Undocumented Asian American Workers and State Wage Laws in the Aftermath of Hoffman Plastic Compounds

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I. OVERVIEW

In 2002, the United States Supreme Court held in Hoffman Plastic Compounds v. NLRB1 that an undocumented immigrant employee who used false work-authorization documentation could not be awarded statutory back pay regarding his employment termination for lawful union activity.2 The Court’s underlying premise lay in limiting the back pay remedy to be consistent with federal immigration law.3 Hoffman sent shockwaves through the immigrant rights and labor organizing community; the Court had eliminated perhaps the most effective means of encouraging employer NLRA compliance4 and had raised questions as to whether courts

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2. Statutory back pay may be awarded in cases where the National Labor Relations Board [hereinafter NLRB] determines that the employer has engaged in an unfair labor practice and reinstatement is an appropriate remedy. See e.g., National Labor Relations Act (hereinafter NLRA) 29 U.S.C. 151 (2006); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198 (1941) (holding that the award of back pay is left to the NLRB’s discretion and is not compelled by the labor act); MICHAEL C. HARPER ET AL., LABOR LAW: CASES, MATERIALS, AND PROBLEMS 157-158. See Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).

3. Hoffman, 535 U.S. at 149, 151. The Hoffman majority stated: [A]warding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer . . . We therefore conclude that allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.

4. See, e.g., Donna Y. Porter, Undocumented Workers Have NLRA Rights, But Not Monetary Remedies, 9 EMP. L. STRATEGIST 1 (2002) ("Monetary remedies tend to deter future illegal conduct."); A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 415, n. 38 (1995) (noting that without potential back pay orders an employer might simply discharge employees who show interest in a union "secure in the knowledge" that the only penalties requirements would be "to cease and desist and post a notice"); Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 185, (1973); EEOC v. Waffle House, Inc., 534 U.S. 279, 296, n. 11 (2002) (noting back pay award provides important incentive to report illegal employer conduct); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (noting that "[it] is the reasonably certain prospect of a back pay award" that leads employers to avoid dubious legal
would apply Hoffman's reasoning to erode the rights of undocumented workers in other contexts.

While many courts have limited the case's application under other statutory schemes or in common law suits, Hoffman leaves some questions unanswered. Whether Hoffman precludes state courts from applying state wage statutes to undocumented workers has not been addressed. Perhaps the most famous case issued prior to Hoffman addressing state wage protections for undocumented workers was Nizamuddowlah v. Bengal Cabaret, Inc. Bengal Cabaret upheld a judgment granting back wages to an undocumented Bangladeshi restaurant worker under a state wage law. Noting that undocumented immigrants had a right to bring civil suits in American courts, the court awarded wages to the undocumented laborer because "deprivation of compensation for labor is not warranted by any public policy consideration involving the immigration statutes." Although the court allowed a worker to receive compensation for hours actually worked notwithstanding immigration status, its state wage protections for undocumented workers was held in question in the aftermath of Hoffman.

This paper will explore state wage protections as they pertain to undocumented workers. The industries wherein undocumented workers are overrepresented "are also known for frequent violations of hour, wage and overtime payment laws." Although these abuses may trigger federal wage law violations under the Fair Labor Standards Act ("FLSA"), courts have maintained that FLSA protections apply to undocumented workers. If

5. See infra note 51 for a summary of post-Hoffman cases.
6. See generally Brief of Amici Curiae States of New York, Arizona, California, Hawaii, Massachusetts, West Virginia and Commonwealth of Puerto Rico in Support of Respondents in Hoffman Plastic v. NLRB (hereinafter "Amici Brief") (stating "should petitioner prevail on the central issue in this case, harmful consequences for state law enforcement could result. Courts could conclude that a ruling by this Court foreclosing NLRB awards to undocumented workers based on the balance of public policies under federal law extends to states as well. Such an outcome would severely jeopardize the ability of states to enforce minimum wage, safety, equal employment and other state laws against many employers whose workers are undocumented."). Amici brief at *2. See also infra note 51 for a list of post-Hoffman cases.
8. Id. at 685.
11. See Amici Brief, supra note 6.
14. See, e.g., Patel v. Quality Inn S., 846 F.2d 700 (11th Cir. 1988) (holding that plaintiff who
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state wage laws are also applicable to undocumented laborers post-
Hoffman, then this group may be able to receive statutory protections and
be afforded monetary relief for employer abuses, similar to the plaintiff in
Bengal Cabaret.

Specifically, this paper will examine how undocumented Asian
American workers may be impacted by Hoffman because high numbers of
undocumented Asian American workers work in industries known for
employer abuses. Also, social dynamics prevalent within the Asian
American community differentiate them from other minority low-wage
workers.

Advocates of Asian American workers face challenges in encouraging
these workers to organize and demand statutory wages against employers.
Newly immigrated workers comprise the bulk of Asian Americans working

had overstayed his visa was a protected employee under FLSA); Flores v. Amigon, 233 F. Supp. 2d 462
(E.D.N.Y. 2002) (holding that an employer’s request for an employee’s immigration status pertaining to
the preclusion of a FLSA claim post-Hoffman is not allowed because its prejudicial value outweighs its
probative value); Ulloa v. Al’s All Tree Serv., 768 N.Y.S.2d 556 (2003) (holding that an undocumented
employee who did not present fraudulent documents could recover the FLSA-calculated minimum
wage in small claims court).

15. In this piece, “Asian American” is defined as those people residing in America, regardless of
immigration status, whose ancestral origins stem from East Asia, Southeast Asia and South Asia.
Although these groups have vastly different cultures and experiences, for purposes of this paper, these
three groups are categorized as “Asian Americans” because these groups share a similar immigration
history of being denied the ability to access full citizenship and the political and social rights that stem
therefrom. See Mohar Ray, “Can I See Your Papers?” Local Police Enforcement of Federal
Immigration Law Post 9/11 and Asian American Permanent Foreignness, 11 WASH. & LEE RACE &

16. See Fred Gaboury, AFL-CIO to Step Up Campaign for Immigrants, available at
http://www.pww.org/past-weeks-2001/Campaign%20for%20immigrants.htm. (last visited October 4,
2004). Gaboury stated:

Today more than a quarter of new entrants to the labor market are foreign-born, coming
primarily from Mexico, China, India and the Philippines. In some areas of the country, 75
percent of the low-wage market is made up of immigrants who hold many of the dirtiest,
lowest-paid, heaviest and most dangerous jobs. A 1998 study conducted jointly by the
National Immigrant Forum and the Cato Institute said immigrant workers add about $10
billion annually to the U.S. economy and pay at least $133 billion in taxes.

