and Industrial Research Organization, "Chapter 4: Nuclear Awakening," in How to Fix a Broken Planet: Advice for Surviving the 21st Century, Cambridge University Press, University of Kansas Libraries, Pro Quest, 2023

The greatest single risk of human extinction among the 10 catastrophic threats that comprise our existential emergency is still nuclear war. However, the core issue is that conflict can originate with almost any one of them – with food shortages leading to international disputes over food, land, and water; in quarrels over dwindling fish, forest, energy, or mineral resources; in the unleashing of uncontrolled technologies such as cyber raids on national IT networks, banks, and even nuclear command-and-control centres; the release of novel man-made plague organisms; the almost universal brain damage and loss of IQ now being caused by the chemical flood; the tension and anxiety driven by worsening climate conditions; and in the manic tide of false information propagated by fools and malignant actors via the internet. The existential threat to humanity thus spirals out of the coming together of several of these mega-risks, culminating in nuclear conflict.

An instance of how mega-risks may compound into nuclear war is the long-standing animosity between India and Pakistan, chiefly over Kashmir, terrorism, and the waters of the Indus River which feed both countries at a time of growing climate stress. Even a relatively limited nuclear conflict between the two – 100–150 warheads of Hiroshima scale – is projected to kill 100 million people directly and 1–2 billion people worldwide as the resulting ‘nuclear winter’ would cause harvests to fail and food supplies to collapse all around the planet.9 Such a disaster would almost certainly trigger further wars, some of them nuclear, as governments fail and atomic weaponry falls into the hands of political radicals, warlords, criminals, or religious extremists.

A second example is acute water scarcity leading to a food crisis in northern China, spilling the local population in all directions, including Siberian Russia: strategic think tanks fear such a development could precipitate a nuclear response. Another case is the Middle East, already the most water-starved and volatile region on Earth, where the acquisition of nuclear weapons by Iran could spark a regional arms race involving Israel and, potentially, Saudi Arabia.10 In all these cases, the nine catastrophic threats pave the road that leads to nuclear holocaust – and all must now be regarded as primers in the explosive chain leading to civilisational collapse and human extinction.

#### Compliance with employment law is key. It stabilizes food supply against antibiotic resistance and foodborne diseases.

Megan Linnea Clayton 14 - PhD candidate for social and behavioral science from The Johns Hopkins Bloomberg School of Public Health. “A Qualitative Investigation of the Role of Food Workers in U.S. Food Safety,” November 2014, The Johns Hopkins University, http://jhir.library.jhu.edu/handle/1774.2/40662

2.1 The Global Food System and Infectious Disease

Protecting the U.S. food supply requires understanding the pathways by which contaminants enter the food system, or the organizational structures, processes, resources, and people involved in the growing, harvesting, processing, packaging, distribution, marketing, consumption, and disposal of food (Behravesh, Williams, & Tauxe, 2012; Tansey & Worsley, 1995). This system is shaped both by the natural environment, such as soil and water, and by social, political, and economic pressures. Since the late 20th century, increased migration, international travel, and trade in food and other commodities have created greater social, political, and economic interdependence at a global level (Kaferstein, Motarjemi, & Bettcher, 1997; Krause & Hendrick, 2011). As a result, the industrial food system has become global in nature, and increased consolidation has resulted in large processing facilities that efficiently produce and distribute products across the world (Tansey & Worsley, 1995; Woteki & Kineman, 2003). Representing 13% of the U.S. Gross Domestic Product, the food sector sells $1.8 trillion dollars in goods and services each year. Thus, this food system contributes significantly to the U.S. economy and provides consumers with a wide array of fresh foods year-round and at relatively low cost (Taylor, 2011).

In addition to benefits in terms of costs and availability of foods, industrial food production and greater interconnectedness allow for the rapid spread of infectious disease and food contamination (Cork & Checkley, 2011). Greater access to foreign foods has changed U.S. food preparation techniques and regional preferences, increasing the chance that new and infrequent pathogens enter the system. Under the industrial food model, the overuse of pesticides and antibiotics has led to multi-drug resistant organisms that infect food, increased pathogen virulence, and reduced antibiotic effectiveness (Travers & Barza, 2002; Woteki & Kineman, 2003). Though the number of foodborne outbreaks has remained steady for decades, pathogens have become increasingly lethal and old pathogens have adapted to new food territories, such as salmonella in nuts (Centers for Disease Control and Prevention, 2011d; Taylor, 2011). When food safety problems do occur, complex production technology and supply chains make it difficult to identify and stop the contamination source. As the U.S. population continues to grow, age, urbanize, and increasingly rely on commercially-prepared foods, the ability of the U.S. food safety system to develop practices that ensure safe food is vital for protecting public health (Cork & Checkley, 2011).

2.2 Foodborne Disease in the United States

2.2.1 The Public Health Burden

As a result of food safety challenges, foodborne disease represents a significant public health problem in the United States. Every year, approximately 48 million Americans become sick, 128,000 are hospitalized, and 3,000 die from contaminated foods (Centers for Disease Control and Prevention, 2011d). Foodborne diseases result from the consumption of foods and beverages contaminated with viruses, bacteria, parasites, toxins, metals, and prions (McCabe-Sellers & Beattie, 2004). While the majority of foodborne diseases result in acute, self-limiting episodes of gastrointestinal problems and vomiting, 2-3% of cases become severe with long-term health consequences, including hemorrhagic colitis, bloodstream infection, meningitis, joint infection, kidney failure, paralysis, and miscarriage (Centers for Disease Control and Prevention, 2011d). While rare, death from foodborne disease is more likely to occur in infants and children, pregnant women, the elderly, and patients with compromised immune systems (McCabe-Sellers & Beattie, 2004).

The costs associated with foodborne disease are significant. For the individual and household, these may include medical costs, income or productivity loss, and pain and suffering. Contaminated food affects the food industry through product recalls, plant closings, and reduced product demand. To both address and prevent foodborne illness, the public health sector incurs costs from implementing and running disease surveillance systems, education, and outbreak investigation (Woteki & Kineman, 2003). Recent studies estimate that health costs from foodborne illness total U.S. $77.8 billion per year, or average to approximately $1,626 per illness episode (Scharff, 2012)

2.2.2 Foodborne Outbreaks, Trends, and Risk Factors

Cases of foodborne disease are classified as outbreaks when two or more persons experience a similar illness after consuming a similar food or beverage (Centers for Disease Control and Prevention, 2013). Currently, the Centers for Disease Control and Prevention (CDC) collects information on foodborne outbreaks from all states, the District of Columbia, and Puerto Rico. These data include information on the number of sick persons, hospitalizations, deaths, the agent or pathogen, implicated food, and other factors related to food preparation and consumption (Centers for Disease Control and Prevention, 2013). Each year, approximately 1,000 outbreaks are reported to the CDC, though the true occurrence is unknown and likely higher. This reporting gap results from challenges in outbreak identification, which relies on sick individuals to seek treatment, medical testing and determination of the food and agent, and health department investigation and reporting (Painter et al., 2013; Scallan et al., 2011; Woteki & Kineman, 2003).

Over the last 15 years, progress in addressing foodborne illness and outbreaks has remained relatively stagnant (Centers for Disease Control and Prevention, 2011d). An inherent challenge of controlling contamination is the fact that food-contaminating microorganisms are everywhere – in the air, soil, and water, as well as on the surface of plants and animals, and in the mouth, nose, and intestines of animals and humans (Adams & Motarjemi, 1999). As such, common sources of foodborne pathogens include flies, polluted water, domestic and wild animals, human and animal waste, food workers, and dirty equipment, which may then infect food through failure to detect and remove diseased materials, inadequate food storage, handling, and/or processing, poor health and hygiene, and intentional introduction into the food supply (Adams & Motarjemi, 1999; Merrill & Francer, 2011). These factors are further complicated by industrial food animal production systems, where public health threats such as antibiotic-resistant pathogens and contaminated animal waste in groundwater are found to originate and to create opportunities for food contamination (Solomon, Yaron, & Matthews, 2002) .

Across the variety of sources of foodborne outbreaks and disease, one of the most common is identified as food workers through poor health, hygiene, and improper food handling practices (Centers for Disease Control and Prevention, 2011d; Gould et al., 2013; Todd, Greig, Bartleson, & Michaels, 2008). Further, norovirus, the pathogenic cause of most foodborne illness in the U.S., has been most commonly linked to foods prepared by workers in commercial settings, such as delis and restaurants (Hall et al., 2012; Hall et al., 2013) . According to Greig et al. (2007), food workers across food work settings have, for decades, been identified as the source of many foodborne outbreaks, with few indications that this trend is on the decline. In this way, a key factor for improving food safety resides in the extent to which our food safety system understands and manages the relationship between food work and food risk.

2.3 Food Work, Working Conditions, and the Impacts on Health in the United States

2.3.1 Jobs in the Food Chain

Approximately 20 million people (1/6th of the U.S. workforce) work in five key sectors of the food system, which include food production, processing, distribution, retail, and service (Food Chain Workers Alliance, 2012). In order to appreciate the connection between workers and food safety, it is important to understand the types of jobs and populations that make up our food system.

Since food service represents over half of food workers, the average food worker is a non-Hispanic white, U.S.-born person whose primary language is English and who holds a high school degree or less. Approximately half of food workers are female and two-thirds are 44-years-old or younger. Food system jobs may include positions as management, supervisor, professional, and/or office worker, though 86% of all workers are categorized as front-line staff, or hold jobs with repetitive work and little decisionmaking capacity. While most workers have lived in the U.S. for their entire lives, approximately 23% were born elsewhere (Food Chain Workers Alliance, 2012). Finally, since most food jobs do not require formal credentials, the food system provides work opportunities to undocumented workers and government labor data likely underestimate the prevalence of this population. Food sector size, tasks, and jobs are summarized in Figure 1 [located on the next page].

[FIGURE 1 OMITTED]

Food Production

There are 3 million people who work in food production, which represents 15% of the food system workforce (Food Chain Workers Alliance, 2012). Food production workers include farmworkers who raise livestock and plant, manage, gather, pick, and collect raw foods, and fisherman, who raise, catch, sort, and pack fish and other aquatic animals (Food Chain Workers Alliance, 2012; U.S. Department of Labor, 2014b).

