BORDERLINE DECISIONS: *HOFFMAN PLASTIC COMPOUNDS*, THE NEW BRACERO PROGRAM, AND THE SUPREME COURT'S ROLE IN MAKING FEDERAL LABOR POLICY

Christopher David Ruiz Cameron*

In Hoffman Plastic Compounds, Inc. v. NLRB, *the U.S. Supreme Court held that an undocumented immigrant who has been fired in retaliation for exercising his right to engage in union organizing activity must nevertheless be denied the remedy of backpay. The majority reasoned that awarding backpay to vindicate the National Labor Relations Act (NLRA) would run afoul of conflicting provisions of the Immigration Reform and Control Act, which forbids the hiring of undocumented workers.*

Dean Cameron argues that Hoffman *is the most recent manifestation of a decades-long process by which the Court has been elevated from an interpreter to a maker of federal labor policy. Since 1959, Congress has enacted practically no substantive reforms of the NLRA. But the Supreme Court has. Its vehicle of choice has been the "borderline" case, in which the majority erects a false conflict at the margins separating the NLRA from some other federal law, then resolves the conflict by effectively abrogating the NLRA.*

In making federal labor policy, the Court's majority now favors four types of choices, none of which Congress would necessarily favor: judicial activism, isolationism from international labor law, protectionism of employers who violate the NLRA, and anarchism. In describing these choices, Dean Cameron pays special attention to judicial activism, which has effectively revived, and expanded, the old Bracero Program, a long-discredited series of laws and treaties under which the United States imported Mexican workers to work in the agricultural industry as indentured servants.

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* Associate Dean for Academic Affairs and Professor of Law, Southwestern University School of Law, Los Angeles. A.B. 1980 University of California, Los Angeles; J.D. 1983 Harvard Law School. My thanks to Roberto Corrada, Kevin Johnson, Cynthia Nance, Michael Olivas, and Adrienne Wing for providing a forum in which to develop this Article at the AALS Annual Meeting in January 2003. Thanks also to Ruben Garcia, Julia Figueira-McDonough, Kevin Johnson, Gillian Lester, George Martínez, Isabel Medina, Lori Nessel, Jim Pope, Mary Romero, and Abel Valenzuela for their comments and suggestions. Research assistance was provided by Lauren Kovner (Class of 2003). Any mistakes in the final product are mine alone.

INTRODUCTION

In 2002, the U.S. Supreme Court did something that no Congress or president has managed to do in almost forty years: revive the infamous Bracero Program. By a five to four majority, the Justices held in *Hoffman Plastic Compounds, Inc. v. NLRB*[1] that an undocumented alien who is illegally fired for exercising his right to join a labor union is not entitled to collect the backpay he would have earned but for his employer's misconduct. The decision effectively gives domestic employers carte blanche to hire at the lowest wages possible the mostly Latino immigrants who now form the backbone of our economy, and to get rid of them at the first sign they might demand a better deal through collective bargaining—all without fear of being called to account for violating federal labor law.

Hoffman is a throwback to the labor policies of an earlier era. Between 1942 and 1964, an estimated 4.6 million Mexican nationals were temporarily admitted into this country for the seemingly benign purpose of fortifying our agricultural labor pool.[2] Their migration also infused the Mexican economy with hard currency, because *braceros* routinely sent home a significant portion of their wages. But the Bracero Program, despite being operated with the official blessing of the U.S. government,[3] was hardly benign. *Braceros* were really indentured servants.

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

2. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS 218 (1992) (estimating the number of Mexican nationals admitted to the United States under the Bracero Program to be 4.6 million); JULIE R. WATTS, IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION 148–49 (2002) (estimating same).

Encouraged to enter the United States by the availability of work under the Bracero Program, an estimated 4.9 million *undocumented* Mexicans were apprehended by immigration authorities during the same period. *See* WATTS, *supra*, at 149.

3. The Bracero Program was actually the product of a complex blend of international agreements with Mexico, federal regulations issued by the Immigration and Naturalization Service and the U.S. Department of Labor, and piecemeal legislation passed by Congress. *See* CALAVITA, *supra* note 2, at 18–41. The principal statute with which the program is usually associated, however, was enacted in 1951. *See* An Act to Amend the Agricultural Act of 1949, Pub. L. No. 78, 65 Stat. 119

They were routinely paid as little as twenty cents an hour,[4] subjected to hazardous working conditions,[5] and fired if they dared so much as to speak with labor organizers.[6] They were promised pensions and benefits that they never received.[7] They were confined by law to a contract system that conditioned their entry on working a single crop for a single employer, so they were not free to shop around for better wages and working conditions.[8] And they were only a phone call away from being deported under Operation Wetback, the federal program established in 1954 to make certain that *braceros* did not wear out their welcomes after the harvest came in.[9] All of which caused some commentators to compare *braceros* with convict labor:

> "As the war progressed, prisoners of war were turned over to growers, along with convicts. Japanese-Americans, impounded in concentration camps, were released to the custody of the big growers. Armed guards patrolled the fields. When the war ended the POWs went back to Italy and Germany, and the convicts went back to their cells" but the braceros stayed in the fields.[10]

(1951) (amended frequently thereafter and expiring by its own terms in 1963); *see also* CALAVITA, *supra* note 2, at 43–46.

4. *See, e.g.*, ROBERT A. CARO, MASTER OF THE SENATE 757 (2002). In fact, the poor pay of *braceros* was the number one concern of Mexican American citizens in South Texas.

Although regulations, and eventually legislation, called on employers to pay *braceros* "prevailing wages," the term came to mean the wages that prevailed once growers, acting unilaterally, had established them. *See* CALAVITA, *supra* note 2, at 63. Often, this meant *braceros* were paid by the piece, a tradition that long prevailed in agricultural employment. Once, when the U.S. Labor Department proposed that piece rates be established to ensure that *braceros* earned at least fifty cents per hour, cotton growers called the measure "prohibitive" and claimed that any minimum wage "would encourage laziness and reward slow workers." *Id.* at 120 (citation omitted). The governors of Arizona, New Mexico, and Texas joined growers' allies in Congress to protest the proposal. *Id.*

5. *See, e.g.*, CALAVITA, *supra* note 2, at 63 (describing evidence of abuses, such as the aerial spraying of *braceros* to fumigate them before their entry into the United States, and workers whose hands were so badly scratched that fingerprints could not be obtained).