See also Ana Avendano & et al., Hoffman Plastic Compounds, Inc. v. NLRB: Courts Limit the Erosion of
avendano.doc (last visited Nov. 26, 2004). Authors state, “[u]ndocumented workers in the United States
work in a variety of low wage, high risk occupations. The manufacturing sector employs 1.2 million
undocumented workers. The service sector employs 1.3 million undocumented workers. One million to
1.4 million undocumented workers labor in the fields. Six hundred thousand more work in construction
and 700,000 work in restaurants.” See also Asian American Garment Workers: Low Wages, Excessive
Hours & Crippling Injuries, available at http://www.aapip.org/pdfs/aaw_05_chapter3.pdf (last visited
Sept. 3, 2005). See also Thomas Maier, Blood, Sweat, Tears, NEWSDAY, Jul. 26, 2001 (describing the
horrible labor conditions of Chinese American workers in New York), available at
Mar. 18, 2006).

17. See Erin Chan, Asian Workers Flex Their Union Muscles – Labor: Employees Are
Organizing, Despite the Stance of Some Asian Business Owners, Who Urge Them to Show Ethnic
in the low-wage industry. These newer Asian American immigrants have come from many countries and speak a wide range of languages, thereby creating operational challenges for labor activists advocating for their rights.

In addition, Asian American workers employed by Asian American employers are less likely than other workers to seek fair wages because of solidarity within the Asian American community. In line with the model minority myth, Asian Americans may be more likely to work in exploitative conditions than other minority workers. This myth leads some employers to believe that Asian American workers will be docile and not demand a statutory wage. Thus, the plight of Asian American laborers in the aftermath of Hoffman presents unique challenges to labor rights activists. It is all the more important for Asian American laborers to assert state wage protections to seek redress in the aftermath of Hoffman.

Until the Court addresses the issue of whether state wage protections should extend to undocumented workers, activists for Asian American workers should assert that state wages are not preempted under the Immigration Reform and Control Act of 1986 ("IRCA"), state wage protections are consistent with FLSA, and state wage protections for undocumented workers are consistent with De Canas v. Bica. First, IRCA does not explicitly preempt states from applying their wage protections to undocumented workers. Second, case law interpreting FLSA has consistently held that the statute’s protections apply to undocumented workers. Lastly, in De Canas, the Supreme Court held that states could issue laws impacting immigrants as long as the laws did not regulate immigration – a power explicitly in the federal government’s domain. A state’s application of its wage protections to undocumented workers ultimately withstands the De Canas holding because it does not regulate the admission and deportation of immigrants. Thus, Asian American workers who are exploited by unscrupulous employers should assert state wage rights under the aforementioned argument.

20. See Chan, supra note 17.
22. See id. at 5. Asian American activist Chin Yol Yi stated, "If this (Hoffman) is justice, doesn’t it mean that undocumented workers have to tolerate any and all exploitation and unbearable working conditions in your workplace? Doesn’t this mean that the boss can treat you in any way they please, and if you try to organize to improve your life, the boss can fire you for it and they won’t be penalized?"
The next section of this paper will explore the current number of Asian American immigrants in the labor force and provide a summary of immigrant worker rights under the NLRA and case law. The following will summarize the Supreme Court's decision in *Hoffman*. Part IV will assert that state wage protections provide a viable alternative post-*Hoffman*, because they do not conflict with IRCA and are consistent with the Supreme Court's decision in *De Canas*. The final section will conclude that although *Hoffman* eliminated the statutory back pay remedy under the NLRA, Asian American undocumented workers may still be able to obtain monetary relief through alternative paths.

**SECTION I: UNDOCUMENTED WORKERS, ASIAN AMERICAN LABORERS AND THE LEGAL LANDSCAPE**

Since the 1970s, the number of immigrants has dramatically increased in the United States. In 2000, 28.4 million immigrants resided in the United States and other estimates indicated that eight million were undocumented. The Immigration and Nationality Services Act of 1965 expanded opportunities for Asian migration to the United States. "The number of Asians and Pacific Islanders increased more than eightfold between 1970 and 2002, from 1.5 million to 12.5 million. Roughly 43 percent of the foreign-born Asian population entered the United States in 1990-2000." Recent studies also indicate that many undocumented immigrants originate from Asian countries, such as India, China and the Philippines.


27. See Camarota, supra note 26.


30. See Gaboury, supra note 16. Although many Asian Americans work as laborers, the H1-B visa, a professional visa used for temporary workers, is often issued to people from Asian countries. See Ron Chepesiuk, *Coming to America: The Debate Over the H1-B Visa Program*, http://www.asianweek.com/2001_03_16/bizl_h1b_visa.html (last visited Dec. 10, 2005). However, over 90
Although there is no perfect estimate as to how many Asian Americans are undocumented in the United States,\(^{31}\) a disproportionate number of them who are undocumented work as laborers in unskilled jobs and regularly endure iniquitous employment conditions, such as excessively low wages and worker safety violations.\(^{32}\) Asian American workers are also concentrated in industries known for heavy exploitation, excessive hours and indentured servitude-like conditions, such as some garment operations in New York and California.\(^{33}\)

In addition to having concentrations in these low-paying industries, Asian American workers face issues that differentiate them from other minority laborers. The issues particular to Asian American workers include: 1) high poverty rates among newer Asian American immigrant communities, making them more likely to endure exploitative conditions;\(^{34}\) 2) lack of English proficiency,\(^{35}\) making them more likely to work in unskilled jobs; 3) diversity of languages spoken by Asian American laborers originating from different countries,\(^{36}\) creating operational challenges for union organizing; and 4) stereotypes of Asian Americans as "docile, hardworking laborers," subjecting this population to greater exploitation.\(^{37}\)

Because Asian American workers are concentrated in some of the
lowest paying and "dirtiest" industries, such as the garment industry, the *Hoffman* decision will likely disproportionately affect them.\textsuperscript{38} Without legal intervention, employers will be able to use *Hoffman's* ruling to further already exploitative conditions.\textsuperscript{39} Although it is uncertain exactly how many Asian American workers will be impacted by *Hoffman*, one thing is clear: if employers already hire high numbers of Asian American workers in low paying industries, *Hoffman* encourages employers to deny Asian American workers basic rights and to withhold wages for work already performed.\textsuperscript{40}

To further complicate matters, Asian Americans have a unique history of union organizing. Although today about 12\% of Asian American workers belong to unions nationwide, a figure slightly lower than the 13.5\% of all American workers belonging to unions nationwide, Asian American unionizing historically has "not been as consistent or as widely known as those by blacks and Latinos."\textsuperscript{41} Perhaps the reason why Asian Americans have a different history of unionizing than other minorities is because of a relationship characterized by loyalty among Asian American workers to Asian American owned businesses and employers.