For a variety of reasons, it is difficult to determine the size of the farmworker population; however, estimates range from 1 to 3 million workers (Economic Research Service, 2012; National Center for Farmworker Health, 2012). Farmworkers mostly work outdoors as field crop workers, nursery workers, and livestock workers; approximately half are employed in California, Florida, Texas, Washington, Oregon, and North Carolina. Compared to other U.S. workers, farmworkers are younger, less educated, more likely to be foreign-born and male, and less likely to speak English, be a U.S. citizen, or hold a legal work permit (Economic Research Service, 2012). An estimated 82% selfidentify as Hispanic, with the majority born in Mexico. There are no formal requirements to become a farmworker, and between 53% and 60% are estimated to be undocumented immigrants (Carroll, Samardick R., Bernard S., Gabbard S., & Hernandez T., 2005; The Southern Poverty Law Center, 2010). There are approximately 36,000 fisherman or fish farmers in the United States, and this industry experiences high turnover due to the seasonal nature of the job and lack of a steady income. Fishing is characterized as strenuous and hazardous, depending on the body of water and type of fish sought (U.S. Department of Labor, 2014b). No formal education is required to become a fisherman and workers usually learn on the job (U.S. Department of Labor, 2014b).

Food Processing

There are 1.3 million people who work in food processing, which represents 7% of the food system workforce (Food Chain Workers Alliance, 2012). Processors include bakers and food processing operators who measure, cook, mix, bake, and assemble raw ingredients into finished products and monitor food temperatures. They also include slaughterhouse workers (packers and eviscerators) who slaughter, clean, and divide animal carcasses, as well as butchers, boners, and trimmers who often repeat the same cut to one type of meat product for the duration of their shift. Some production workers act as operators and tenders of baking, roasting, and drying machinery, and process meat as well as foods like tortillas, fruits (e.g., raisins), and vegetables (U.S. Department of Labor, 2014c). Many of the food products created in the processing sector are shipped in bulk to food warehouses, retail outlets like grocery stores, and service outlets like restaurants. Food processing workers often inspect and pack final products and sterilize and clean the processing area (The Johns Hopkins Center for a Livable Future, 2012).

An estimated 500,000 people work in U.S. slaughterhouses and meat processing facilities (Kandel, 2009). These workers are predominantly African American and Latino, 38% are foreign-born, and many live in low-income communities (U.S. Government Accountability Office, 2005). These facilities experience high turnover, and it is believed that many employers knowingly hire undocumented workers, estimated to represent 25% of the workforce (Human Rights Watch, 2005; Passel & Cohn, 2009; U.S. Government Accountability Office, 2005). Many slaughterhouse positions are at-will, which means jobs may be terminated at any time without advance warning.

Bakers most often work in commercial settings, such as large factories (18%), or retail environments, such as bakeries and tortilla factories (31%), grocery stores (27%), limited-service eating places (12%), and restaurants (4%) (U.S. Department of Labor, 2014c). While some bakers attend culinary school or an apprenticeship program, most receive long-term on-the-job training.

Next, approximately 131,000 individuals work as food processing operators (U.S. Department of Labor, 2014c). These workers use a large assortment of equipment to create highly processed foods like breakfast cereals, frozen pizza, candy, and chips, medium-processed foods like flour, and minimally processed foods like milk. These jobs generally require a high-school diploma or equivalent, and have on-the-job training. Finally, meat, poultry, and fish cutters and drying equipment operators work in food manufacturing plants (U.S. Department of Labor, 2014c). These jobs often require workers to operate dangerous equipment in loud and wet environments that are very hot or cold (The Southern Poverty Law Center, 2010). Across processing jobs, workers perform most or all tasks while standing (U.S. Department of Labor, 2014c).

Food Distribution

Approximately 1.6 million people work in food distribution, which represents 8% of the food system workforce. Distribution workers include warehouse workers who load and unload trucks and move products using equipment and physical labor, sometimes in cold storage environments (Food Chain Workers Alliance, 2012). Limited data are available regarding work and workers in this sector. However, a few reports, including one focused on the greater Chicago area and Southern California, find that workers in these major distribution centers are generally employed through staffing or temp agencies, such that workers are expected to leave the employer within a certain period of time. These positions often pay at or below minimum wage (Food Chain Workers Alliance, 2012; Smith & McKenna, 2014; Warehouse Workers for Justice, 2010).

Food Retail

There are 2.5 million people who work in food retail, representing 13% of the food system workforce. Food retail workers include grocery store workers such as cashiers, clerks, deli workers, and those who stock shelves and clean facilities (Food Chain Workers Alliance, 2012). Approximately one half of all food retail workers are women, 85% are non-Hispanic white, 10% African American, and 4% Asian. One third of the industry is between the ages of 35 and 54, while teenagers (16-17) represent 11% and workers 65 and over 3% (Lovell, Song, & Shaw, 2002). This sector does not require formal credentials, and approximately 29% of workers did not finish high school. Almost half of all retail positions are part-time (46%) and 52% of the part-time workforce is female (including 7% single mothers), which means that women are most greatly affected by the limited hours and pay in this sector (Lovell et al., 2002).

Food Service

With 11.4 million workers representing 54% of the food system workforce, service is by far the largest food sector (Food Chain Workers Alliance, 2012). Food service workers include bartenders who mix and serve drinks, chefs and head cooks who oversee staff and food preparation, cooks who prepare, season, and cook foods, food preparation workers who work under cooks to slice, peel, chop, cut, mix, and prepare cold foods, food and beverage serving and related workers (who conduct food preparation and cleaning duties in places like cafeterias and hotels), bussers, dishwashers, and waiters and waitresses who take orders and serve food and beverages to customers (U.S. Department of Labor, 2014d).

The food service sector is mostly comprised of restaurant workers (88%), the vast majority of whom work in non-supervisory positions (90%) (Restaurant Opportunities Centers United, 2010). Across restaurant jobs, half of the workers are women, 22% Latino or Hispanic, 11% African American, and 6% Asian (U.S. Department of Labor, 2014d). In general, the restaurant industry does not require formal training; however, many workers have higher levels of education than workers in other sectors, with 38% of workers over 25 years of age holding a high school degree, 27% with some college, and 15% with a bachelor’s degree or higher (Restaurant Opportunities Centers United, 2010). According to the Pew Hispanic Center (2009), undocumented workers comprise 12% of the restaurant workforce.

2.3.2 Food Working Conditions

Although some food sector jobs provide a livable wage and opportunities for upward mobility, the majority offer low wages with little access to benefits, few opportunities for advancement and training, and significant risks to worker health and safety (Food Chain Workers Alliance, 2012). Overall, the 86% of food workers who work in front-line positions also report earning low or poverty wages. This pay includes a median salary of $18,880 per year and represents the least across all jobs in the food sector as well as across U.S. industries, including healthcare, manufacturing, government, retail trade, construction, education, and transportation. In fact, six of the ten lowest paying jobs in the U.S. are in the food industry, including the bottom three as (3) dishwasher, (2) food prep cook, and (1) fast food cook (U.S. Department of Labor, 2014e).

Beyond low pay, many food workers cite that the inconsistent provision of wages and work hours challenges their ability to plan and achieve economic stability. For approximately 40% of food workers, making ends meet requires working for two or more employers for 40 hours a week and with little access to breaks (Food Chain Workers Alliance, 2012). For some production workers, wages are earned according to a piecerate, a payment structure that connects earnings to stamina and output and negatively impacts worker health and safety (Johansson, Rask, & Stenberg, 2010).

Agricultural work is considered one of the most hazardous jobs in the U.S., putting workers at regular risk for heat exhaustion and stroke (Carroll, Samardick R., et al., 2005). Compared to the general public, production workers suffer higher rates of toxic chemical injury and pesticide exposure (Economic Research Service, 2012). Many hired farmworkers live in employer-provided housing, which has been found to be low quality, with crowding and poor sanitation (Economic Research Service, 2012). In a study of cooking facilities within farmworker housing in North Carolina, Quandt and colleagues (2013) identified cockroach infested food preparation areas and contaminated water sources, signaling a lack of employer compliance with housing regulations and risks to worker health. These risks extend to significant sexual harassment problems, where reports from females in food production and service suggest female food workers experience higher rates of sexual harassment than women in the general workforce (Jayaraman, 2012; The Southern Poverty Law Center, 2010; Waugh, 2010).

These conditions are exacerbated by the fact that 79% of workers report that they lack, or do not know if they have access to paid sick days, 83% report a lack of health insurance from employers, and 58% lack any coverage whatsoever. These conditions make it difficult for workers to care for themselves or their families and many report that they rely on the emergency room for primary care. Further, more than half report working while sick (Food Chain Workers Alliance, 2012). To complicate the issue, some workers note that the nature of work environments prolongs illnesses, sometimes for months (Food Chain Workers Alliance, 2012). For example, most production jobs require working outdoors, meat processors work on slaughtering floors that lack climate control and trap heat in summer and cold in the winter, and food processing, distribution, retail and service workers operate in extreme temperatures to help preserve foods (U.S. Department of Labor, 2014b, 2014c, 2014d). Finally, more than half of workers report that they handle food without health and safety training and a third report a lack of access to proper equipment to do their job (Food Chain Workers Alliance, 2012).

Some poor working conditions are, in part, related to food worker exemptions under U.S. Department of Labor laws such the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA) (Farmworker Justice and Oxfam America, 2010; Liu, 2012). The FLSA entitles some workers to the minimum wage for each hour worked ($7.25), overtime pay of one and one-half times the regular rate for each hour worked over forty-hours per week, and that employers maintain payroll records. Under the NLRA, workers earn protection for union organizing and collective bargaining (U.S. Department of Labor, 2004b, 2013). Currently, farmworkers are exempt from the NLRA and the FLSA overtime pay requirements, and workers on small farms (fewer than 7 workers employed in a calendar quarter) are excluded from all protections (Farmworker Justice and Oxfam America, 2010). Further, employers of workers classified as tipped employees (those who customarily and regularly receive more than $30 a month in tips) are only required to pay $2.13 per hour, as long as that amount combined with worker earned tips equals the federal minimum wage (U.S. Department of Labor, n.d.)