6. *See, e.g.*, CARO, *supra* note 4, at 757–59.

7. *See, e.g.*, Shannon Lafferty, *Migrant Workers Aim for Back Pay*, RECORDER (San Francisco), July 18, 2001, at 1.

8. *See* CALAVITA, *supra* note 2, at 56.

9. *See, e.g.*, JUAN RAMON GARCIA, OPERATION WETBACK 230–31 (1980); *see also, e.g.*, RODOLFO F. ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES 113 (1996) (describing the interaction between Operation Wetback and the anti-Communist feelings of the 1950s); JULIAN SAMORA, LOS MOJADOS: THE WETBACK STORY 52 (1971) (describing Operation Wetback as "the greatest maximum peacetime offensive against a highly exploited, unorganized, and unstructured 'invading force' of Mexican migrants").

Occasionally, *braceros* fought back by organizing and engaging in brief but disruptive strikes. *See, e.g.*, ERASMO GAMBOA, MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942–1947, at 61 (rev. ed. 2000).

10. CALAVITA, *supra* note 2, at 57 (quoting with approval TRUMAN MOORE, THE SLAVES WE RENT 83 (1965)).

By 1965, the Bracero Program had become a synonym for race-based oppression.[11] What Jim Crow laws were to African Americans, and World War II internment was to Japanese Americans, the Bracero Program had become to Mexican Americans. And so, under pressure from organized labor and workers' rights advocates, Congress permitted the program to die.[12]

Although the Bracero Program ended, calls for its reestablishment by Congress never did. As recently as August 2001, the Bush Administration proposed that "guest workers" from throughout Latin America—*braceros* by another name—be admitted to the U.S. under limited conditions.[13] Critics complained that the protections promised to the new "guest workers" could not be guaranteed any more than they had been for the old *braceros*.[14] Then the events of September 11, 2001, seemed to put those plans on hold. That is, until the Court's ruling in *Hoffman* on March 27, 2002, made the enactment of "guest worker" legislation largely unnecessary.

The *Hoffman* decision has been widely criticized, and rightly so.[15] The decision, without apology to "the very persons who most need protection from exploitative employer practices"[16]—as Justice Kennedy once described undocumented workers—creates in effect a new Bracero Program. It authorizes the creation of an underclass of low-wage Latino immigrants who are promised workplace rights in theory, but not in practice.[17]

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11. The comparison between Mexican *braceros* and black slaves was no less apparent to employers than it was to critics. As an Arkansas cotton grower told the President's Commission on Migratory Labor in 1951, "Cotton is a slave crop, nobody is going to pick it that doesn't have to." CALAVITA, *supra* note 2, at 56 (citation omitted).

12. *See id.* at 142–43, 148–51 (noting the expiration of the authorizing legislation and grace period on January 5, 1965). Professor Calavita also reports that the appointment of Kennedy Administration officials who opposed extension of the Bracero Program had a lot to do with its demise. *See id.* at 144–48; *see also, e.g., id.* at 149 ("Secretary of Labor W. Willard Wirtz, in hearings before the Senate Agriculture Committee, testified that sufficient domestic labor is available, and that to reinstitute the bracero program . . . would be morally, economically, and legally wrong.") (quoting Assistant Commissioner for Enforcement Donald Coppock) (internal quotations omitted).

13. The guest worker program would particularly impact workers from Mexico. *See, e.g.*, Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Guest Workers*, FOREIGN AFF., Nov.–Dec. 2001, at 117.

14. *Id.*

15. *See, e.g.*, Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc. *Produce Disposable Workers?* 14 BERKELEY LA RAZA L.J. 103 (forthcoming 2003) (on file with author). The decision prompted California to enact a law guaranteeing all workers, regardless of immigration status, the right to invoke the state's worker protection legislation. *See* Bob Egelko, *Workplace Protections for Illegal Immigrants*, S.F. CHRON., Dec. 30, 2002, at A13. It also prompted the AFL-CIO to file a complaint with the International Labor Organization charging the U.S. government with violating international labor standards. *See AFL-CIO Complaint Filed With United Nations*, 2002 DAILY LAB. REP. (BNA) No. 218, at E36 (Nov. 12, 2002).

16. NLRB v. Apollo Tire Co., 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring). Ironically, in *Hoffman*, Justice Kennedy joined the majority.

17. The problem is a common one for immigrant workers. *See, e.g.*, Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE

Scholars and workers' advocates have focused on the disasters that *Hoffman* might portend for undocumented aliens asserting backpay claims under fair labor standards, employment discrimination, and other worker protection legislation.[18] Although I share their concerns,[19] I believe that over time *Hoffman* is unlikely to alter most of the substantive rights of undocumented workers in these nonlabor law areas, especially the rights of victims pursuing back wages for hours actually worked.[20] The ill effects of *Hoffman* will be confined mostly to the ever shrinking world of the National Labor Relations Act (NLRA),[21] where undocumented aliens have long lived in the shadows.[22] After all, *Hoffman* is the logical extension of the Court's 1984 decision in *Sure-Tan, Inc. v. NLRB*,[23] which created a strong presumption that undocumented workers are not entitled to the equitable remedy of reinstatement that is usually awarded to victims of antiunion animus. The 1986 passage of the Immigration Reform and Control Act (IRCA),[24] and especially, IRCA's declaration that the employment of undocumented persons is against the

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L.J. 2179 (1994); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993–1994).

Even well-intentioned efforts to expand the coverage of worker protective legislation can be problematic, notwithstanding the immigration status of the employees in question. For a discussion of the disadvantages in proposals to expand unemployment insurance programs, see Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335 (2001).

18. *See, e.g.*, Correales, *supra* note 15.