[Unionizing] rarely emerged within Asian-owned businesses, primarily because of the loyalty that many Asian Americans have felt to friends and

\begin{itemize}
\item \textsuperscript{38} National Immigration Law Center, *Hoffman Plastic Decision: Bad for Workers; Bad for Business*, March 2003, at http://www.nilc.org/immsemploy/\textsuperscript{18} NYL\textsuperscript{19} Hoffman NLRB/Hoffman\textsuperscript{20} TPs.PDF (last visited Dec. 12, 2005). Although the National Immigration Law Center recognizes that the *Hoffman* decision also disproportionately impacts "Latinos" and others who look or sound "foreign," the author will not focus on these two groups because this paper's focus is on Asian Americans. It is probable that *Hoffman's* impact is similar for Latina/os for other "foreign" looking or sounding groups; however, this paper will focus on Asian Americans because of the unique problems faced by Asian American workers, such as the likelihood of being exploited in lower-paying industries because of newer immigration status and a stereotype of being docile and accepting of horrific labor conditions. See APALA, AFL-CIO, UCLA Labor Center Report, *supra* note 18.
\item \textsuperscript{39} See University of Illinois-Chicago Center for Urban Economic Development, *The Hoffman Decision – A Threat to All Workers' Rights*, http://www.icirr.org/publications/hoffmandecision.pdf (last visited Mar. 18, 2006) (quoting the NELP as stating, "some employers in the US hire undocumented immigrant workers because it's assumed they will be less likely to complain about wage and hour violations, unsafe working conditions, inadequate training, and lack of health care options.... it *Hoffman* encourages employers to hire the most vulnerable people in the workforce, and then forces these people to 'stay under the radar' by not reporting wage and hour violations, unsafe conditions, and other exploitive practices.").
\item \textsuperscript{40} See id.
\item \textsuperscript{41} Chan, *supra* note 17.
\end{itemize}
relatives who hired them [and] also because racial discrimination has prevented workers from finding work elsewhere . . . Asian American employers have also used this loyalty to manipulate workers, urging employees not to fight with bosses to show ethnic solidarity.\(^4\)

Thus, a relationship of loyalty to Asian American employers, combined with racial discrimination played a role in differentiating the Asian American labor movement from other minority unionizing. This complex relationship between Asian American laborers working for Asian American employers has prompted the Asian American labor movement to focus on informing Asian American workers of their right to unionize.\(^4\) These complexities within the Asian American community create difficulties in relation to the *Hoffman* ruling because Asian American businesses in which unions are not prevalent may use the *Hoffman* ruling to further exploit Asian American workers, especially those who feel torn between asserting their rights and expressing solidarity with their Asian American employers.

Additionally, Asian American undocumented laborers who join labor unions may encounter employer retaliation through employment termination. Unscrupulous employers may also contact the Department of Homeland Security’s Bureau of Immigration and Customs Enforcement (“ICE”),\(^4\) which could result in an Asian American undocumented laborer’s indefinite detention\(^4\) or deportation.\(^4\)

In spite of these obstacles, the judiciary recognized that all undocumented immigrants are nonetheless protected under the NLRA. Specifically, in *NLRB v. Apollo Tire Co.*, the Ninth Circuit reaffirmed that the NLRB has consistently interpreted the NLRA § 2(3) definition of

\(^{42}\) *Id.*

\(^{43}\) See Chan, *supra* note 17.

\(^{44}\) The United States Immigration and Naturalization Service (INS) was reorganized into the Department of Homeland Security after the September 11, 2001 terrorist attacks, possibly due to a perception that immigration controls were correlated to national security. See Ray, *supra* note 15, n.4.

\(^{45}\) Post 9/11, the United States Supreme Court held that indefinite detention of an immigrant waiting for a deportation proceeding would be allowed. See, e.g., Zadvydas v. Davis, 533 U.S. 288 (2001).

\(^{46}\) See Michael Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004). See also Montero v. INS, 124 F.3d 381, 385 (2d Cir. 1997) (stating that “the INA does not preclude deportation of an undocumented alien on the basis of evidence obtained in relation to a labor dispute”). For cases addressing possible employer NLRA violations for calling federal immigration authorities as a retaliatory measure, see N.L.R.B. v. Hasa Chemical, Inc., 235 N.L.R.B. 903, 912-13 (1978) (finding that the employer violated NLRA § 8(a)(1) when it threatened to call immigration authorities to deport an undocumented alien employee in retaliation for his union activities); See also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-96, n. 6 (1984). The *Sure-Tan* Court stated, “[i]t is only when the evidence establishes that the reporting of the presence of an illegal alien employee is in retaliation for the employee’s protected union activity that the Board finds a violation of § 8(a)(3). Absent this specific finding of antunion animus, it would not be an unfair labor practice to report or discharge an undocumented alien employee. Such a holding is consistent with the policies of both the INA and the NLRA.” See also Maier, *supra* note 33.
“employee” to include undocumented immigrants. Similarly, in *Sure-Tan, Inc. v. NLRB*, the Supreme Court held that the NLRA is applicable to undocumented immigrants.

In addition to undocumented workers being covered under the NLRA statutory scheme, the judiciary has interpreted that undocumented workers are also covered under federal wage protections as delineated in FLSA. Further, IRCA, an immigration law, reformed the immigration statutes in 1986, illustrating the federal government’s control over immigration law. This concept is important to this paper’s later assertion that states can apply their wage protections to undocumented immigrants because this application does not encroach on the federal government’s domain.

Although the federal government can legislate immigration control (as demonstrated by the IRCA statutory scheme), the Supreme Court eliminated the statutory back pay remedy for undocumented workers in *Hoffman* to be consistent with federal immigration law. Since issuing *Hoffman*, numerous scholars have analyzed the impact of the Supreme Court decision. Some scholars have argued that the elimination of back pay will create greater incentives to hire undocumented workers and encourage employer NLRA violations. Additionally, certain federal and state courts have been reluctant to apply *Hoffman’s* holding in cases involving FLSA, discovery issues, or to state court cases where back wages are sought as damages.

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47. See NLRB v. Apollo Tire, 604 F.2d 1180, 1181-1182 (1979) ("The Board has consistently interpreted the definition [of employee] to include aliens.").