In an effort to make up for lack of farmworker protection under the FLSA, Congress passed the 1982 Migrant and Seasonal Agricultural Worker Protection Act. This Act regulates farm contracts such that employers must disclose wage rates and job terms to workers, keep detailed records of wages and hours worked, meet local and federal housing and safety health standards, and register with the Department of Labor (Farmworker Justice and Oxfam America, 2010). Despite these added protections, employment law violations, such as not being paid for full hours worked and poor work and housing conditions persist among workers in the food chain (Food Chain Workers Alliance, 2012).

2.3.3 The Impacts of Food Work on Family Health

Beyond the workplace, poor food working conditions impact workers’ families. It is sadly ironic that food workers and their families experience high rates of food insecurity, or the lack of access to enough food for an active and healthy life (Economic Research Service, 2013; Restaurant Opportunities Center of New York, 2014). To support themselves, food workers often participate in public assistance programs, such as the Supplemental Nutrition Assistance Program (formerly known as Food Stamps), at twice the rate of all other workers in the U.S. (Food Chain Workers Alliance, 2012).

Further, the conditions faced by the majority of U.S. food workers exact a price on their children. The lack of access to health benefits and an inability to stay home with sick children has been associated with children experiencing worse health and slower recovery times (Heymann, 2003). Poor working conditions also impact children’s educational attainment and risk for injury, as children spend more time alone, lack stimulation necessary for physical and cognitive growth, and regulate themselves or are regulated by other children (Heymann, 2003). While these scenarios impact many working families, they particularly disadvantage the poor, who often lack access to support that may help with inflexible schedules, such as affordable and quality child care (Heymann, 2003). These conditions also impact elderly and disabled family members who often have caregiving needs that require attention from working adults. As the U.S. elderly population grows to 379 million by 2050, the inability of food workers to effectively care for this population represents a serious public health problem (Heymann, 2003).

2.4 Implications of Working Conditions for Food Risk

The negative health impacts of poor working conditions and the states of deprivation that they create—inadequate food, housing, and sanitation—have been recognized for centuries (Braveman, Egerter, & Williams, 2011). A smaller body of research, however, has extended this knowledge base to consider which poor food working conditions may impact worker health in ways that directly impact food safety, such as working while ill (Braveman et al., 2011; Johns, 2010).

2.4.1 Presenteeism

Presenteeism is a term that describes working when ill (Johns, 2010) . Since the 1980s, this workplace problem has been studied in business and social science literatures, and examined mostly for impacts of chronic conditions, like arthritis, on worker productivity, measured as economic costs (Johns, 2010; Schultz & Edington, 2007). The existing research that applies this problem to public health has focused mostly on health care settings, or risk of workers spreading infectious disease to vulnerable patient populations (Rodriguez, Parrott, Rolka, Monroe, & Dwyer, 1996; Widera, Chang, & Chen, 2010). This body of research is valuable for understanding the impact of food working conditions on presenteeism in food jobs, particularly as food, like patients in health care settings, extends the risk of presenteeism beyond productivity to issues of food safety and public health (Widera et al., 2010).

Factors Driving Presenteeism

Research suggests that presenteeism is related to both personal and work factors, including work discipline, employee status in the work hierarchy, and human resource policies such as pay, paid sick days, attendance control, downsizing, and permanency of employment (Johns, 2010, 2011). For example, in a systematic review of presenteeism research, Johns (2011) found that employees who perceived themselves as replaceable, held temporary status, and lacked a sense of job security exhibited more presenteeism days. In a study of infectious disease outbreaks in New York State nursing homes, Li and colleagues (1996) found that homes with paid sick leave policies were less likely to have infectious disease outbreaks, attributing the relationship to reduced presenteeism. To the author’s knowledge, no similar studies have been conducted for the food worker population. However, these data corroborate findings from surveys conducted with food workers who often reported working while sick (53%) and attributed their behavior to a lack of paid sick days, a belief that one would otherwise lose her job, and threats made by an employer (Food Chain Workers Alliance, 2012).

Consequences of Presenteeism

Presenteeism is associated with lost productivity as workers are paid a salary but cannot perform at optimal levels, increased chance for worker injury or mistakes, and a further drop in productivity and increased risk for injury and mistakes as the sickness of one worker spreads to others (Collins et al., 2005; Widera et al., 2010). For food workers, presenteeism likely holds implications for disease transmission (to other workers and food) as well as for the successful performance of measured tasks such as the ability to control food temperatures and operate machinery properly, watch the flow of products, and check products to ensure accuracy and absence of adulteration or health problems (Nestle, 2010). Ultimately, though research examining drivers of presenteeism is limited, existing data suggest the importance of considering food working conditions in efforts to control and prevent worker-related food safety risks (Johns, 2011).

Considering previous descriptions of food workers, however, it is clear that the food industry runs on work characterized by factors that may increase presenteeism as well as other risks for food. This state of affairs suggests working conditions may not be considered in food safety strategies, which is problematic for reducing the burden of foodborne disease as well as for workers who are expected to keep food safe despite conditions that impact their own well-being and make them a risk for food. In order to understand how to address this problem, it is essential to identify where we now stand, or how the role of food workers is accounted for in food safety. In the next section, the historical origins and current structure of the U.S. food safety system is presented to provide context and to help define the key stakeholders and policies that may be most appropriate for answering this question.

## CP

### Any Ambiguity Zeroes – 1AC

#### Overturning Hoffman solves legal ambiguity that lets courts arbitrarily restrict rights under employment law that are unrelated to collective bargaining. That’s necessary to end the chilling effect.

Michelle Goldberg 21 – Columbia University. “Re-Examining Hoffman Plastic Compounds v NLRB under the Trump Administration,” Fall 2021, Columbia Undergraduate Law Review 18(1), pp. 84-126.

The precedent from Hoffman has yielded many decisions from courts that have challenged the rights of undocumented immigrants. Although courts have established clear guidelines for some legal issues, such as FLSA wage claims, other issues led to completely incongruous results between cases. 38 While many courts chose to limit Hoffman to NLRA cases, some courts interpreted the reasoning in Hoffman so broadly to suggest that granting any sort of monetary compensation to undocumented immigrants will incentivize migration.39 Cases following Hoffman have been inconsistent at best while providing ammunition for those seeking to restrict the rights of immigrant workers.

While the courts were mostly consistent on issues such as disclosure of immigration status and whether the law protects undocumented workers, there was a clear division between different jurisdictions on the topic of what damages workers can recover post-Hoffman. On some topics, such as FLSA wage theft, the courts agreed on an established distinction with Hoffman, arguing that wages for hours already worked need to be honored.40 However, as courts began to deal with other forms of remedies for workers, this distinction began to fall apart. When discussing issues other than FLSA, there was a lack of clear standards to apply to the case of undocumented immigrants. In these opinions, courts were unsure which damages would disincentivize future migration, the aim of IRCA and the Hoffman decision.4'

As a result, cases unrelated to FLSA-type wages were highly inconsistent with one another, even within the same legal issue. For example, in cases of loss of future earnings potential due to workplace injuries, one court chose to grant full damages without regard to status,42 while another created a new test to determine employer and employee culpability under IRCA to decide whether damages can be awarded.41 Meanwhile, another court granted damages calculated based on the plaintiff's home country, El Salvador, in order to account for the worker's ineligibility to work in the United States.44 Here, there is an unclear brightline rule because these damages represent hypothetical work, similar to backpay, but in the future rather than the past. The potential for a worker to amend their work authorization status complicates the issue presented in Hoffman and makes the distinction less clear. These inconsistencies affect workplace conditions for unauthorized workers and the decision calculus to go forward with claims for violation of workplace protections.

Another trend within the case law was the use of Hoffman's logic to argue that any right or remedy can incentivize further unauthorized migration and IRCA violations. Employers generally attempted to argue this in court, with mixed success. While courts generally rejected these arguments, there were several instances where courts categorically denied remedies to undocumented immigrants, regardless of the degree of similarity between the case and Hoffman. For example, in Phase II Investments Inc., the court utilized the broad reasoning in Hoffman to deny backpay under Title VII, notwithstanding that the employer, in this case, was complicit in the violation of IRCA by providing with and instructing their employees to use false identification documents after a Department of Homeland Security (DHS) investigation.41 Similar arguments also became the basis for these courts to deny rights unrelated to the NLRA to undocumented immigrants, such as state disability benefits.46

Ultimately, the Hoffman opinion failed to specify clearly what characteristic of backpay made it unique from other types of remedies and to what extent it would apply to other areas of the law. Without this clarification, courts lacked a clear direction, leading to inconsistency in how damages are calculated or awarded. In the worst scenarios, it allowed for any court to use Hoffman's logic broadly to unilaterally forbid any type of monetary compensation to victims of workplace law violations. While many courts have drawn clear boundaries to the Hoffman decision and upheld the rights of immigrant workers, several courts have chosen to deny workers damages due to their immigration status. The discrepancy between courts' interpretations illustrates the ongoing need for Hoffman to be clarified or overturned.

### Overturning Key – 1AC

#### Supreme Court language is key. Hoffman created a “wider lens” approach that gives judges unilateral authority.

Keith Cunningham-Parmeter 09 - Assistant Professor of Law at Willamette University. “Redefining the Rights of Undocumented Workers,” August 2009, American University Law Review 58(6), pp. 1361-1416.

The Supreme Court has stated that the goal of discouraging illegal immigration should be seen "through a wider lens."23 4 Viewed uncritically, this statement could lead to diminished rights in all cases.

When courts focus on the "wider lens" of incentives, rather than on the specific functional and policy-based arguments discussed above, they often compare unauthorized immigrants' employment relationships to illegal contracts. 2 35 But the comparison ignores the rules governing the enforcement of illegal contracts. Although courts generally refuse to give effect to contracts formed with an illegal purpose, the finding of "illegality" does not end the inquiry. For example, courts are more likely to enforce illegal contracts when failure to do so would result in disproportionate forfeiture. 236 Such forfeiture would certainly occur if an unauthorized immigrant could not recover wages for work performed.