In September 2002, the National Employment Law Project (NELP) issued a memorandum tracking twelve pieces of employment law litigation from around the country in which the employer attempted to invoke a claimant's immigration status as a defense under the Americans With Disabilities Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act, or similar federal or state legislation. *See* NAT'L EMPLOYMENT LAW PROJECT, EMPLOYERS AND THEIR LAWYER'S ATTEMPTS TO EXPAND U.S. SUPREME COURT RULING IN *HOFFMAN PLASTIC COMPOUNDS V. NLRB* (2002) (on file with the author) [hereinafter *NELP Memo*]. As of the date of the memo, rulings in five of the twelve cases had unambiguously rejected any such attempt. *Id.*

19. I do not mean to downplay the mischief that *Hoffman* will likely cause undocumented workers who forgo pursing their rights in the workplace, whatever the source, out of fear of deportation. Invoking the decision soon after *Hoffman* was issued, employers across the country attempted to avoid liability and backpay in suits brought against them for violations of fair labor standards and antidiscrimination legislation. In some cases, employers sought to discover the immigration status of the plaintiffs. *See id.* at 1–2. I have little doubt that these efforts are already having a significant chilling effect on the willingness of other undocumented immigrants to bring legal actions of all types.

20. *See* Ryan D. McCortney, *A Careful Look at* Hoffman Plastic Compounds v. NLRB, 16 CALIF. LAB. & EMPL. L.Q. 1, 23 (July 2002).

21. 29 U.S.C. §§ 151–169 (2000).

22. For a thoughtful discussion of the NLRA-related difficulties faced by undocumented immigrants long before the Supreme Court's decision in *Hoffman*, see Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001). For a case study of the difficulties faced by undocumented workers trying to organize a union at a waterbed factory in a major metropolitan area, see HÉCTOR L. DELGADO, NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES (1993).

23. 467 U.S. 883 (1984).

24. 8 U.S.C. § 1324(a) (2000).

law, was practically invited by the *Sure-Tan* majority.[25] Of the many things that might be said about *Hoffman*, surprising is hardly one of them.

To me, *Hoffman*'s greatest evil lies in its not-so-subtle elevation of the Supreme Court over Congress as the final arbiter of federal labor policy. This promotion has been a long time in the making. Except for some narrow but significant changes made in 1984,[26] Congress has enacted no substantive reforms of federal labor policy since 1959.[27] But the Supreme Court has. Seizing on purported conflicts between the NLRA and other federal legislation, the Court periodically has taken advantage of this repose to "enact" its own substantive policy choices. In selected cases, the Court has set up an apparent conflict between the NLRA and some other federal legislative scheme, then resolved that conflict by effectively abrogating federal labor policy in favor of federal "other" policy. Typically, the majority dresses its rationale in the clothing of true congressional intent, and dismisses as the ravings of an incompetent bureaucracy any views to the contrary expressed by the National Labor Relations Board (the NLRB, or the Board).[28]

Hoffman, in creating a new Bracero Program, is but the most recent example of adjudication at the margins ordinarily separating labor law from other federal laws. The Court's opinions in such cases are "borderline decisions,"[29] not only because they involve false conflicts and dubious outcomes, but also because they have serious implications for people who work on the literal and

25. *See Sure-Tan*, 467 U.S. at 892 (noting that immigration laws, "as presently written," express only a "peripheral concern" with the employment of undocumented aliens) (internal quotations omitted).

26. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. §§ 1113–1114 (2000). The 1984 Act was unique for, among other things, amending federal labor law through the Bankruptcy Code rather than the NLRA, and for permitting the bankruptcy judiciary to do what the NLRB may not: regulate the product as well as the process of collective bargaining, at least in the context of a reorganization proceeding under Chapter 11. For a more complete explanation, see Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 867–75 (1994) [hereinafter Cameron, *Necessary*].

27. The major amendments to the original National Labor Relations (Wagner) Act of 1935, which created the framework we know today, were the Labor Management Relations (Taft-Hartley) Act of 1947, which outlawed unfair labor practices by unions as well as employers, and the Labor Management Reporting and Disclosure (LMRDA or Landrum-Griffin) Act of 1959, which regulated unions' internal affairs and secondary activities. Most of these provisions are codified at 29 U.S.C. §§ 151–169 (2000).

For a thoughtful discussion of the implications of Congress's failure to enact reforms in the NLRA during the intervening years, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

28. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (citing a line of cases setting aside NLRB orders "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer").

29. The language is also used by Justice Breyer. *Id.* at 156 (Breyer, J., dissenting) ("[T]he Court's rule offers employers immunity in borderline cases, thereby encouraging them to take risks, i.e., to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations.").

metaphorical borders of our economy—people like the undocumented Latinos targeted in *Hoffman*.

Part I of this Article explores the carefully crafted rationale underlying *Hoffman*. Part II explains how the Court developed the *Hoffman* formula in three earlier decisions expressly relied upon by *Hoffman*'s five-justice majority, but unchallenged by its four-justice dissent. These include: *NLRB v. Bildisco & Bildisco*,[30] a 1984 decision in which the NLRA collided with the Bankruptcy Code; *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[31] a 1975 decision in which the NLRA squared off against the Sherman Antitrust Act; and *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB (Sand Door & Plywood Co.)*,[32] a 1958 decision in which the NLRA clashed with the Interstate Commerce Act. Finally, Part III identifies the unfortunate implications of permitting the Supreme Court to assume Congress's role in setting federal labor policy.

I. THE FORMULA AS APPLIED: *HOFFMAN PLASTIC COMPOUNDS*

In May 1988, José Castro was hired by Hoffman Plastic Compounds, a Paramount, California–based maker of custom chemicals used in the manufacture of pharmaceutical, construction, and household products.[33] Castro's job was to operate various blending machines that "mix and cook" formulas for making plastics to order. To get the job, Castro presented papers that appeared to verify his authorization to work in the United States.

Six months later, the United Rubber Workers sought to organize Hoffman employees. Castro and several others who supported the organizing drive distributed authorization cards to coworkers. In January 1989, Hoffman laid off four employees who had distributed the cards, including Castro. All of the laid-off workers were Latinos.

In January 1992, the National Labor Relations Board found that the layoffs were really retaliatory dismissals targeting union adherents.[34] That is, they were classic violations of section 8(a)(3) of the Act.[35] The Board issued an order requiring Hoffman to do three things: cease and desist from further violations of the NLRA, post a notice to employees regarding the order, and offer reinstatement and backpay to Castro and the three other laid-off employees.[36]

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30. 465 U.S. 513 (1984).
31. 421 U.S. 616 (1975).
32. 357 U.S. 93 (1958).
33. The facts as described here and throughout this Article may be found in the majority opinion. *See Hoffman*, 535 U.S. at 140–42.
34. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100 (1992).
35. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (2000).
36. *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. at 107–08.