48. *Sure-Tan*, 467 U.S. at 892 ("Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of [NLRA] 'employee.'"). The *Sure-Tan* Court also held that it was an unfair labor practice under the NLRA for an employer to report the presence of an undocumented worker in retaliation for union activity. *Id.* at 895-96.

49. See * supra note 14.


51. See, e.g., Singh v. Jutla, 214 F. Supp. 2d 1056 (N.D. Cal. 2002) (refusing to extend the *Hoffman* rule to bar the remedies that the undocumented immigrant sought, i.e. back pay for work actually performed and overtime when the employer was a “knowing employer” and allegedly actively recruited the alien to come work in the United States); Renteria v. Italia Foods, Inc., 149 Lab. Cas. (CCH) P34,771 (2003) (awarding compensatory damages to an undocumented immigrant because the
III. A SUMMARY OF HOFFMAN

A. Facts & Procedural History

In May 1988, Hoffman Plastic Compounds ("Hoffman Plastic"), a company that custom formulates chemical compounds for pharmaceutical, construction and manufacturing companies, hired Jose Castro to operate chemical mixing machines based on documents that "appeared to verify his authorization to work in the United States." In December 1988, Hoffman Plastic terminated Castro and three other employees for lawfully distributing union authorization cards.

In January 1992, the NLRB found Hoffman Plastic in violation of NLRA § 8(a)(3) and ordered that it: 1) cease and desist from future NLRA violations, 2) post a detailed notice to employees regarding the remedial order, and 3) offer reinstatement and back pay to the terminated employees, including Castro. During a compliance hearing before an Administrative Law Judge (ALJ) in June 1993, Castro testified that he had presented fraudulent documents to obtain employment at Hoffman Plastic; Castro was born in Mexico and had undocumented status in the United States.

Accordingly, the ALJ precluded the NLRB from awarding reinstatement and back pay to Castro because it would be contrary to both Sure-Tan, Inc. and the Immigration Reform and Control Act (IRCA), which prohibited workers to using fraudulent immigration documents.

In September 1998, the NLRB reserved the ALJ's decision with respect to back pay pursuant to NLRB v. A.P.R.A. Fuel Oil Buyers Group Inc., which afforded an undocumented worker make-whole remedies.

_Hoffman_ Court explicitly discouraged back pay and allowing front pay would assume the undocumented employee would continue to work in violation of IRCA; New York Attorney General's Opinion, 2003 N.Y. Op. Att'y Gen. 3, 7 ("Because enforcement of New York's wage laws does not implicate the concerns articulated by the Court in _Hoffman_, we believe that _Hoffman_ does not preclude these enforcement efforts."); Zeng Liu v. Donna Karan Int'l, Inc., 207 F. Supp. 2d 191, (S.D.N.Y. 2002) (denying Donna Karan's request for a laborer's immigration status by holding that _Hoffman_ was inapplicable to the company's request and that a worker is not barred from receiving wages for work actually performed); Cortez v. Medina's Landscaping, 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. 2002) (holding that _Hoffman_ does not bar a worker from receiving wages for work actually performed); Rodriguez v. Texan, Inc., 2002 U.S. Dist LEXIS 17379 (N.D. Ill. 2002) (holding that _Hoffman_ did not bar an undocumented worker from seeking relief under FLSA); Lopez v. Superflex, Ltd., 2002 WL 1941484 (S.D.N.Y.) (holding that an employee's immigration status was not discoverable in a case involving the Americans with Disabilities Act).

52. _Hoffman_, 535 U.S. at 140.
53. _Id._
54. _Id._ at 140-141.
55. _Id._ at 141.
56. _Id._
57. 320 N.L.R.B. 408 (1995). The NLRB stated:
After two unsuccessful petitions for review to the Appellate Court, the Supreme Court granted Hoffman Plastic writ of certiorari and reversed the NLRB’s decision.  

B. Court’s Holding

Writing for the 5-4 majority, Justice Rehnquist sought to balance IRCA’s underlying policies with the NLRA and examined prior NLRB decisions involving illegal conduct. The majority recounted that since Southern Steamship Co. v. NLRB, the Supreme Court had “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.” Since IRCA criminalizes an employee’s use of false immigration documents, awarding back pay to an employee who had committed this criminal conduct would be inconsistent with federal immigration law. Although the Supreme Court eliminated the statutory back pay remedy for Castro, it still upheld the Board’s cease and desist order and sign posting order.

C. Dissent

Justice Breyer in his dissenting opinion argued that awarding statutory back pay to undocumented immigrants was not contrary to immigration law, but rather, “reasonably helps to deter unlawful activity that both labor laws and immigration laws seek to prevent.” In particular, eliminating

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We find that IRCA and the NLRA can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace. We reject the Respondent’s reading of IRCA as requiring the Board to deny its traditional make-whole remedies to unlawfully discharged employees because they have not provided documents necessary for legal employment in the United States. Id. at 408.

58. Hoffman, 535 U.S. at 142. The Supreme Court noted that circuit courts and different NLRB regions remained divided on the issue of whether undocumented workers were entitled to back pay under the NLRA:


59. 316 U.S. 31 (1942) (reversing NLRB’s order of reinstatement following an employee strike on a ship because a strike by seamen against their officers aboard a vessel was to be punished as mutiny under 18 U.S.C.S. §§ 483-84).

60. Hoffman, 535 U.S. at 144.

61. Id. at 151.

62. Id. at 152.

63. Id. at 153.
statutory back pay would increase employer incentives to hire undocumented workers without fear of monetary penalties for NLRA violations. Justice Breyer asserted that the NLRB should be afforded deference in its reasonable interpretation of the NLRA under the guise of fundamental administrative law concepts.

D. Implications

Justice Breyer's arguments in his dissenting opinion have not gone unnoticed. Numerous scholars have addressed the Hoffman decision, some fearing that it will have a detrimental impact on undocumented workers. Further, the National Employment Law Project conducted a study on the impact of Hoffman on undocumented workers and summarized their findings as follows: 1) employers have used Hoffman to "threaten or harass workers who are organizing to improve their work conditions, falsely telling them that if they are undocumented, they do not have the right to organize;" 2) undocumented workers are now unable to receive statutory back pay under the NLRA; 3) some employers have argued that undocumented workers "should not be covered by other laws that protect workers;" 4) workers may now have to reveal their immigration status when asserting their rights in court or in government agencies; and 5) undocumented workers' loss of rights impacts other workers.