Further, a contract that is made illegal by a particular regulation or statute may still be enforced if one of the contracting parties is a member of the class of persons protected by the statute.237 Although the IRCA bars the employment of unauthorized immigrants, Congress sought to protect the rights of unauthorized immigrants should they ultimately obtain employment. 3 8 Thus, the finding of illegality is only the starting point of the analysis, even if a wider lens is used.

Detached from the language or purpose of the IRCA, the wider lens approach becomes a Rorschach test for judges. Those strongly opposed to illegal immigration focus exclusively on the illegality of the employment relationship. 2 9 Because the Supreme Court has announced many factors relevant to cases involving unauthorized workers without formulating a hierarchy of factors, a plaintiffs unauthorized status becomes the sole focus of the analysis. ° Viewed broadly, the wider lens approach threatens not only the remedy of backpay, but also the ability of unauthorized workers to assert workplace claims at all.

Although still among the minority, several judges have utilized a wider lens to argue that unauthorized 24d cn workers should enjoy fewer rights under federal wage 24 and antidiscrimination 242statutes. These outcomes contradict most post-Hoffman decisions that continue to favor unauthorized workers' rights and remedies. They also ignore Hoffman's central premise, which is that courts may restrict remedies only to the extent that the underlying workplace protections remain intact. Nonetheless, the wider lens view offers an attractively simplistic analysis: denying recovery altogether discourages illegal employment relationships and supports national immigration objectives.

#### Courts cannot escape Hoffman’s shadow while its rationale is ambiguous. The Supreme Court arbitrarily inserted its policy preference by obscuring its implied repeal of the NLRA with vague rhetoric.

Nhan T. Vu & Jeff Schwartz 08 – Associate Professor at Chapman University School of Law & J.D. from University of California at Berkeley Law School, Aspiring Legal Scholars Fellow at California Western School of Law. “Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny,” 2008, Immigration and Nationality Law Review 29(1), pp. 813-872.

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." 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." Even the dissent and critics of the Hoffman opinion have chosen to focus their argumens on the role of the agency rather than on the issue of statutory conflict. 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. This aspect of Sure-Tan was left untouched in Hoffman. 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. The provision of the NLRA that granted authority to the Board to 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]…” 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.

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 IRCA. From this, one could argue that the Hoffman case did not implicate two conflicting statutes, but merely the conflict bctween 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 Boad acted perfectly in line with the statue 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. The Hoffman majority placed no qualifiers when it stated that “allowing the Board to award backpay to illgal 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.”

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 intepret 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 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 th 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. 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.50 The debtor failed to meet several obligations under the collective bargaining agreement and ultimately requested permission from the bankruptcy court to reject it.R! 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 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.R In fact, without explicitly referring to implied repeal analysis, the majority spent almost the entire opinion attempting to reconcile the two statutes,$5 and held that the newly enacted provisions of the Bankruptcy Code trumped the NLRA only when the two statutes were irreconcilable.6 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.97 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. 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 discemed 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. 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.9 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, 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 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.10f 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."" 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.106 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 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."!10

Finally, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." 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.12 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.13 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 decply 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 fcderal statutes.115 According to this explanation, implied repeal is based 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."19 This concept readily translates to implied repeal: it can be argued that it is because courts lack insight into legislative motivations that implied repcal 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

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, 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.125 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 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 repcaled § 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."37 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." It was alleged that the preference conflicted with, among other laws, the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972 (the "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 "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."4 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 number of scats.148 One set of plaintiffs (the Branch plaintiffs) brought suit requesting that a state court issue a redistricting plan.H49 Another set of plaintiffs (the Smith plaintiffs) brought a separate action asking a federal court to issue a redistricting plan.18) The two sets of plaintiffs differed on whether the elections should be held by district or should be at-large.15! 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 apportiontent 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."150 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 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.19 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 obstacies to discourage them from organizing, but also to guarantee that the employer does not benefit by its unscrupulous actions.100 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 the same time, the undocumented worker may be made subject to the appropriate IRCA sanctions for running afoul of that statute.16!

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 lcad 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 arc 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 Hoffinan, 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 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 lcad 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 Hoffinan argue whether the availability of back pay awards for undocumented workers "runs counter to" or "trenches upon" the IRCA.165 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 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."1 The majority contended that this demonstrates one way in which the back pay award encourages future IRCA violations." 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,1T 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 berween 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) language to count against Castro's case."" 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."7 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 issuc 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 conciude 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 tequired the 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.1$0 The majority in Hoffinan 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."18!

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 "Attomey 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."3 No explanation is given for why the Attorney Geteral'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,181 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."15 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,1%

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 invoived 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 irrcconcilable conflict. The employce in ABF could be prosecuted for 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."18\* 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 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 eared, 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 Fansieel 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 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.i94

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 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"?" 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 anion-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, 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 concem 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 dale 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 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.

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.2 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 Hoffinan would weigh strongly against recovery in an action considering workers' compensation awards, if the Supreme Court's logie 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 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 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. One case to voice this sentiment was Majlinger v. Cassino Contracting Corp. Here, the court considdered whether under New York law undocumented workers were eligible to recover lost wages resulting from a workplace injury. En route to upholding the compensation rights at issue, the court dismissed Hoffman’s concerns about IRCA policy as follows:

In our judgment – and in the judgment of many other courts…whitholding 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.

This is the very logic relied upon by the Board in rendering the decision that the Supreme Court overturned in Hoffman. 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. The majority implicitly rejected that rationale when it concluded the opposite – that providing back pay actually undermines the IRCA. Seeings 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 in the Ninth Circuit used to distinguish the case in Rivera v. NIBCO, Inc. 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. The court was called upon to decide whether immigration status was discoverable in acase such as this, and if so, under what restrictions. The employer’s argument was that Hoffman rendered this information discoverable because it made the issue relevant to available remedies. But the court reasoned that any potential harm of the discovery – the chilling effct that the disclosure of plaintiffs’ immigration status could have upon their ability to effectuate their rights.” In addition, the court went out of its way to express its opinion that Hoffman was most likely inapplicable to Title VII.

To distinguish Hoffman, the court relied heavily on the gravity of the policy considerations expressed in Title VII. According to the Rivera court, the anti-discrimination policies reflected in the statute are of the “highest priority,” 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 immigrations in Title VII cases.” 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 policies: 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 immigraiton policy. Meanwhile, according to the Court, NLRA policies would still be vindicated because the employer would be saddled with other sanctions.

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 cenral 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, alhough 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. 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. 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.

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. 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.

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

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. The plaintiff in the case, Maria Flores, sought back pay for her employer’s failure to pay proper overtime wages. 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.” 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” in that it eliminates the employer’s incentive “to hire an undocumented alien in the first instance.” Though this may be true, the majority in Hoffman already spurned this rationale when used to defend back pay under the NLRA, 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 distinction between plaintiff’s mitigation duties when seeking recompense for work not performed, on the one hand, and the impossibility of legally doing so in the U.S. when such plaintiffs are undocumnted workers, on the other.“\* 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.”

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.\*° 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 tics together on the way to its holding. Only countering this particular argument, therefore, leaves much of Hoffman's logic intact. Most importantly, the Court's central argument—that providing a back pay remedy to an undocumented worker condones an employment relationship ilegal 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. 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, ach 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 identificd 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, when the employer violates the IRCA (by, for instance, not conducting the proper diligence with respect to immigration status at the time of hiring), courts have argued that Hoffman does not apply.

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.

This point of distinction also finds support in the opinion itself. The Court makes note af Castro's illicit conduct several times, and at one point specifically points out that it “subverts” IRCA policy to reward Castro’s "criminally punishable conduct.” Moreover, if Castro was not in breach, the Court would no longer be able to argue that its decision fits nearly 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. 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. 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.

In addition, the Suprem Court’s other shots at Castro may just have been dicta. What points to this conclusion is language in the opinon that suggests the Court was not focused on assigning blame, but on the illicit nature of the entire employment relationship. 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 knowlingly hires the undocumented alien in direct contradiction of its IRCA obligations.

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. 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 authorisation to work, even if the employer technically commits the violation, back pay can still be perceived as a regard 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 respct, 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. This paradigm is contrasted with the procdural framework underlying the NLRA, where the Board is charged with both enforcing employee rights and adjudicating disputes.

These procedural distinctions, however, are shaky grounds on which to base a departure from Hoffman. The first prong of this argument-distinguishing based on the litigant-is unimpressive because, whether the Board or the employes 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 adminster” IRCA policies. 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.” 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.

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.

### Carveouts fail/are squo – 2AC

#### Distinguishing fails. The legal justifications result in limited remedies, misapplications, and increased vulnerability.

Angela D Morrison 20 - Associate professor at Texas A&M University School of Law. “Why Protect Unauthorized Workers? Imperfect Proxies, Unaccountable Employers, and Antidiscrimination Law's Failures,” Winter 2020, Baylor Law Review 72(1), pp. 117-164.

Although unauthorized workers have successfully argued that they are protected under federal antidiscrimination laws, courts have failed to provide full protection to unauthorized workers. Just over a decade after Congress enacted IRCA, the Supreme Court decided Hoffman, in which it found an unauthorized worker was not entitled to backpay because of his unauthorized status.54 Advocates and scholars worked to develop legal justifications to distinguish workers seeking protection under Title VII from workers seeking protection under the NLRA.