A year and a half after the Board issued its order, the parties proceeded to a hearing before an administrative law judge (ALJ). On the final day of the hearing, Castro testified that he was born in Mexico. He had never been legally admitted to, or authorized to work in, the United States. To get hired at Hoffman, he admitted, he had tendered the birth certificate of a friend born in Texas. And he had used the same birth certificate to obtain a Social Security card, a California driver's license, and even post-Hoffman employment. Based on this evidence, the ALJ decided that *Sure-Tan* precluded reinstatement, and IRCA precluded backpay.[37] IRCA, a 1986 statute, established a legal regime that did not exist when *Sure-Tan* was decided. IRCA is "a comprehensive scheme prohibiting the employment of illegal aliens in the United States."[38]

In September 1998, four years after the ALJ's decision, and almost ten years after Castro was fired, the NLRB affirmed with respect to reinstatement but reversed as to backpay.[39] According to the Board, "the most effective way to accommodate and further the immigration policies embedded in [IRCA] is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."[40] The Board found that Castro was entitled to $66,951 in backpay, plus interest, calculated from the date of his unlawful termination through the date the company first learned of Castro's undocumented status, a period of three and-a-half years. Hoffman filed a petition for review of the Board's order, but the U.S. Court of Appeals for the District of Columbia Circuit denied it.[41] The Supreme Court granted certiorari to resolve a split in the circuits over the backpay question.[42]

In March 2002, thirteen years and two months after Castro had been fired, the Court finally ruled five to four that he was not personally entitled to any relief. But the majority did offer a "consolation" prize. "Lack of authority to award backpay," wrote chief Justice Rehnquist, "does not mean that the employer gets off scot-free." The portions of the Board's order requiring Hoffman to cease and desist from committing unfair labor practices and to post a notice to employees remained intact, thereby rendering the company "subject to contempt proceedings should it fail to comply with these orders."

Typically, the Supreme Court begins its review of Board orders, even ones that it plans to set aside, by paying some lip service to the deference owed to

37. *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 685–86 (1994).
38. *Hoffman*, 535 U.S. at 147.
39. 326 N.L.R.B. 1060, 1065 (1998) (2-1 decision).
40. *Id.*
41. Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000), *reh'g en banc denied*, 237 F.3d 639 (D.C. Cir. 2001).
42. Hoffman Plastic Compounds, Inc. v. NLRB, 237 F.3d 639 (D.C. Cir. 2001), *cert. granted*, 533 U.S. 976 (2001).

the NLRB's expertise in interpreting and applying the NLRA.[43] The *Hoffman* Court didn't bother. After reciting the facts, the Chief Justice got straight to the point: "This case exemplifies the principle that the Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad . . . is not unlimited."[44] He then offered a list of cases in which the Court has "consistently set aside awards of reinstatement or backpay to employees found guilty of serious illegal conduct in connection with their employment."[45]

This last statement is quite remarkable, for it has a superficial appeal that disappears upon closer inspection. It rests on two unstated but unmistakable assumptions. The first assumption is that the NLRA, by rewarding "serious illegal conduct" in connection with employment, is solely to blame for creating the conflict. The notion that the *other* law might deserve some of the credit for creating the tension—after all, it takes two to tango—is cleverly avoided. The second assumption is that labor law must give way because it is somehow less important than the law with which it conflicts. The implication is that although violating the other law is "serious illegal conduct," committing unfair labor practices under the NLRA is not, and so may be regarded as de minimus.

Thus the Court set aside awards of reinstatement, backpay, or both, in three cases: *NLRB v. Fansteel Metallurgical Corp.*,[46] in which employees responded to the employer's creation of an unlawful company union by engaging in a sit-down strike that turned violent and ran afoul of local law; *Southern Steamship Co. v. NLRB*,[47] in which five sailors responded to the employer's unlawful refusal to recognize their union by engaging in a strike that was deemed to be a mutiny in violation of federal law; and *Sure-Tan, Inc., v. NLRB*,[48] in which workers responded to being unlawfully fired for union organizing by departing for Mexico and were thereafter barred from reinstatement so long as they remained unauthorized to reenter the United States.

Similarly, the Court pushed aside the Board's views about statutory conflicts in three more cases: *NLRB v. Bildisco & Bildisco*,[49] which "precluded the Board from enforcing orders found in conflict with the Bankruptcy Code"; *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[50] which "rejected claims that federal antitrust policy should defer to the NLRA"; and *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB (Sand Door &*

43. *See, e.g.*, Lechmere, Inc. v. NLRB, 502 U.S. 527, 536 (1992).
44. *Hoffman*, 535 U.S. at 142 (citations omitted).
45. *Id.*
46. 306 U.S. 240 (1939).
47. 316 U.S. 31 (1942).
48. 467 U.S. 883 (1984).
49. 465 U.S. 513 (1984).
50. 421 U.S. 616 (1975).

Plywood Co.),[51] which "precluded the Board from selecting remedies pursuant to its own interpretation of the language of the Interstate Commerce Act."[52]

According to Chief Justice Rehnquist, these six decisions, which he called "[t]he *Southern S.S.* line of cases,"[53] "established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."[54] Since *Southern Steamship*, he claimed, the Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and polices unrelated to the NLRA."[55]

In retrospect, three of these six decisions make sense, but hardly compel the result reached by the *Hoffman* majority. Indeed, they do not even present true conflicts between the NLRA and other laws. *Fansteel* and *Southern Steamship* were correctly decided because, as Justice Breyer put it for the four *Hoffman* dissenters, "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."[56] Even *Sure-Tan*, as odious as the result was to many critics, is hard to argue with because it conditioned an equitable remedy, reinstatement, upon proof that the discriminatees would not be breaking the immigration laws by reentering the country to return to work. No lawyer who has completed the basic course in remedies can be astonished by this condition. But neither set of authorities implicated the case of José Castro. Castro had not behaved in any manner meriting his discharge for good cause under the nonlabor statutes in question. Nor had he threatened to break the immigration laws by reentering the country. As Justice Breyer pointed out, neither *Fansteel*, *Southern S.S.*, nor *Sure-Tan* came close to explaining, much less justifying, the result in *Hoffman*.[57] In short, in none of these cases did the Board "trench upon federal statutes and policies unrelated to the NLRA."[58]

Which leaves us with the three cases that Justice Breyer did *not* address or distinguish: *Bildisco*, *Connell*, and *Carpenters (Sand Door)*. It is to these cases that I turn for the development of the formula applied in *Hoffman*.