Given these negative implications of Hoffman and its disproportionate impact on Asian American workers, it is all the more important for activists to seek fair wages for their clients through state remedies. As previously mentioned, Asian American workers often work in the low-wage industry known for worker exploitation because of these workers' lack of English proficiency, newer immigration status that pulls them initially to the low-

64. Id. at 155-56.
65. See generally Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 842-43 (1984). In Chevron, the Supreme Court stated:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
66. See supra note 50.
67. National Employment Law Project, Supreme Court Decision in Hoffman Plastic Compounds v. NLRB: Fact Sheet for Workers, May 2002, at http://www.nelp.org/docUploads/pub132%2Epdf. Hoffman absolves employers from monetary penalties for violations of labor laws, creating fewer incentives for them to abide by the laws. This creates more workplace violations that impact all workers, regardless of their immigration status because employers are allowed to coerce undocumented employees from joining unions, ultimately weakening labor movements. ICIRR, supra note 39.
wage market, and ties with Asian American employers who manipulate Asian American employee loyalty to maintain exploitative conditions. As long as Hoffman continues to potentially empower unscrupulous employers to exploit Asian American undocumented workers by withholding fair wages, labor rights activists for Asian Americans should seek state law protections when litigating for wages because this will create another way to seek redress in the aftermath of Hoffman. The next section will argue that state wage statutes should apply to undocumented workers because these statutes are not preempted by federal law and should be allowed under an analysis of De Canas.

IV. STATE REMEDIES ARE VIABLE POST-HOFFMAN

A. State Regulation of Labor and Employment Law

In 1905, the Supreme Court issued its historic decision in Lochner v. New York, holding unconstitutional a state statute that limited the number of hours that a bakery employee could work because the law interfered with the right to contract under the Fourteenth Amendment.68 Lochner and its progeny from 1905 to the mid-1930s illustrated a trend in judicial intervention of state laws that governed various aspects of employment as being constitutionally invalid.69 However, by the end of the Lochner era, the Supreme Court deferred to the states to regulate economic policy as long as the regulation had a “substantial relation to the object sought to be obtained.”70 Accordingly, by 1937, the Supreme Court held in West Coast Hotel v. Parrish that states could regulate wages, hours and working conditions.71

Today, states may promulgate their own labor and employment laws; however, state laws regulating activities that fall or ‘arguably fall’ under the NLRA must yield to federal jurisdiction.72 On the other hand, federal preemption is less common for employment law,73 wherein states may

68. 198 U.S. 45 (1905).


71. 300 U.S. 379 (1937).

72. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); see also Int’l Ass’n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm’n, 427 U.S. 132 (1976) (holding that the NLRA preempted the application of a state law even though it did not specifically protect a ban on overtime. The NLRA intended to leave the type of economic pressure exercised by the union unregulated. Accordingly, the state did not have the authority to regulate it.).

73. Employment law typically covers individual employees, whereas labor laws address the rights to organize, collective bargaining, etc. Employment laws include both statutory and common laws, such as wage laws, pension schemes (usually under federal domain), and workers compensation
regulate wage rates and overtime pay as long as these regulations do not contradict FLSA. Under state law, undocumented workers before the Hoffman decision had filed suits for wages pertaining to work actually performed under state minimum wage statutes, (such as the Bengal Cabaret case mentioned in the first section of this paper) and sued for back wages as damages in common law tort and breach of contract cases. State courts may also award back pay in labor standard and equal employment cases, though there are few reported decisions because most of these cases are settled at the administrative level. Nonetheless, it is important to note that state employment laws, particularly minimum wage laws, have a back pay remedy.

As for state wage law application, each state has its own statutory scheme with its own definitions. Seven states do not define the term “employee” under its wage statutes, thus making it unclear whether undocumented workers are protected under these state laws. Furthermore, the vast majority of states that do define the word “employee” do not address whether the statute covers undocumented workers. (usually under state domain). See generally Matthew T. Bodie, The Potential for State Labor Law: The New York Greengrocer Code of Conduct, 21 Hofstra Lab. & Emp. L.J. 183 (2003).

74. See, e.g., New York’s wage scheme encoded in N.Y. LAB. LAW § 652 (Consol. 2004); the Green Grocers Code of Conduct described in Bodie, supra note 73. See also New York Attorney General’s Opinion, supra note 51 for a discussion of New York’s state wage scheme.

75. See, e.g., Nizamuddowlah, 415 N.Y.S.2d at 685 (1979) (holding that although the “law provides penalties for aliens who obtain employment in contravention of their visa obligations . . . deprivation of compensation for labor is not warranted by any public policy consideration involving the immigration statutes.”). See also Gates v. Rivers Construction, 515 P.2d 1020, 1022 (Alaska, 1975).

76. See generally Petersen v. Neme, 281 S.E.2d 869 (1981) (holding that allowing an undocumented immigrant to recover in tort regarding wages for lost time for an injury did not undermine public policy because it did not encourage other undocumented workers to accept employment). See also Montoya v. Gateway Ins. Co., 401 A.2d 1102 (1979); see also Arteaga v. Literski, 265 N.W.2d 148, 150 (Wis. 1978) (“It cannot be seriously argued that people enter this country illegally so they can recover for an injury.”).

77. Amici Brief, supra note 6, at *11.


Only three states have specified certain groups of workers that could arguably include undocumented workers under the state wage statutory scheme. Arkansas has included the term “migrant worker” in its definition of employee, but does not explicitly mention whether a migrant employee who is also an undocumented worker is covered under the Arkansas wage law. After *Hoffman*, California adopted an “affirmative state law” that amended Civil, Government, Health and Safety and Labor Codes to apply protections, rights and remedies available under state law (unless prohibited by federal law) to individuals regardless of immigration status. Lastly, New York claims that its wage laws apply to all employees that are covered under FLSA. As previously mentioned, FLSA covers undocumented workers.

In light of the *Hoffman* decision, can Asian American undocumented workers be protected under state wage laws, such as those protections afforded to the litigant in *Bengal Cabaret*? As noted earlier, the *Hoffman* majority reconciled the NLRA with IRCA, holding that undocumented immigrant employment is illegal under IRCA. Accordingly, awarding statutory back pay for work that would have been illegally performed would undermine the immigration statute, notwithstanding the employer’s NLRA violation. Even though an undocumented worker’s employment is illegal, either because an undocumented worker tendered false documentation or an employer unscrupulously approved fraudulent documentation, state wage remedies, such as those awarded by the *Bengal Cabaret* court, should still be available post-*Hoffman* because IRCA does not preclude state control over applying its wage laws to undocumented immigrants. Thus, activists for Asian American undocumented workers should assert in state courts that state statutory protections extend to

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20. ARK. CODE ANN. § 11-4-203 (West 2006).
21. CAL. CIV. CODE § 3339(b) (West 2006).
24. *Hoffman*, 535 U.S. at 148 (“Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.”).
undocumented workers.