Title VII of the Civil Rights Act of 1964,55 prohibits employers from discriminating against workers on the basis of sex, race, national origin, color, or religion.56 Those protections include prohibitions on subjecting an employee to a hostile work environment or harassment, disciplining an employee, terminating an employee, or subjecting an employee to different terms or conditions of employment. 57 Title VII similarly prohibits employers from retaliating against employees who exercise their rights under Title VII. 58 Other federal antidiscrimination statutes protect employees from discrimination on the basis of disability or age.59

The Supreme Court has not addressed directly whether IRCA bars unauthorized workers from seeking relief under federal antidiscrimination laws. But the Supreme Court's 2002 decision in Hoffman Plastic Compounds v. NLRB did address whether unauthorized workers could obtain relief for their employers' violations of the National Labor Relations Act. 60 In Hoffman Plastic Compounds, a group of workers had participated in a union organizing campaign at the company's production plant. 61 The company subsequently laid off the workers who participated in the campaign.62 The NLRB eventually determined that the company had laid off the workers because of their union organizing activities, a violation of the NLRA.63 The NLRB ordered the company to remedy the violation, including that the company reinstate and provide backpay to the workers it unlawfully laid off. 64

An administrative law judge held hearings to determine the amount of backpay the company owed to each worker.65 During the hearings, one worker testified that he lacked immigration status and admitted that he used someone else's birth certificate to obtain the documents he needed to work in the United States. 66 The NLRB awarded the worker backpay, reversing the ALJ's decision to deny backpay, for the period from when the company laid off the worker to when it discovered the worker lacked immigration status.67 When the case reached the Supreme Court, the Court held the National Labor Relations Board lacked authority under the National Labor Relations Act to award backpay to an unauthorized worker. 68 The Court pointed to IRCA to support its decision, writing "allowing the Board to award backpay to [unauthorized noncitizens] would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA." 69

Subsequent to the Court's decision in Hoffman, employers argued that federal antidiscrimination laws either do not apply to unauthorized workers because the employment relationship was not valid in the first instance 7 or that Hoffman limits the remedy to which workers are entitled." For the most part, employers have been unsuccessful with the former argument7 and successful with the latter.7 Given the success of the latter argument, employers use the reasoning in Hoffman to argue that because the decision limits the remedies to which unauthorized workers are entitled, discovery into workers' immigration status is warranted.7 4

When courts have determined workplace laws extend their protections to unauthorized workers, they have relied on two justifications.75 The first justification, the "proxy" justification, is that to ensure the protection of authorized workers, that is, United States citizens and noncitizens with authorization, in the workplace, workplace protections must extend to unauthorized workers. 76 The second justification, the "deterrence and accountability" justification, looks at the impact on employers' overall compliance with federal workplace laws. 77 Under this justification, courts protect unauthorized workers because to do otherwise would allow employers to evade accountability and would fail to deter employers from engaging in discrimination in the future.78

But the justifications do not provide full protection to workers, as described below. 79 First, the justifications can increase vulnerability in the workplace because they reinforce harmful stereotypes about unauthorized workers as either subservient or criminal. Second, the justifications result in limited access to remedies because the proxy justification only extends protections to unauthorized workers to the extent necessary to protect authorized workers.

A. The Proxy Justification

There are two strands to the proxy justification. First, failing to protect unauthorized workers from discrimination in a specific workplace will deteriorate employment conditions for all workers in that workplace. As Hiroshi Motomura has noted, "courts sometimes recognize that unauthorized workers have workplace rights and remedies because any other outcome will harm citizens and noncitizens who are working lawfully in the same workplace." 8 0

Similarly, courts and advocates sometimes assert that allowing unauthorized workers to assert workplace claims protects citizen and authorized workers because it reduces unauthorized immigration over the long term.81 According to proponents of this justification, reducing unauthorized migration will result in more jobs for the authorized workforce. 82

Second, barring unauthorized employees from bringing claims would also chill others' claims under federal antidiscrimination laws. This undermines all workers' employment rights because federal workplace laws rely on workers to act as private attorney generals for enforcement. 83 The court in EEOC. v. Restaurant, Co., relied, in part, on this justification when it determined that the plaintiff had standing to pursue her Title VII claim even though she was unauthorized. 84 There, the employee alleged that her supervisor subjected her to a hostile work environment based on her sex and that her employer failed to promote her after she complained about her supervisor's harassment.85 The employer argued that the employee was not entitled to bring a Title VII claim because she "may be" unauthorized.8 In holding that unauthorized workers have standing to bring Title VII claims, the court wrote, "Congress intended to empower individuals to act as private attorneys general in enforcing the provisions of Title VII.. . . [A] ruling that undocumented workers could not pursue civil rights claims on their own behalf would likely chill these important actions.",8

Courts rely on similar reasoning to bar discovery into employees' immigration status.88 In Rivera v. NIBCO, Inc., the Ninth Circuit affirmed the district court's grant of a protective order that prohibited the employer from conducting discovery about the employees' immigration status. 89 The workers in Rivera were Latina and Southeast Asian women who had limited English proficiency.90 The employer required the women to take a basic job skills exam administered only in English, even though the women's job duties did not require English proficiency. 9 1 When the women did not perform well on the test, the employer demoted or transferred them to undesirable jobs, and eventually the employer fired them. 92 During a deposition, the employer asked one of the women where she was married and born.93 Her attorney instructed her not to answer and requested a protective order to prevent inquiry into the women's immigration status and into information likely to lead to discovery of the women's immigration status.94

When the court granted the protective order, it emphasized the chilling effect that allowing discovery would have on not just unauthorized workers, but also on authorized workers: "[e]ven documented workers may be chilled by the type of discovery at issue here."9 5 It concluded that allowing discovery into immigration status would "unacceptabl[y] burden the public interest" in light of Title VII's "dependence on private enforcement[.]"96 The U.S. district court for the District of Columbia adopted similar reasoning when it granted a protective order that barred the employer from discovery into the employee's immigration status, writing the "chilling effect disadvantages all workers as it makes it less likely that discriminatory practices will come to light and be appropriately dealt with in a court of law." 97

B. The Deterrence and Accountability Justification

Deterrence and accountability as a justification stems from the idea that protecting unauthorized workers from unlawful discrimination is necessary to hold employers fully accountable under both antidiscrimination laws and IRCA. 98 Moreover, accountability is important because it deters future violations of the law.99 In EEOC v. Restaurant Co., the court relied on deterrence and accountability when it found that unauthorized workers may bring Title VII claims, "[t]he Court also considers the need to reduce employer incentives to hire undocumented workers because of their inability to enforce their rights." 0 0 The Rivera court also highlighted accountability and deterrence as justifications for protecting unauthorized workers: "Congress has armed Title VII plaintiffs with remedies designed to punish employer who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers."'1

Other courts have relied on the deterrence and accountability justification. In EEOC v. Maritime Autowash, Inc., the EEOC applied to enforce its administrative subpoena that sought information from an employer alleged to have discriminated against an unauthorized worker based on his national origin.0 The employee alleged that after he was hired, his manager told him that his name did not match his social security number.' 03 So the employee said that the manager told him to get new documents with a new name. 4 The employee did.10 5 After a DHS audit, the employee claimed the company owner and a manager gave all of the Hispanic employees $150 for a one-time bonus and said that they should use them to get new documents with new names.10 6 The employer rehired the employees.10 7 Subsequently, the employees complained to the employer that Hispanic employees faced "longer working hours, shorter breaks, lack of proper equipment, additional duties, and lower wages."' 08 The employer fired them.1 09

When the employer resisted the subpoena and the EEOC sought enforcement, the employer argued that the EEOC had no basis to issue the subpoena because an unauthorized worker had no "standing or right to seek remedies under Title VII[.]"" 0 The court rejected that argument writing, the employer "is asking the court for carte blanche to both hire [unauthorized workers] and then unlawfully discriminate against those it unlawfully hired. [The employer] would privilege employers who break the law above those who follow the law.""

Officials at the agencies that enforce antidiscrimination laws, also rely on this justification to refrain from asking workers about their immigration status. Shannon Gleeson interviewed government officials at state and federal agencies that enforce workplace rights, including the EEOC.n2 When Gleeson asked an EEOC official why the agency did not ask claimants about their immigration status, he asserted that allowing employers to evade workplace laws would create incentives for employers to evade immigration laws: "if his agency were not allowed to enforce the rights of all workers, employers would be emboldened to hire undocumented workers solely 'with the intent of exploiting them.""' 3 And this would "reinforce the demand for undocumented labor." 1 4

Relying on the proxy justification and the accountability/deterrence arguments has meant that advocates have been successful in arguing that federal antidiscrimination laws include in their protection unauthorized workers."1 1 Although these justifications lead to some workplace protections for unauthorized workers, they also limit the workers' exercise of their rights. As the next section shows, these justifications ultimately harm the rights of unauthorized workers. They reinforce notions that unauthorized workers are less morally deserving of the court's protection than authorized workers and subject unauthorized workers to scrutiny not faced by authorized workers seeking to assert their workplace rights.

C. The Limits of Current Justifications for Protecting Unauthorized Workers

Viewing unauthorized workers as proxies for United States citizen workers and authorized workers, may provide some protection for workers but it also makes unauthorized workers more vulnerable. Likewise, focusing on employer accountability and deterrence also results in unauthorized workers receiving less protection than authorized workers. First, the deterrence and accountability justification reinforces stereotypes about immigrant workers, and, unauthorized workers, in particular. It casts the unauthorized worker in either the role of the subservient and exploited worker, or as a criminal. Second, the proxy justification shifts the focus from the protected worker part of the employee's identity to the unauthorized part of the employee's identity. It emphasizes how unauthorized employees are different from authorized employees, that is, in the legality of their employment relationship in the first place. The result is more vulnerability in the workplace and limited access to remedies.

1. More Vulnerability in the Workplace

The narratives that flow from the accountability/deterrence justification result in more workplace vulnerability for unauthorizes workers. The narrative frames the harm as the employer's failure to obey immigration laws not employment laws. Relying on a narrative that "focuses on immigrant workers as victims of criminal employers who fail to obey the rule of law"116 can create "stereotypes and classes of outsiders, resulting in disfavoring immigrant workers who do not fit the role of the 'good immigrant'-the iconic hard worker or victim."" 7

Three problems flow from this framing." 8 First, it provides an incentive for employers to show that an employee is not a "good immigrant" because the employee violated criminal laws. It thereby emphasizes the viewpoint that unauthorized workers are criminals who broke the law to obtain employment.! 19 As described below,120 that can lead to limited remedies in antidiscrimination claims, it also, as Lee notes, feeds into the general "criminalization hysteria" surrounding immigrants.12 1 This results in a cycle in which immigrant workers are targeted for enforcement actions rather than employers.12 2 Second, unauthorized workers "may have to act the part of the powerless victim to achieve results, although that may be contrary to their personal empowerment. It can also mean that the abuse must be egregious enough that the workers can cast themselves as powerless victims.