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51. 357 U.S. 93 (1958).

52. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002) (summarizing the respective holdings of *Bildisco*, *Connell*, and *Carpenters (Sand Door)*).

53. *Id.* at 147.

54. *Id.*

55. *Id.* at 144.

56. *Id.* at 158–59 (Breyer, J., dissenting).

57. *Id.*

58. *Id.* at 144.

II. THE FORMULA AS DEVELOPED: *BILDISCO*, *CONNELL*, AND *CARPENTERS (Sand Door)*

A. *Bildisco*

An opportunity to perfect the borderline decisionmaking process used later in *Hoffman* came before then Justice Rehnquist eighteen years earlier in *Bildisco*.[59] Although dimly remembered today, *Bildisco*, for the five short months of its life, was considered by organized labor to be the biggest judicial disaster of its time.

The time was the late 1970s and early 1980s, when the American economy was undergoing a substantial and painful retrenchment.[60] Entire industries—including air transportation, steel manufacturing, and retail—seemed to be imploding, crushed by the weight of their own economic inefficiencies.[61] Chief among the culprits thought to be responsible for this mess were the high labor costs imposed by greedy unions. Scores of major American firms made last-ditch efforts to survive by filing for Chapter 11 reorganization, and most demanded that their unions agree to cut wages and benefits guaranteed by collective bargaining agreements. Unions who refused were dragged away from the familiar confines of the NLRB and into the bankruptcy courts, where they were strangers and employers were often asking to have their collective bargaining agreements thrown out. Usually, they were. During the period from 1975 to 1984, bankruptcy judges granted 36 of 54 reported requests to reject such contracts, a rejection rate of nearly 67 percent.[62] Emblematic of the era, Continental Airlines chief Frank Lorenzo made big plans to lay off much of his unionized workforce and to slash the wages and benefits of the employees who managed to keep their jobs. He executed those plans first and asked a bankruptcy judge to reject the pilots', flight attendants', and mechanics' union contracts that stood in his way second. Lorenzo, and many others, got what they wanted.[63]

Looming over labor relations during this period was a conflict between section 8(a)(5) of the NLRA,[64] which makes it an unfair labor practice for an employer unilaterally to change or to abrogate a collective bargaining agreement

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59. 465 U.S. 513 (1984).

60. *See generally* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA (1988); *see also* LESTER C. THUROW, THE ZERO-SUM SOLUTION: BUILDING A WORLD CLASS AMERICAN ECONOMY 47 (1985) ("The 'effortless economic superiority' that America had come to know in the aftermath of World War II evaporated in one industry after another.").

61. *See* Cameron, *Necessary*, *supra* note 26, at 857–63 (discussing the growing number of rejection cases decided from 1975 to 1984).

62. *See id.* at 894–95 (discussing the rejection rate from 1975 to 1984).

63. *See In re* Cont'l Airlines Corp., 38 B.R. 67 (Bankr. S.D. Tex. 1984) (rejecting unions' attack on an air carrier's bankruptcy filing as motivated by a desire to reject collective bargaining agreements).

64. 29 U.S.C. § 158(a)(5) (2000).

during its term, and section 365(a) of the Bankruptcy Code, which permits the debtor-in-possession to reject any executory contract that, in its business judgment, burdens the estate.[65] Whereas a violation of section 8(a)(5) could be remedied by a Board order restoring the status quo under the collective bargaining agreement, rejection under section 365(a) was treated as a mere pre-petition breach, for which the union could only file a claim in bankruptcy—and get in line with other unsecured creditors to collect damages at a fraction of the claim's actual value.[66]

The clash between the two statutes appeared to be dramatic. Now, as then, section 8(a)(5) does not permit an employer to make midterm changes, period, unless the union agrees—and the union is under no obligation to agree. Even the employer's severe economic distress is no defense. But in 1984, section 365(a) contemplated just the opposite: that the debtor-employer's economic distress, as manifested by having been thrust into bankruptcy, vests it with almost complete discretion to reject any executory contract that, in its business judgment, burdens the estate. There were no exceptions, not even for collective bargaining agreements.

Against this backdrop, the Supreme Court was presented with *Bildisco*.[67] A building supplies distributor failed to remit the pension and benefit contributions required by its collective bargaining agreement. The union filed unfair labor practice charges alleging breach of the duty to bargain under section 8(a)(5), and the NLRB issued an order so finding.[68] Meanwhile, the distributor filed a petition for reorganization under Chapter 11. It also refused to pay wage increases as they became due under the contract. The distributor sought rejection, which was granted by the bankruptcy court and affirmed by the district court.

The Board's petition for enforcement of its order and the union's appeal of the district court's order granting rejection of the contract were consolidated so that the conflict could be addressed head on. The U.S. Court of Appeals for the Third Circuit held that the collective bargaining agreement, like any executory contract, could be rejected, but declared that the business judgment standard presented too low a barrier.[69] It embraced a somewhat higher one, thus taking sides in a circuit split over which higher-than-business-judgment standard should govern the rejection of a collective bargaining agreement.[70]

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65. 11 U.S.C. § 365(a) (2000).

66. *See* Cameron, *Necessary*, *supra* note 26, at 848–51.

67. The facts of the case are set forth in the majority opinion. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 517–19 (1984).

68. NLRB v. Bildisco & Bildisco, 255 N.L.R.B. 1203 (1981), *enforcement denied*, 682 F.2d 72 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

69. *Bildisco*, 682 F.2d at 72.

70. *See* Cameron, *Necessary*, *supra* note 26, at 857–63 (discussing the circuit split in detail).