B. The Preemption Doctrine

Although none of the cases litigated after *Hoffman* have addressed whether states can fashion back pay remedies to undocumented workers under statutory wage schemes, although the federal preemption doctrine provides activists for undocumented Asian American workers with a strong argument that they are covered under state wage schemes. As a general rule, the federal preemption doctrine directs that a state law must yield to a conflicting federal law pursuant to the Constitution. The Supreme Court in *Jones v. Rath Packing Co.* determined that whether a federal law preempts state law rests on the intent of Congress, which may be either express or implied.

Where Congress has an explicit intent, it will provide for preemption in the statute. However, to understand whether Congress had an implied intent to preempt a state statute, a court may defer to other techniques, such as examining the federal statute's legislative history and the comprehensiveness of the federal scheme. A state court addressing whether federal law preempts state employment law noted that there is a "strong presumption against federal preemption of state and local legislation . . . this presumption is especially strong in areas traditionally occupied by the states, such as public health and safety . . . [t]he Immigration Reform Act itself gives no indication that Congress intended the act to preempt state laws whenever state laws operate to benefit undocumented aliens."

Based on the aforementioned preemption doctrine, a strong argument can be made that IRCA did not intend to preempt state minimum wage laws or other similar state remedies, even in light of *Hoffman*. First, IRCA's legislative history indicated that state protections of undocumented workers should not be displaced:

"[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such

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85. See Smith, supra note 12, at 607.
86. See U.S. CONST. art. VI, cl. 2.
87. 430 U.S. 519, 525 (1977) ("We start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
88. Id. See Correales, supra note 50.
89. Id.
90. Dowling v. Slotnik, 712 A.2d 396, 404 (Conn. 1998) (noting that IRCA does not preempt, either expressly or impliedly, the authority of states to award workers' compensation benefits to undocumented workers).
agencies or for engaging in activities protected by these agencies.\footnote{91} If Congress had intended that IRCA displace state wage protections for undocumented employees, it would have affirmatively included such a provision.\footnote{92}

Second, states that have minimum wage statutes typically mirror the purposes of FLSA.\footnote{93} States may set wage rates higher than those wages delineated in FLSA or may have laws in areas not covered by FLSA,\footnote{94} nonetheless, states may not establish wage laws that are contradictory or inconsistent with FLSA. Notably, most states have either defined “employee” generally as one who works for an employer, or have adopted the FLSA definition of “employee.”\footnote{95} However, neither the FLSA definition nor the definition of “employee” under any state minimum wage law addresses whether undocumented workers are covered under the statute.\footnote{96} As noted in the first section of this paper, both pre- and post-\textit{Hoffman} courts have held that undocumented workers are protected by FLSA. Since state wage laws must be at least consistent with FLSA, it should follow that undocumented workers should receive state wage law protections.

However, similar to FLSA —which does not extend its protections to certain groups of agricultural and domestic workers,— many state wage laws have similar exclusionary provisions under the definition of “employee.” Although these occupation exclusions do not specifically apply to Asian American or other undocumented workers but, rather, apply to occupations usually held by undocumented workers,\footnote{98} these laws have been silent as to whether undocumented workers holding other positions may be protected under state wage laws. For statutes as comprehensive as FLSA and its state counterparts, legislators could have excluded undocumented workers under the definition of “employee” — but did not.

Notably, after the \textit{Hoffman} decision, some states have affirmatively stated that undocumented immigrants should be afforded state wage

\begin{itemize}
\item \footnote{92} \textit{See} O’Melveny & Myers v. FDIC, 512 U.S. 79, 85-87 (1994) (finding that silence within a detailed statute is usually interpreted to mean that no federal rule on the matter was intended).
\item \footnote{93} 48A Am. Jur. 2d Labor and Labor Relations § 4189 ("[w]here other federal, state, or local laws governing the calculation of wages and the frequency or manner of paying them promote the same purpose without contravening any of the requirements of the FLSA, those laws also remain in effect") (referencing 29 CFR § 531.26).
\item \footnote{94} \textit{See} 48A Am. Jur. 2d Labor and Labor Relations § 4190. Also, “[m]ost states establish a specific minimum rate for wage payments by statute, although a significant number call for a state agency to set minimum wage rates, often for specific industries or categories of employees, by administrative order.” \textit{id.}
\item \footnote{95} \textit{See supra} notes 78-79.
\item \textit{id.}
\item \footnote{97} \textit{See} 29 CFR § 531.26 (2006).
\item \footnote{98} \textit{See} Avendano, \textit{supra} note 32.
\end{itemize}
protections. For example, California amended its existing state employment laws to cover workers regardless of immigration status. This provides labor activists in California an avenue to seek monetary compensation through California's wage laws. In addition, New York created the "green grocers" law as a result of undocumented Mexican workers receiving excessively low wages from local grocery store owners known as "green grocers." Specifically, in the "green grocers" example, the New York State Attorney General's Office, representatives of local New York City "green grocers," the New York State AFL-CIO, and a non-profit organization representing Mexican undocumented workers entered into a settlement mandating that New York City "green grocers" abide by the State's minimum wage laws.

Activists for the Asian American community can also use the "green grocers" example as an avenue to press for rights of Asian American undocumented workers by urging state governments—either through court litigation or through settlements—to acknowledge that their state wage laws apply to undocumented workers. Since many state wage laws are silent as to whether undocumented immigrants are "employees," and many of the state definitions of "employee" mirror FLSA (which the judiciary has recognized to apply to undocumented workers), it should follow that courts will uphold state wage protections for undocumented workers in all the states. Thus, labor rights activists for the Asian American community should argue that state wage protections apply to undocumented workers.