Third, casting unauthorized workers solely as victims of unscrupulous employers makes them into "essentialized workers who are divorced from their individual characteristics as human beings[.]"12 4 This plays into the stereotype of the subservient immigrant worker who will take the jobs that authorized workers will not-for lower wages and under more dangerous conditions.12 5 Employers, then, can take advantage of the stereotype and use it to justify their treatment of unauthorized workers, casting unauthorized workers as freely consenting to the conditions and lower wages. 126 This narrative regularly appears in media reports about workplace raids. 'For example, in 2018, ICE conducted a raid on a worksite in Mount Pleasant, Iowa.127 ICE arrested thirty-two employees, but not the employer. NPR interviewed an employer in the town about unauthorized workers and the employer responded that businesses needed immigrant workers because businesses had difficulty filling jobs with authorized workers, "It is so hard to get people in the door just to sit down and interview . . . You're afraid you're going to scare them off. Any little thing that you do, they won't show up for the first day of work." 12 9 Other recent media reports reflect the same narrative. A New York Times article had the following lede: "As a tight labor market raises costs, employers say the need for low-wage help can't be met by the declining ranks of the native-born."' 30 And after workplace raids in poultry processing plants in Mississippi in 2019, people in the towns affected by the raids reported that they didn't believe that workers who were U.S. citizens would remain in the jobs because "of the simple fact that the jobs are hard . . . [i]t's something they didn't see themselves doing growing up. Something they don't want to do" and "American-born residents 'didn't want to work, period.""3 ' These narratives reinforce the stereotype that unauthorized workers will take jobs that authorized workers will not-at lower wages and under more dangerous conditions.

In short, the justifications play into stereotypes about unauthorized workers. Because of their unauthorized status, they are viewed as lawbreakers, on the one hand, but because of their employers' actions they are viewed as exploitable victims, on the other hand. The stereotypes work to shore up the employer-created narratives that unauthorized workers consent to unequal work conditions, including harassment, low wages, and unsafe work environments.

2. Limited Access to Remedies

The proxy justification has led to limited access to remedies. It has resulted in the misapplication of the after acquired evidence doctrine and the mixed motive defense. And that misapplication matters because it has chilled employees from pursuing their workplace rights in the first instance or in foregoing full remedy for their employers' violations. The misapplication of doctrines in the Title VII context stands in contrast to how courts apply similar doctrines in the FLSA context.

The difference between authorized workers and unauthorized workers has resulted in courts misapplying legal doctrines, such as the after-acquired evidence doctrine and Title VII's mixed motive defense. In Title VII litigation, employers may assert a defense to limit liability for illegally terminating an employee when they subsequently learn that an employee engaged in employment-related misconduct.1 32 Normally, an employer must prove "by a preponderance of the evidence" that it would have terminated the employee had it known about the misconduct.13 3 When an employer successfully proves that it would have fired the employee, front pay and reinstatement become unavailable to the employee, and backpay is limited to the period prior to the employer discovering the misconduct.13 4 But some courts have used the doctrine to limit recovery despite the difficulty of proving that the worker's unauthorized status would have resulted in the worker's termination or to bar a plaintiff's claims entirely because the employee lacked work authorization.'35 Thus, courts' focus on the unauthorized status of the workers short-circuits the burden of proof that the court would require if the employee were authorized.

Another doctrine that courts misapply to unauthorized workers is the mixed motive defense. If an employer's actions were motivated both by a discriminatory reason and another non-discriminatory reason, an employer is still liable under Title VII.1 36 However, an employer may avoid damages and some equitable relief if the employer proves that it would have taken the unlawful employment action anyways because of the nondiscriminatory reason:

(B) On a claim in which an individual proves a violation .. and [an employer] demonstrates that the [employer] would have taken the same action in the absence of the impermissible motivating factor, the court-

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim ... ; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or [backpay]. 13

Under this doctrine, then, the employer should be required to show that it took the action, in part, because of the worker's unauthorized status.

But some courts have not required that employers show they took the action because of the employee's status, and instead have determined that the unauthorized status, itself, forecloses backpay. For example, although the court in Escobar v. Spartan Security Service' 38 held that Title VII applied to an employee who was unauthorized when he worked for the employer, 139 the court determined the employee could not recover backpay for the period during which he was not authorized to work. 140 Other cases similarly have found that the EEOC may not seek backpay or reinstatement when the employee is unauthorized.141 In these cases, the court did not require the employer to prove that it would have taken the action because of the workers' immigration status or that it was motivated, in part, by the workers' status. 4 2 Moreover, because the cases involve hostile work environments, it would be difficult if not impossible, for the employers to make that showing.

The misapplication is significant because it disincentivizes workers from bringing claims. Lack of immigration status chills workers from bringing claims in the first place, 143 but the lack of remedy further deters workers. As Kati L. Griffith and Shannon M. Gleeson note "unauthorized employees are also disincentivized from claiming because there is little clarity about whether they have the same rights to monetary remedies . .. as compared to their authorized counterparts." 144 It matters that courts have prevented unauthorized workers from achieving full remedy because it prevents them from bringing claims.

In other cases, the EEOC or the worker pre-emptively decide not to pursue remedies to avoid discovery into the worker's immigration status. 14 5 In EEOC v. DiMare Ruskin, the EEOC alleged that supervisors subjected two female farmworkers to a hostile work environment because of sex. 146 The conduct included one supervisor telling one of the women that he wanted to kiss her all over, including her breasts, and that he would never stop pursuing her; it also included one supervisor forcing one of the woman's hand to his crotch. 147 The EEOC moved for a protective order to bar the employer from asking about the employees' immigration status. 148 The court granted it. 149 As part of its reasoning, the court wrote, "ft]his case deals with sexual harassment and unlawful termination for refusing to comply with a supervisor's sexual advances. All individuals, both citizens and immigrants, are protected from unlawful employment discrimination under Title VII." 150 But the court premised its grant on the workers' foregoing their right to backpay, reinstatement, or front pay, concluding "since [the workers] are not seeking backpay, front pay, or reinstatement, the [workers'] immigration status is irrelevant as to damages calculations." 15' Thus, plaintiffs often do not seek the full array of available remedies when they do bring claims. They forego seeking backpay, front pay, and reinstatement;' 5 2 all of which are remedies to which successful Title VII plaintiffs are entitled. 53

## FDI

### Deportation t/ FDI – 1AC

#### Trump’s deportation campaign collapses the economy and threatens the fabric of society. It spikes food and housing costs, collapses small businesses, overburdens the healthcare system, and erodes communities.

Sarah Krieger 25 – Policy Analyst at USCIS Office of Policy & Strategy. “The Price of Cruelty: How Trump’s Mass Deportation Agenda Endangers Us All,” 10/03/2025, National Immigration Law Center, https://www.nilc.org/articles/the-price-of-cruelty-how-trumps-mass-deportation-agenda-endangers-us-all/

The second Trump administration has – in less than a year – established a whole-of-government campaign against immigrants. Their mass deportation agenda is being carried out through indiscriminate and often violent raids and arrests. These arrests have drawn significant attention for the resulting family separations and disappearances of community members to inhumane prisons here and abroad. In addition to this immediate pain to those whose families are being torn apart, the Trump administration’s immigration agenda directly harms our collective economy, health, and safety as a nation. This commentary reviews the harm thus far to our country, as the administration pursues its mindless ambitions.

The only coherent policy goal of this administration when it comes to immigration is its relentless pursuit of cruelty—no matter what the cost and no matter what else is impacted. The strategy is clear: to cultivate so much suffering and fear, through real and threatened violence, that immigrants choose to abandon their communities and lives in the United States. As a nation, we are witnessing the profound cost—in both tangible and intangible ways—of a government deliberately targeting a community for misery, making life so unbearable that they consider exiling themselves to survive.

Our Economy

The human costs of mass deportation are clear, but sometimes less visible are the financial costs to American communities. The harm is immediate and expansive, affecting our nation’s GDP, the job market, the cost of goods, and lost tax revenue.

Mass deportations are forecast to reduce our nation’s Gross Domestic Product (GDP, a measure of the overall economy) by more than 7 percent in the next three years—greater than the damage to the U.S. economy during the Great Recession from 2007 to 2009, when the country’s GDP fell by more than 4 percent. In addition, despite the administration’s claims, the actual consensus of researchers is clear: mass deportations cause U.S. citizens to lose jobs. According to one estimate, if the administration succeeds in its staggering and inhumane goal of removing 4 million people over the next 4 years, there would be 2.6 million fewer jobs for U.S.-born workers.

Communities are also seeing the ramifications of this cruelty in the prices they pay for food and housing. Economists have estimated that deporting 1.3 million immigrants would increase prices 1.5 percent in the next three years. Deporting 8.3 million immigrants in that time would increase prices by more than 9 percent. This is greater than the inflation the United States saw from 2019 to 2021, during the COVID-19 pandemic, when prices went up by less than 8 percent over three years.

Immigrants are essential to the U.S. economy, paying almost $580 billion in taxes annually, including massive contributions to federal, state, and Social Security taxes. Contrary to this administration’s claims, undocumented immigrants contribute far more to Social Security than they receive; in 2022, for example, they contributed $26 billion in Social Security taxes, despite being ineligible to receive the benefits they pay for. The Social Security program is already facing a funding shortfall; lower immigration (not even mass deportation) would create an increased shortfall by more than 11 percent. The administration’s efforts to allow the Internal Revenue Service to share private taxpayer information with Immigration and Customs Enforcement (ICE) will likely result in less tax revenue from immigrants due to a chilling effect.

Small businesses and farmers are already enduring very real harms less than one year into the administration’s campaign of cruelty. Since January, the labor force has already shrunk by more than 1.2 million immigrant workers. Restaurant owners, already facing economic hardships, are struggling to keep their businesses staffed and afloat. Other small business owners across the country have experienced sharp decreases in customer traffic due to fears of immigration enforcement. Some business owners report losing up to 50 percent of their customers, and up to two-thirds of their workforce. Farmers are especially hard hit. Over the last three decades, approximately 40 percent of the farm labor force has been made up of undocumented immigrants. In addition to mass deportation, the reduction in the numbers of immigrants arriving to the United States is also “really hurting” farmers.