The Supreme Court affirmed.[71] Speaking through then Justice Rehnquist, the Court issued a two-part decision. First, a unanimous Court agreed that, because of the "special nature" of the collective bargaining agreement under federal law, a "somewhat stricter standard" than the business judgment rule should govern the rejection.[72] Second, and more relevant here, a closely divided Court ruled that the debtor-employer's resort to self-help, by breaching the contract first and seeking bankruptcy court approval for rejection afterward, did not violate section 8(a)(5).[73] Writing for five Justices, Justice Rehnquist reasoned that enforcement of the Board's order finding a breach of the duty to bargain "would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space."[74] According to Justice Rehnquist, "the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again."[75]

Justice Brennan dissented from this part of the opinion.[76] Writing for four Justices, he said he did not understand how, on the one hand, the majority could profess to accommodate the "special nature" of the union contract when contemplating the proper standard for rejection, yet, on the other hand, permit the employer to take the unilateral step of rejecting it.[77] The majority, Justice Brennan suggested, had made a policy choice; it had chosen to subordinate federal labor law to federal bankruptcy law, instead of choosing to give some effect to both statutory schemes. "One could as easily, and with as little justification, focus on the policies and provisions of the NLRA alone and conclude that Congress must have intended that section 8(d) [the violation of which is an unfair labor practice under section 8(a)(5)] remain applicable."[78]

Bildisco was swiftly denounced by organized labor.[79] The reaction was so strong that, less than five months later, Congress passed and President Reagan signed into law section 1113, which amended the Bankruptcy Code by outlawing self-help and erecting specific hurdles that employers must meet before bankruptcy

71. *Bildisco*, 465 U.S. at 513.
72. *Id.* at 524.
73. *Id.* at 527–34.
74. *Id.* at 532 (Rehnquist, J., joined by Burger, C.J., Powell, Stevens, and O'Connor, JJ.).
75. *Id.*
76. *See id.* at 535 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., dissenting).
77. *See id.* at 541 (Brennan, J., dissenting).
78. *Id.*
79. *See* Cameron, *Necessary*, *supra* note 26, at 843 n.15, 848 n.42 (citing authorities therein).

judges may approve rejection of collective bargaining agreements.[80] That such an event could occur during the middle of an administration that had gained a reputation for being hostile to unions seems to support the notion that the *Bildisco* Court had resolved a borderline conflict by arrogating to itself Congress's role of setting federal labor policy.

B. *Connell*

Before *Bildisco*, in the years when organized labor exerted more influence in the economy than it does today, the Supreme Court considered several major antitrust challenges to collectively bargained provisions designed to consolidate union power.[81] One of the more common provisions extracted from employers during this period, which lasted roughly from the late 1940s until the end of the 1950s, was the "hot cargo" clause. A hot cargo clause requires an otherwise neutral employer, such as a supplier, vendor, or subcontractor, to refuse to deal with the primary employer with whom the union has a labor dispute.[82] The purpose of such a clause is to put economic pressure on the primary employer to settle the dispute on terms favorable to the union. For most industries, hot cargo clauses were outlawed in 1959, when Congress amended the NLRA by adding section 8(e).[83] But two industries, construction

80. Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C. § 1113 (2000). For an analysis of the statute and its effects, see Cameron, *Necessary*, *supra* note 26, at 866–75.

81. *See, e.g.*, Am. Fed'n of Musicians v. Carroll, 391 U.S. 99 (1968); Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676 (1965); UMW v. Pennington, 381 U.S. 657 (1965); Hunt v. Crumboch, 325 U.S. 821 (1945); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797 (1945).

82. *See, e.g.*, 2 THE DEVELOPING LABOR LAW 1310 (Patrick Hardin et al. eds., 1992).

83. Section 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

NLRA § 8(e), 29 U.S.C. § 158(e) (2000).

and apparel, won provisos in section 8(e) exempting them from liability for entering into hot cargo arrangements.[84]

The antitrust challenges brought to the Court in *Connell* posed a direct conflict between section 1 of the Sherman Act, which proscribes "[e]very contract, combination . . . or conspiracy" in restraint of trade,[85] and section 7 of the NLRA, which guarantees workers the right to combine into labor organizations and to engage "in other concerted activities for . . . [their] mutual aid or protection."[86] Whereas the typical remedy for a restraint of trade under the Sherman Act is the tantalizing prospect of treble damages gained by an injured competitor bringing a private right of action,[87] the typical remedy for an unfair labor practice is merely an injunction and other make-whole relief obtained in an enforcement proceeding prosecuted exclusively by the NLRB's General Counsel.[88] Although section 303 of the Taft-Hartley Act does permit an injured neutral to bring an action challenging a union's illegal secondary activity, the remedy is limited to actual damages.[89]

Over the years, Congress has offered unusually clear guidance about how to reconcile conflicts between federal antitrust policy and federal labor policy. Usually, it favors the latter. A pair of antitrust exemptions—one express, the other implied—helps illustrate the point.

The first is the statutory labor antitrust exemption.[90] Created by sections 6 and 20 of the Clayton Antitrust Act of 1914, the statutory antitrust exemption declares human labor not to be a "commodity," and therefore, not part of the "trade" that the Sherman Act polices for illegal contracts, combinations, or conspiracies.

The second is the nonstatutory labor antitrust exemption.[91] Created by the judiciary, and thought to be the logical extension of both the Clayton Act and the Norris-LaGuardia Act of 1932,[92] the nonstatutory antitrust exemption declares that anticompetitive labor agreements are to be shielded from Sherman Act liability, so long as certain basic criteria are met. Except in those few cases failing to meet these criteria, federal antitrust policy is trumped by federal

84. *See id.*
85. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2000).
86. 29 U.S.C. § 157 (2000).
87. Clayton Act § 4, 15 U.S.C. § 15(a) (2000).
88. NLRA § 10(c), 29 U.S.C. § 160(c).
89. *See* Labor Management Relations (Taft-Hartley) Act § 303, 29 U.S.C. § 187 (2000).
90. I have explained the labor antitrust exemptions elsewhere. *See* Christopher D. Cameron & J. Michael Echevarría, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against a Salary Cap for Major League Baseball*, 22 FLA. ST. U. L. REV. 827, 839 n.82 (1995).
91. *See id.*
92. 29 U.S.C. §§ 104, 105 & 113; *see also* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621–22 (1975) (explaining the interaction between the Clayton and the Norris-LaGuardia Acts on the one hand and the nonstatutory exemption on the other).

labor policy, because that is the way to give effect to Congress's intent to foster collective bargaining relationships.[93]

The development of these exemptions was a response to labor's long-standing fears that the treble damages remedy authorized by the Sherman Act would be turned against unions and their members. More than once during the early twentieth century, these fears were realized.[94]

But Congress's guidance did not end with the two labor antitrust exemptions, which apply generally; its protections also included a pair of section 8(e) provisos, which apply specifically to unions and employers operating in the construction and apparel industries. Although the statute's main text declares hot cargo provisions to be "unenforcible and void," the construction industry proviso says:

> Provided, That *nothing* in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work .... *Provided further*, that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.[95]

All of this makes the Supreme Court's refusal to adhere to this guidance more puzzling.