It might be argued that Hoffman should be applied broadly to eliminate state wage remedies for undocumented workers because their employment is illegal. Hoffman proponents could claim that allowing state remedies encourages more undocumented workers to enter the workforce in hopes of a statutory wage, undermining IRCA's intent of limiting the employment of undocumented workers. However, this argument is misplaced. Eliminating state wage protections actually provides stronger incentives for unscrupulous employers (such as the "green grocers" of New York City) to hire undocumented workers because

99. See Ash, supra note 50.
100. See supra note 74.
101. See Reinforced Earth Co. v. Workers' Comp. Appeal Bd., 810 A.2d 99 (Pa. 2002) (holding that public policy does not contravene an undocumented immigrant from receiving workers' compensation benefits and that an employer does not have to show that other jobs are available). However, in state tort actions where back pay is sought, Hoffman does not completely bar undocumented workers from recovery. See, e.g., Cano v. Mallory Mgmt., 760 N.Y.S.2d 816 (2003) (holding that barring an undocumented immigrant who obtained employment with fraudulent documentation from suing an utility company for on-the-job injuries contravened public policy and that the immigrant's undocumented status could not be presented to the jury on the issue of pain and suffering, but was relevant in the area of lost wages); Balbuena v. IDR Realty, LLC, 787 N.Y.S.2d 35 (2004) (allowing undocumented immigrant plaintiff to seek statutory back wages, but limiting the amount based on what he would have earned in his country of origin).
employers would be able to pay unfair wages or withhold pay. Consequently, undocumented Asian American workers would have even less power to negotiate for protections.

States have an interest in guaranteeing statutory wage protections to undocumented workers because this practice ensures fair and comparable wages for all workers, regardless of their immigration status. Definitions of "employee" applied to undocumented workers ultimately create a better situation for all workers and reduce the likelihood for undocumented Asian American workers to be subject to exploitation because unscrupulous employers would be forced to comply with the state-mandated statutory wage. Thus, the statutory wage scheme sets a "floor" to ensure higher wages for all workers and provides for overall improved working conditions.

C. De Canas v. Bica: The State's Ability to Regulate Immigrant Life

Although it is clear that immigration control rests soundly in federal domain, states should be able to regulate aspects of immigrant life under De Canas. The Supreme Court first addressed the federal government’s authority to regulate immigration matters under the plenary power doctrine in the 'Chinese Exclusion' case of 1889. During that time, the Supreme Court allowed states to determine whether their laws should apply to immigrants, reasoning that state governments were better equipped than federal governments to make certain public policy decisions.

For example, in 1877, the Supreme Court upheld, in McCready v. Virginia, a Virginia statute barring noncitizens from planting oysters in state rivers, explaining that states had the right to determine the use of public property. In 1914, the Supreme Court in Pastone v. Pennsylvania upheld a Pennsylvania law barring foreign-born residents from owning

102. The national legislature may establish a "uniform rule of naturalization" under the Constitution. U.S. CONST. art. 1, § 8, cl. 4. The U.S. Supreme Court has also held that the federal government has power over admission and deportation matters. See, e.g., Smith v. Turner, 48 U.S. 283, 392, 409 (1849); Chae Chan Ping v. United States, 130 U.S. 581, 609-10 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Ekiu v. United States, 142 U.S. 651, 663 (1892).

103. The 'Chinese Exclusion' case is also known as Chae Chan Ping. See supra note 102.

104. Prior to the enactment of the Immigration and Naturalization Act (hereinafter INA) (1965), Congress historically regulated immigration through ad hoc treaties barring certain races from having temporary or permanent legal status in the United States. See Congressional enactment in 1790, Chinese Exclusion Act (1882), Johnson-Reed Act (1924). In 1965, Congress removed the racial criteria in the immigration laws through the INA and created a documented status through visas. Thus, the documented/undocumented distinction began in 1965 applying to those residents who had visas and those residing in this country without the adequate visa paperwork. Because those from certain races had a de facto type undocumented status, the rights of the immigrant litigant in these earlier cases can be compared to those of undocumented workers today. Both groups did not have full immigration status either because of race or lack of visa status, and thus both groups were not afforded the panoply of rights that attach to having documented status.

105. 94 U.S. 391 (1877).
shotguns because "a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked . . . out." Similarly, throughout the 1920s, the Supreme Court upheld other state laws that prohibited immigrants from operating billiard halls, owning agricultural property, and entering into sharecropping schemes. Although these laws differed from state wage protection schemes in that they discriminated against immigrants, these laws demonstrated how states were allowed to determine whether certain laws applied to immigrants.

The Supreme Court has ruled that as long as the state law did not address immigrant naturalization, deportation or admission—areas that lay within federal control—state laws addressing other aspects of immigrant rights would be upheld. In 1948, the Supreme Court in *Takahashi v. Fish & Game Commission* expanded the scope of federal preemption pertaining to state laws impacting immigrants.

In *Takahashi*, the Court invalidated a California law barring noncitizens from obtaining fishing licenses, noting that the law was analogous to the regulation of immigration. California had passed this law after the Japanese internment with an intent to prevent those of Japanese ancestry from fishing in its waters. By barring noncitizens, California excluded those of Japanese descent from licensure because those with Japanese ancestry could not obtain citizenship. The Court invalidated the California law because, although a state had the ability to control who could fish within its waters, California could not genuinely express a state interest in this instance. Rather, it reasoned that "to deny to aliens the opportunity of earning a livelihood [through fishing] . . . would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." Thus, if a law impacted how immigrants could earn a living, it was a per se

106. 232 U.S. 138, 144 (1914).
110. See *Hines v. Davidowitz*, 312 U.S. 52, 59, 72 (1941) (declaring void a Pennsylvania alien registration statute mandating that aliens carry identification cards because it directly conflicted with Congress's Alien Registration Act).
111. See *Terrace*, 263 U.S. 197.
112. 334 U.S. 410 (1948) (quoting *Truax v. Raich*, 239 U.S. 33 (1915)).
114. *Id.*
115. *Id.*
116. *Id.* at 416.
state regulation of immigration and would be invalidated. Although both Truax and Takahashi addressed issues involving immigrants who were lawfully admitted, it should be noted both cases were decided prior to the federal enactment of the 1965 Immigration and Naturalization Act ("INA") that created classes of documentation through visa status.  

In 1976, the Supreme Court narrowed Takahashi's application, clarifying that a state law would be invalidated only if it directly impacts immigration. In De Canas, Justice Brennan, writing for a unanimous court, addressed whether the California Labor Code, providing that an employer shall not "knowingly employ an [undocumented immigrant] . . . if such employment would have an adverse effect on lawful resident workers," was unconstitutional either because it was a state attempt to regulate immigration or because it was preempted by the supremacy clause of the U.S. Constitution. Petitioners, lawfully residing migrant farm workers, sued respondent employment contractors under the California law after losing their employment to undocumented workers hired by respondents.