Despite all the economic benefits immigrants contribute, this administration has chosen to spend astonishing sums on harming them – approximately $170 billion over the next four years – that could be far better used to strengthen and support our communities, not break them apart. $170 billion would fund a paid family and medical leave program or a universal preschool program for almost a decade. Or it could clear the backlog of all needed infrastructure improvements to our country’s public transit systems, twice.

Health

In addition to devastating our economy, mass deportations are harming our nation’s health. The administration’s brutal immigration agenda will make it more expensive for everyone to get medical care, reduce our health care workforce, increase the burden on hospitals and health care providers, create a chilling effect on patients, and cause significant harm to people’s mental and physical health.

More than one million immigrants work in essential health care jobs in the United States, and one-third of them are undocumented. In some states, immigrants comprise one-third of all health care sector workers. The Trump administration is stripping more than one million TPS holders of their immigration status this year, 50,000 of whom work in health care. Half a million immigrants with humanitarian parole have also had their status terminated. The administration’s actions to strip people of lawful status will shrink the health care workforce, causing additional strain to an already overburdened system. Our population is aging at an unprecedent rate, and within the next five years, 20 percent of the country’s residents will be of retirement age. Studies show that our health care system is not prepared for the demands of caring for this population.

We are already seeing the harm unfolding across our health care sector. Long-term care providers have indicated they will need to increase costs for residents due to labor shortages, given that immigrants comprise 28 percent of the direct care workforce for long-term care. Fifty percent of nursing homes in the United States have reported that they have had to stop accepting residents because they lack the staff to care for them. Families are finding that long-time caretakers, who previously were authorized to work, can long longer provide care to their loved ones. Given the numbers of immigrants that contribute to our health care system, we are losing an essential part of the vital labor force that cares for the people we love.

The mass deportation regime also fails doctors, nurses, and health care workers across the board because of a change to long-standing policy that now allows immigration enforcement in hospitals and other health care facilities. Instead of being able to focus all their attention on improving the health of their patients, these essential workers must now prepare for and respond to ICE presence in their facilities. The public strongly opposes ICE in hospitals, yet the administration continues to defend the practice.

Mass deportations also have an impact on patients, who avoid medical care out of fear, resulting in worse health outcomes. Their failure to seek timely care also increases the burden on hospitals, which were stretched thin before the health care cuts in the 2025 budget bill that are expected to lead to closures of rural hospitals. When people delay or avoid seeking timely medical care, their conditions worsen and ultimately lead to higher costs and poorer outcomes for everyone.

Widespread immigration enforcement also causes dramatic mental and physical health impacts on families and communities experiencing the detention or deportation of a loved one. The results of having a friend, family member, coworker, or other community member detained results in U.S. citizens, particularly children, having greater anxiety, depression, and psychological distress. U.S.-citizen children who are separated from their parents due to detention or deportation often experience adverse behavioral changes; have higher rates of suicidal ideations, alcohol use, and aggression; and exhibit signs of post-traumatic stress disorder. Doctors have expressed significant concerns about the long-term physical and mental health consequences on children who experience such fear and uncertainty.

These disruptions don’t just happen to individuals or isolated groups of people; the effects of mass deportation undermine and harm the overall health of entire communities. Republicans and this administration have chosen to allocate more than $170 billion to this violent anti-immigrant apparatus. That money could easily be used to uplift the health of our residents, by covering health care for millions of veterans, hiring one million elementary school teachers, or hiring almost 900,000 nurses.

Society and Safety

The damage this agenda inflicts doesn’t end with jobs, or dollars, or even our collective physical or mental health. Mass deportations erode our civil society, our communities, and our connections to each other. Immigrants make up significant and vital portions of our communities, and ICE raids are quickly becoming the gateway to the entry of destabilizing forces that leave people less safe and erode the social bonds and connections that make our communities vibrant. The Supreme Court’s recent ruling in Vasquez-Perdomo v. Noem also paves the way for racial profiling during immigration enforcement, which will further erode trust and safety.

In pursuing their anti-immigrant goals, this administration has gone to unprecedented lengths—including occupying two of its largest cities, Los Angeles and D.C. These likely unconstitutional shows of force erode trust in the government, increase fear, and disproportionately target immigrant communities and people of color. In D.C., 61 percent of residents who noticed the presence of additional law enforcement felt less safe with them present. This makes sense, given the large numbers of arrests, increase in racial profiling, and indiscriminate targeting and detention of immigrants. The residents of Los Angeles also learned that the risks and damage to a community after being occupied don’t end if the occupiers leave. The climate of fear and continued ICE raids persist.

Mass deportations undermine our safety and topple the building blocks that create community. Indeed, in places that prioritize welcoming, rather than demonizing, immigrants, studies show a documented decrease in crime. Policies that do not embrace newcomers only erode the safety of our communities. A climate of fear and enforcement can also cause individuals to withdraw from public life more broadly, which harms social growth and communities.

The social connections that are created through participation in community life, including religious institutions, affinity groups, or other clubs, are pivotal to individual and community. In a climate of fear and justified paranoia, trust is eroded—not only in our government, but also among neighbors. Instead of spending billions on tearing our communities apart, the federal government can better fund many of their programs that increase social capital, like partnering with faith-based, local, state and nonprofit organizations to improve community wellbeing.

Investing in People, Not Fear

The Trump administration acts as if it has a blank check to cause any amount of cost, chaos, and harm in the name of its mass deportations agenda. It wants people to believe that mass deportations only hurt undocumented immigrants. But we are all part of the same fabric: family, neighbors, churchgoers, nurses, patients, teachers, and students. The ripple effects of these deportations will be felt for generations, by all of us.

Mass deportations are not just a policy choice. They are an economic mistake, a public health risk, and a threat to the social fabric of our communities. When families are separated and community members are forcibly removed, our economy, health, and communities suffer. The ties that bind us unravel when our government causes untold destruction in its relentless targeting of one group for harm.

This administration has only just begun spending billions of dollars to unleash a violent and hate-filled agenda—money that should be used to build our communities up, not tear them down. Without greater outcry by elected officials, businesses, civic leaders, and the public leading to a change in direction, we may be in for much darker days. Instead of our tax dollars paying for mass deportations, we could be investing in health care, education, housing, and infrastructure that benefit everyone. We must reject fear and division and choose policies that promote dignity, safety, and health for all. Our communities and our country deserve better.

#### That triggers global nuclear war.

Dambisa Moyo 24, PhD, Contributor, Project Syndicate. Member, House of Lords, United Kingdom. Principal, Versaca Investments, "The Eight Headwinds Threatening Global Growth In 2025," Project Syndicate, 12/06/2024, https://www.project-syndicate.org/onpoint/powerful-headwinds-herald-decade-of-paltry-growth-by-dambisa-moyo-2024-12

NEW YORK – As we enter the second quarter of the twenty-first century, slow economic growth will remain the world’s most persistent challenge, transcending national borders and affecting developed and developing countries alike.

The economies of the United States, the European Union, and Japan are all projected to grow by less than 3% per year for the foreseeable future – the threshold needed to double per capita income within a generation (25 years). At the same time, large emerging economies like Brazil, Argentina, and South Africa are also expected to experience sluggish growth over the next decade.

While total global GDP has increased to $110 trillion, progress remains unevenly distributed, threatening to erode living standards. Worse, the world economy faces powerful headwinds that could stifle growth, innovation, and investment, triggering political and social instability.

Governments and business leaders must adjust their models and assumptions accordingly. In the face of significant policy shifts, investors will need to rethink their investment and allocation strategies to navigate an era defined by uncertainty and uneven growth.

Looking ahead, eight risks to global GDP growth stand out: geopolitical fissures; divisive domestic politics; technological disruption and the rise of artificial intelligence; demographic trends; rising inequality between and within countries; natural-resource scarcities; government debt and loose fiscal policies; and deglobalization. Taken together, these headwinds will be a persistent impediment to economic growth in the coming years.

*No World Order*

The first drag on global growth is the escalation in geopolitical tensions – particularly among the US, China, and Russia – compounded by additional threats from Iran and North Korea. As the rift between developed and developing economies widens, developing countries are increasingly joining economic alliances like the BRICS bloc, which expanded from five members at the start of 2024 to nine by the end of the year. In the near term, there is a growing risk that this geopolitical tug-of-war could escalate into an all-out military conflict.

Over the past 50 years, the world economy has gone from being a positive-sum game to a negative-sum game. The positive-sum era, driven by economic and global cooperation, reached its zenith during the Washington Consensus period, which was highlighted by the fall of the Berlin Wall in 1989 and China’s accession to the World Trade Organization in 2001. But following the 2008 financial crisis, the world entered a negative-sum period, marked by declining growth, intensifying competition, and rising international tensions, further heightened by the COVID-19 pandemic, Russia’s invasion of Ukraine, and the Gaza War.

Widening geopolitical fissures have laid bare deep vulnerabilities. China, for example, is one of America’s largest foreign creditors, holding more than $770 billion in US Treasuries. This gives it significant leverage over the US, whose policymakers increasingly regard it as a political and ideological rival. Against this backdrop, the intensifying race between China and the West for technological dominance in AI, quantum computing, and semiconductors has fractured the digital economy, giving rise to a balkanized “splinternet.”

As decades of multilateral cooperation give way to economic fragmentation, new cross-country alliances have weakened the US-led international order and the Bretton Woods institutions, such as the World Bank and the International Monetary Fund. The expanded BRICS bloc – led by Brazil, Russia, India, China, and South Africa – is the most significant of these alliances, representing more than 40% of the world’s population and 36% of global GDP.

Meanwhile, so-called “swing states” like Turkey, Saudi Arabia, and other Gulf Cooperation Council countries are reshaping global trade routes, reconfiguring supply chains, and redirecting investment flows, altering the distribution and pricing of key commodities such as foodstuffs and critical minerals.

Beyond stifling global GDP growth, these geopolitical rifts are hindering collective efforts to tackle climate risks, as developed and developing economies remain deeply divided over the urgency, scope, and aggressiveness of the regulatory and policy reforms required to combat climate change and advance the clean-energy transition.