In *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,[96] a union representing workers in the plumbing and mechanical trades picketed Connell Construction, a general building contractor, to compel it to sign a hot cargo agreement to which the union and about seventy-five other Dallas area mechanical contractors were signatories.[97] The agreement forbade any signatory from awarding subcontracts for mechanical work to anyone except another signatory.[98] This agreement was separate from the basic multi-employer collective bargaining agreement to which other Dallas area employers were also signatories, and the union did not press Connell to sign the basic agreement. Nevertheless, Connell resisted, because the company neither employed plumbers

93. *See, e.g.*, *Connell*, 421 U.S. at 622–23.

94. *Compare* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (allowing prosecution of unions under Sherman Act section 1 despite protections of Clayton Act sections 6 and 20), *with* United States v. Hutcheson, 312 U.S. 219 (1941) (overruling *Duplex Printing*); *see also* Christopher D. Cameron, *How the "Language of the Law" Limited the American Labor Movement*, 25 U.C. DAVIS L. REV. 1141, 1152 n.50 (1992) (reviewing WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991)) (recounting the use of federal antitrust laws to penalize union organizing efforts) [hereinafter Cameron, *Language of the Law*].

95. NLRA § 8(e), 29 U.S.C. § 158(e) (emphasis added).

96. 421 U.S. 616 (1975).

97. *Id.* at 619–20.

98. *Id.* at 620.

and mechanics of its own, nor wished to have its hands tied in competitive bidding for general contracts by having to award subcontracts to higher-priced signatory firms. The picketing persuaded Connell to sign the hot cargo agreement, but under protest.[99]

Connell brought an action challenging the hot cargo agreement under sections 1 and 2 of the Sherman Act and sought declaratory and injunctive relief. The district court held the agreement to be exempt under the construction industry proviso. The U.S. Court of Appeals for the Fifth Circuit affirmed.[100]

By a vote of five to four, the Supreme Court reversed. Speaking through Justice Powell,[101] the majority embraced Connell's argument that Congress, by enacting the construction industry proviso, "intended only to allow subcontracting agreements within the context of a collective bargaining relationship . . . ."[102] Congress "did not intend to permit a union to approach a 'stranger' contractor and obtain a binding agreement not to deal with nonunion subcontractors."[103]

The main problem with this analysis is that it is impossible to square with the plain language of the statute. The construction industry proviso says that "nothing" in section 8(e), which outlaws hot cargo provisions, "shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction"; more to the point, section 8(e), referring to the exception outlined in the provisos, says "that *nothing* in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."[104] The hot cargo promise extracted by the union fit this description precisely, which even Justice Powell conceded: "On its face, the proviso suggests no such limitation."[105]

So how did Justice Powell decide that Congress had not meant what it said? By invoking religious metaphor—the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its *spirit*, nor within the intention of its *makers*."[106] Without acknowledging the irony, he cited as primary authority for this rarely applicable proposition a case

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99. *Id.* at 620.

100. *Id.* at 621; *see also* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 483 F.2d 1154 (5th Cir. 1973), *vacated by* 421 U.S. 616 (1975), *remanded to* 518 F.2d 553 (5th Cir. 1975), *and cert. denied*, 423 U.S. 884 (1975).

101. *Connell*, 421 U.S. 616, 618 (Powell, J., joined by Burger, C.J., White, Blackmun, and Rehnquist, JJ.).

102. *Id.* at 627.

103. *Id.* at 627–28.

104. 29 U.S.C. § 158(e) (2000) (emphasis added).

105. *Connell*, 421 U.S. at 628.

106. *Id.* (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)) (internal quotations omitted).

called *Holy Trinity Church v. United States*.[107] This led Justice Powell to the conclusion that the hot cargo agreement "may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions."[108]

Thus the majority resolved a conflict between two federal policies in favor of antitrust policy and at the expense of labor policy. It is worth noting that, in so doing, the *Connell* majority said two things that foreshadowed *Bildisco*, as well as *Hoffman*.

First, the Court asserted its own policy preference. Instead of determining Congress's intent from the statutory language, Justice Powell divined it out of fear—fear of the labor policy consequences, as he saw them, of permitting unions to do what the literal words seemed to condone. Were the majority to agree with the union's interpretation of the construction industry proviso, Justice Powell reasoned:

> [O]ur ruling would give construction unions an almost unlimited organizational weapon. The unions would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.[109]

The notion that Congress might have contemplated precisely this result was never seriously considered. Instead, it was dismissed as "highly improbable."[110]

Second, just as majorities would do in *Hoffman* and *Bildisco*, the *Connell* majority suggested that there was something wrong with the remedies, and therefore, the jurisdiction, of the NLRB.

It is a long-settled principle of federal labor policy that the exclusive jurisdiction to award remedies for violations of the NLRA lies with the Board and not the courts.[111] But Congress has made an important exception in cases of secondary pressure applied to a neutral employer by a union—pressure that was perfectly legal until 1947. That year, Congress enacted the Taft-Hartley Act, which proscribes many forms of secondary activity directed at neutrals.[112] In particular, section 303 permits an injured neutral to bring a private action

107. 143 U.S. at 459.
108. *Connell*, 421 U.S. at 635.
109. *Id.* at 631–32.
110. *Id.* at 632.
111. *See* NLRA § 10(a), 29 U.S.C. § 160(a) (2000).
112. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–187 (2000).

against the union to recover actual damages.[113] But a successful section 303 action should still depend on the NLRB's exclusive authority to decide whether a section 8(e) unfair labor practice has been committed, because without a section 8(e) violation, the secondary pressure applied in the form of a hot cargo clause cannot be considered illegal.