The California appellate court declared the state law unconstitutional because it regulated immigrant employment in spite of federal domain in the field of immigration. The Supreme Court reversed the state court's decision, holding that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted [sic] by this constitutional power, whether latent or exercised." The nexus of the Court's opinion rested on whether a state statute was "a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."

In De Canas, the Supreme Court ultimately upheld the California law because it only indirectly impacted immigration and reflected federal law barring the employment of undocumented workers. The Court reasoned

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117. The undocumented/documented distinction is more of an effect of modern immigration law through the INA that allowed immigrants from various countries to obtain documentation through acceptable visa status. However, during the earlier immigration cases, even American-born persons whose ancestral origins could be traced back to certain countries would never obtain full citizenship status; instead, these persons constituted a sub-class, analogous to 'undocumented' immigrants today, in that they were afforded different levels of protections (i.e. Hoffman Plastic). Thus, the cases described prior to 1965 dealt with citizenship/non-citizenship status rather than the documented/undocumented distinction seen today. See generally United States v. Wong Kim Ark, 169 U.S. 649 (1898).
118. CAL. LAB. CODE § 2805(a) (repealed 1988).
119. 424 U.S. at 352-53.
120. See id. at 353.
121. See id.
122. Id. at 355.
123. Id.
124. See id. at 361.
that "California sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens [and that] even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . . ."\textsuperscript{125} Unlike \textit{Takahashi}, where the Court invalidated a state law in part because denying a licensure that could be used for livelihood purposes was analogous to immigration regulation, the \textit{De Canas} court held that the law's impact on immigration must be direct rather than derivative.

The \textit{De Canas} rule still remains in effect today. State wage laws (covering undocumented immigrants) that do not conflict with federal law and do not directly impact immigration should be able to withstand \textit{Hoffman}. For activists using the courts to seek wages on behalf of Asian American undocumented clients, arguing that state wage remedies apply to their clients' notwithstanding immigration status should be a way to afford some relief. First, state wage laws are not contradictory to federal law because state laws must be consistent with FLSA. Applying these laws to undocumented Asian American immigrants would be consistent with \textit{Patel v. Quality Inn} and its progeny, which afforded FLSA protections to undocumented workers for work actually performed.\textsuperscript{126}

Second, affording state wage protections to undocumented Asian American workers would not be a direct control of immigration under the \textit{De Canas} standard. Even if states such as New York or California—that have affirmatively extended wage protections to undocumented workers—would have a "pull" effect to lure more undocumented workers to these states, it would be a derivative effect of these laws. The \textit{De Canas} court held that the California law criminalizing the employer's conduct of hiring undocumented workers would only have an "indirect" or "speculative" effect on immigration.\textsuperscript{127} Similarly, the \textit{Hoffman} majority's theory of awarding back pay to undocumented workers as "trivializing" immigration laws because it would provide an incentive to undocumented workers to violate IRCA also appears to be "speculative" and "indirect" regarding its impact on immigration.

It is uncertain whether affording statutory monetary relief to undocumented workers for an employer's unscrupulous conduct would provide an incentive for undocumented workers to seek jobs in certain states or whether it would have a deterrent effect on employers by giving them less incentive to hire undocumented laborers. The dissent in \textit{Hoffman}, however, opined that awarding back pay to undocumented workers under the NLRA would not be a "magnet" to pull undocumented workers toward

\textsuperscript{125} \textit{Id.} at 355.
\textsuperscript{126} 846 F.2d at 700.
\textsuperscript{127} 424 U.S. at 355.
illegal employment, but would rather create employer incentives to comply with IRCA.\(^{128}\)

Thus, extending state minimum wage protections to undocumented Asian American workers, even if these protections create "push" or "pull" factors on immigration would still not translate into a direct regulation of immigration by the state. State wage protections would only have a derivative rather than a direct effect. This derivative effect passes judicial muster under the *De Canas* test that upheld a state law that had a similar "speculative" effect on immigration. Ultimately, state wage protections should apply to Asian American undocumented workers because these protections are consistent with federal law and do not encroach on the federal government's domain to regulate immigration. Based on the foregoing analysis, states do not need to absorb *Hoffman*'s limitation of monetary remedies to undocumented workers in state wage schemes.

V. CONCLUSION

Until a case applying state wage statutes to undocumented immigrants is litigated after *Hoffman*, it cannot be said with certainty whether courts will apply state wage protections to undocumented Asian American and other workers. Given this window of opportunity to make a novel legal argument, activists for Asian American workers should assert that state wage protections extend to undocumented workers. This argument is important because these activists will be faced with labor issues that are unique to the Asian American community and will need to find different ways to litigate for the rights of Asian American workers.

Undocumented Asian American workers are more likely to be impacted by *Hoffman* because there are higher concentrations of Asian American workers in exploitative industries, such as the garment industry. Other social factors particular to the Asian American community, such as the model minority myth, lead some unscrupulous employers to believe that Asian American workers will endure exploitative conditions because of stereotypes of being compliant or docile. Lastly, there is a lower likelihood of unionizing to assert workers' rights among Asian Americans who are employed by Asian American employers because of complicated relationships of loyalty and community solidarity.

In light of these issues prevalent among Asian American workers, and in light of *Hoffman*, activists now more than ever need to find as many avenues as possible to seek fair wages. The time to make this argument is now because there is no hard and fast rule that state statutory wage schemes do or do not apply to undocumented workers in the aftermath of *Hoffman*.

Activists should support the state wage argument for several reasons.

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128. 535 U.S. at 155.
First, state law application to undocumented immigrants is not preempted by IRCA and is consistent with FLSA and its judicial interpretations. Second, affording state wage protections to undocumented workers is consistent with the reasoning in *De Canas v. Bica*. Regardless of the possibility that a state wage scheme may have a “push” or “pull” effect on undocumented immigration to certain states, state laws would not directly impact the federal government’s control of admission, deportation and naturalization of immigrants. Accordingly, state wage schemes should be able to withstand judicial scrutiny and protect undocumented Asian American workers.

Ultimately, affording Asian American undocumented workers with state wage protections under the aforementioned argument will likely discourage unscrupulous employers from taking advantage of undocumented Asian American laborers and provide workers with additional protections. Activists should inform Asian American undocumented workers that they are entitled to protection under state wage laws. These undocumented workers may find comfort in knowing that there are other avenues available to seek fair wages in addition to FLSA in a post-*Hoffman* world. Given the exploitative working conditions endured by many Asian American undocumented workers, the state wage remedy opens up another door to assert individual worker rights in an age where there is a fear that the rights of undocumented workers will slowly be eroded in light of the historic *Hoffman* decision.