*Populism and Domestic Politics*

Many advanced economies are also grappling with deepening political polarization at home. US President-elect Donald Trump’s return to the White House – much like Brexit and Trump’s first election victory in 2016 – heralds a period of widespread uncertainty and major political transformations.

Amid these populist gales, developed economies’ budgets are increasingly strained by expanded welfare programs. In 2022, for example, the EU spent €3.1 trillion ($3.3 trillion) – 19.5% of its GDP and nearly 40% of its total expenditures – on social protection.

As demands on government budgets grow, worsening fiscal positions will make it increasingly difficult for many countries to provide essential public goods like health care, education, and infrastructure. The resulting fiscal pressures will likely deepen polarization and lead to more policy volatility.

### FDI Low – 2AC

#### 1. FDI Low. Trump chilling effect.

Riley '25 – master’s degree in economics @ University of Southern California. (Bryan Riley. (6-27-2025). "Foreign Investment in U.S. Plummets Amid Trade Uncertainty". National Taxpayers Union. https://www.ntu.org/publications/detail/foreign-investment-in-us-plummets-by-625-amid-trade-uncertainty; Neo)

New foreign investment in U.S. equities plummeted by 62.5% from the final quarter of 2024 to the first quarter of 2025, according to recently released statistics from the Bureau of Economic Analysis (BEA).

New foreign direct investment (FDI)—consisting of foreign ownership of companies in the United States—fell from $88.5 billion in the last quarter of 2024 to $58.7 billion in the first quarter of 2025, a 33.7% decline.

New foreign investment in U.S. equities purchased via the stock market and investment funds fell from $167.8 billion to $23.2 billion, an alarming 86.2% plunge.

Total foreign investment in U.S. equities fell by $174.5 billion, a 62.5% reduction from the fourth quarter of 2024.

Without attempting to draw too many conclusions from a single quarter’s changes, it is reasonable to question whether the administration’s policies are deterring the growth of new foreign investment in the United States.

According to Commerce Secretary Howard Lutnick, “President Donald Trump is committed to bringing in trillions of dollars in new investment into the United States.”

Unfortunately, Trump’s advisors do not seem to share that goal. Peter Navarro, Trump’s senior counselor for trade and manufacturing, says foreign investment in factories like BMW’s in South Carolina is a “scam” that “doesn’t work for America.” Such factories are responsible for more than half of all vehicles assembled in the United States.

If they remain in place, Trump’s tariff hikes will continue to be a big roadblock to foreign investment. Tariffs on raw materials and imported components drive up the cost of producing goods in the United States, discouraging new international investment here.

More fundamentally, U.S. tariffs and quotas that restrict imports leave our trading partners with fewer dollars to invest in our economy and to purchase U.S.-made exports. The more we import, the more dollars our trading partners have available to invest in the United States. The less we import, the less international investment we receive.

As long as the Trump Administration clings to its misguided view that trade deficits are a national security threat, it will deter U.S. businesses and Americans from attracting foreign investment. No one in the Trump Administration seems to understand that, when someone buys a U.S. export, Americans benefit, but if they buy a share of Apple, we also benefit, even though the purchase of Apple stock causes our trade deficit to increase.

The Trump Administration’s unprecedented actions regarding Nippon Steel’s purchase of U.S. Steel will also have a chilling effect on foreign investment. Trump refused to allow Nippon Steel to merge with U.S. Steel without subjecting several business decisions to a presidential veto. For example, there can be no changes to the location of the company’s headquarters, no salary cuts before 2030, and no acquisition of a U.S. business that competes with U.S. Steel or its supplier without the written consent of President Trump or his designee. Reports are already circulating that these moves may scare off future investment.

The Trump Administration’s trade and investment strategy resembles the failed approach utilized by some developing countries in the 1970s: erect high trade barriers in an attempt to force people to make things here if they want to sell things here, and subject new foreign investment to micromanagement by government officials. It is wishful thinking to believe those policies will work any better here than they have in other countries.

### FDI Low – 1AR

#### 1. FDI Low. Trump chilling effect.

Riley '25 – master’s degree in economics @ University of Southern California. (Bryan Riley. (6-27-2025). "Foreign Investment in U.S. Plummets Amid Trade Uncertainty". National Taxpayers Union. https://www.ntu.org/publications/detail/foreign-investment-in-us-plummets-by-625-amid-trade-uncertainty; Neo)

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### Aff Small – 1AR

#### They’re 4.6%

Statista 25, "Infographic: Where Undocumented Immigrants Work," Statista Daily Data, 3/10/2025, https://www.statista.com/chart/34074/us-industries-highest-share-of-the-workforce-undocumented-immigrants/?srsltid=AfmBOooO7Bp7w7jxHz9mAPyVnRgxrRbRVYC2daoYyPnYQB7Sz2\_jwfUQ

More industries with a high share of undocumented workers include wholesale trade, transporting and warehousing as well as manufacturing, among others. Overall, the U.S. is estimated to have 7.5 million undocumented workers, or 4.6 percent of the country's workforce. As undocumented immigrants are more likely to be working due to their age makeup, this is despite the fact that they make up only 3.3 percent of the population.

### Worker Power Low – 1AR

**Fissured economy makes worker power impossible.**

**Whitney 16** — Bigelow Teaching Fellow and Lecturer in Law, University of Chicago Law School. J.D. from Harvard Law School. Former clerk for Chief Judge of the Seventh Circuit. Heather M. Whitney, “Rethinking the Ban on Employer-Labor Organization Cooperation,” 37 Cardozo Law Review 1455 (2016), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=12438&context=journal\_articles

Whether one supports unionization or not, the NLRA was originally intended to protect “full freedom of association [and] selforganization” for workers.43 As Benjamin Sachs, Professor of Labor and Industry at Harvard Law School, has pointed out, most scholars believe it has failed to do this for one of two reasons: the statute is too weak, and thus unable to do the necessary protecting, or the statute is too rigid, unable to keep pace with changes in the composition and nature of work.44 An examination of modern company-worker relations speaks to the latter reason.

NLRA-style unionization is premised on the notion of a single company that acts as a stable employer of long-term, full-time employees.45 But a number of transformations to the nature of work have rendered anachronistic this conception, and with it the possibility of 1935-era unionization, increasingly impracticable.

Perhaps most significantly, the modern workplace is fissured.46 “Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment—hiring, evaluation, pay, supervision, training, and coordination—are now the result of multiple organizations.”47

Supply chains and outsourcing more generally provide one example of this. A basic question a company must answer is whether a particular activity it needs done (be it manufacturing, marketing, or inventing) occurs within the corporation itself.48 This choice may be influenced by a variety of considerations, but for corporations with the exclusive goal of maximizing shareholder value, the answer will be straightforward: which is cheaper? In the past, the direct costs of producing a cell phone in China or a lower-cost area in the United States might be far lower than those associated with producing it in house at the company’s headquarters in Silicon Valley; other transaction costs, like those associated with transportation and monitoring, were sufficiently high that cheaper labor did not always translate to cheaper production, all things considered.49 Today, however, those transaction costs are going down. Flying to China to check on manufacturers is cheap and email and surveillance technologies make monitoring farflung factories cheaper.50 Additionally, by contracting out a particular project or job, companies can take advantage of the downward pressure facing smaller companies that compete to win bids for those jobs.51 If a hotel is looking to outsource its room-keeping, it can create a bidding war between vendors, who in turn cut worker wages or risk losing the contract.

Supply chains makes traditional unionization ineffective, if possible at all. With outsourcing, even if the workers are able to successfully unionize the supplier, the supplier itself is intensely competing for bids against other, non-unionized competitors, in low-margin markets.52 The result will often be that the unionized workforce simply does not win contracts for work at all. And in cases where suppliers win and workers subsequently unionize, there is simply not enough money to go around, and the lead company is always free to choose a cheaper (typically nonunionized) supplier during the next round of bidding.53 Thus, unionization of a single low-level supplier is not an effective strategy for workers looking to better their position Franchises are another method of fissuring.54 As one way to lower costs while increasing profits, companies focus on creating and developing a brand while outsourcing day-to-day business operations to franchisees.55 Companies like McDonald’s use this strategy; they create strong brand identities and then sign franchise agreements whereby franchisees agree to abide by strict quality standards.56 In exchange, the franchisee gains access to a consumer-trusted brand while starting their business.

The franchise arrangement used by companies like McDonald’s render traditional unionization difficult and ineffective. First, the nature of franchisee-franchisor relation often puts downward pressure on wages, which results in low-wage and part-time work, as a means to avoid triggering additional benefits.57 This combination, in turn, leads to high turnover and workers juggling multiple jobs, both of which leave them with little time and motivation to unionize a bad but ultimately short-term workplace.58

Moreover, franchisee workers can typically only unionize on a franchisee-by-franchisee basis, since the franchisee of each in particular location traditionally stands as the sole employer of the workers in its particular establishment. This is a problem for workers who want to use collective action as a way to negotiate for improved conditions, since the inaccessible franchisor can maintain significant control over rules about employee scheduling and human resource activities and yet are not at the bargaining table.59 Thus, even if unionization efforts are successful, the franchisor’s control means franchisees have little room to meaningfully negotiate on issues like wages and working conditions.60 While the answer here may be that the franchisors that exert substantial control over the terms and conditions of work most salient to workers should be held a joint employer, the litigation required to achieve that outcome is time-consuming and costly.61

As a result of globalization and new technological developments, companies have also moved further away from long-term employment promises.62 In the June 2013 issue of the Harvard Business Review, Reid Hoffman, co-founder of LinkedIn, and co-authors argued that globalization and the Information Age had eroded stability, put adaptability and entrepreneurship front and center, and “demolished the traditional employer-employee compact and its accompanying career escalator in the U.S. private sector.”63 In this world, they recommended workers think of themselves as “free agents” and the development of a new employer-employee compact based on “tours of duty,” where employees are hired for a specified number-of-year “tours,” typically two to four, with specific and tangible goals.64 While commentators often assume this shift to a “gig economy” is a bad thing, not all workers are opposed. Younger workers especially embrace the role of freelancer in the knowledge economy.65 But regardless of one’s views on long-term versus short-term employment, the less time workers expect to spend at a particular company, the less likely they will be willing to organize to improve the terms and conditions of working there.66