By 1975, when *Connell* was decided, the state of Board law was settled as to whether the construction industry proviso exempted hot cargo clauses calling on signatories to use union subcontractors only: They were exempt and without limitation.[114] But the *Connell* majority would have none of it. This too was found to contravene Congress's intent, not because of what the statute actually said, but because of what its legislative history did *not* say. "There is no legislative history in the 1959 Congress," Justice Powell wrote, "suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA."[115]

Writing for the dissenters, Justice Stewart paid little attention to the plain text of section 8(e), but devoted much space to its pedigree.[116] First, he suggested that the 1959 legislative history could not be understood without first understanding the 1947 legislative history.[117] And the record, which he canvassed extensively, showed that "Congress in 1947 did not prohibit all secondary activity by labor unions . . . and those practices which it did outlaw were to be remedied only by seeking relief from the Board or by pursuing the newly created, exclusive federal damages remedy provided by § 303."[118] Second, Justice Stewart found that the 1959 legislative history showed that Congress "made the same deliberate choice to exclude antitrust remedies as was made by the 1947 Congress."[119] Among the more persuasive pieces of evidence were two: the 1947 House-Senate Conference Committee's adoption of Senator Taft's compromise proposal, which rejected treble damages in favor of actual damages,[120] and

113. *Id.* § 303, 29 U.S.C. § 187 (2000).

114. *See, e.g.*, Los Angeles Bldg. & Constr. Trades Council (B & J Investment Co.), 214 N.L.R.B. 562, 563 (1974). The respondents in *Connell* cited *B&J Investment* Co. and a memorandum from the General Counsel in a similar case, Plumbers 100 (Hagler Construction Co.), No. 16-CC-447 (May 1, 1974), to support this position. The *Connell* majority thought so little of these authorities that it distinguished them in a footnote. *See Connell*, 421 U.S. at 631 n.10.

115. *Connell*, 421 U.S. at 634.

116. *Id.* at 638–55 (Stewart, J., joined by Douglas, Brennan, and Marshall, JJ., dissenting).

117. *Id.* at 645–47 (Stewart, J., dissenting).

118. *Id.* at 645–46 (Stewart, J., dissenting).

119. *Id.* at 650 (Stewart, J., dissenting).

120. *Id.* at 644–45 (Stewart, J., dissenting) (citing 93 CONG. REC. 4872–73 (1947) (statement of Senator Taft)).

the 1959 House of Representatives' rejection of several amendments that would have subjected proscribed union activities to the antitrust laws.[121]

A last point about the common origins of *Hoffman*, *Bildisco*, and *Connell*: Justice Rehnquist joined the five-justice majority in each case. Whereas in *Hoffman* and *Bildisco* he was the author, in *Connell* he merely supplied one of the decisive votes.

C. *Carpenters (Sand Door)*

In *Connell*, the Supreme Court described the addition of section 8(e) in 1959 as "part of a legislative program designed to plug technical loopholes" in section 8(b)(4)'s general prohibition of secondary pressure.[122] One of the biggest loopholes that section 8(e) was designed to plug was one that had been created by the Court itself in 1958, when it declared in *Carpenters (Sand Door)*[123] that section 8(b)(4) enacted a blanket prohibition of all hot cargo provisions, including those in the construction industry, even though the earlier statute had done no such thing.[124]

In *Carpenters (Sand Door)*, the Court considered three cases. The first case, which arose in Los Angeles, involved a hot cargo provision in a master labor agreement between millwork contractors whose employees installed doors and a union representing the carpenters who did the installation. The provision said that workmen were not required to handle nonunion material. When union carpenters refused to install doors that had been manufactured by a nonunion company, the millwork contractor filed charges with the NLRB. The Board issued a cease and desist order,[125] which was enforced by the U.S. Court of Appeals for the Ninth Circuit.[126] The second and third cases, which arose in Oklahoma City, involved a labor dispute between a foundry and the union representing its production and maintenance machinists. Picketing by the union prevented common carriers that normally hauled freight for the employer from making pickups and deliveries, so the employer used its own trucks to haul freight to the carriers' platforms. There they were followed and met by union pickets anyway. Invoking a hot cargo clause in their own contract, the union representing drivers of the carriers refused to handle the freight. The Board issued an order finding violations of section 8(b)(4) by both the machinists

121. *Id.* at 652–53 (Stewart, J., dissenting) (noting the rejection of the amendments offered by Representatives Alger and Hoffman).
122. *Id.* at 628.
123. 357 U.S. 93 (1958).
124. *Id.*
125. Local 1976, United Bhd. of Carpenters, 113 N.L.R.B. 1210 (1955).
126. NLRB v. Local 1976, United Bhd. of Carpenters, 241 F.2d 147 (9th Cir. 1957).

and the drivers.[127] The U.S. Court of Appeals for the District of Columbia Circuit upheld the order as to the machinists but set it aside as to the drivers due to the explicit hot cargo clause in the drivers' contract.[128]

In each case, it was undisputed that the unions' conduct, standing alone, ran contrary to section 8(b)(4)(A). In pertinent part, the statute said then what it does now: that it is unlawful for a union

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal . . . to use . . . transport, or otherwise handle or work on any goods, articles, materials, or commodities . . . where an object thereof is . . . forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person.[129]

Unions for the carpenters, machinists, and drivers in these cases had each sought to induce the employees of other employers to refuse to handle certain goods.[130] But they denied that their object was to "forc[e] or requir[e]" anyone to do so. Instead, they contended that these actions were voluntary. After all, the hot cargo clauses in the carpenters' and drivers' contracts had been agreed to by their respective employers, which agreement eliminated the crucial element of coercion.[131] The main question, therefore, was whether, in those pre–section 8(e) days, a hot cargo clause could be raised as a defense to a charge under section 8(b)(4).[132]

Writing for a six to three majority, Justice Frankfurter said the answer was no.[133] Such a result, he reasoned, would run contrary to the purpose of the statute, which was to eliminate "the dangerous practice of unions to widen [industrial] conflict . . . [by] the coercion of neutral employers."[134] The signing of a collective bargaining agreement appearing to permit such coercion could not eliminate it; indeed, the contract itself might have been signed under pressure.[135]

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127. Gen. Drivers, Chauffeurs, Warehousemen & Helpers Union, Local No. 886, AFL-CIO, 115 N.L.R.B. 800 (1956).

128. Gen. Drivers, Chauffeurs, Warehousemen & Helpers Union, Local No. 886, AFL-CIO v. NLRB, 247 F.2d 71 (D.C. Cir. 1957).

129. Labor Management Relations (Taft-Hartley) Act § 8(b)(4)(i)(B), 29 U.S.C. §§ 158(b)(4)(i)–(ii)(B) (2000).

130. *See* Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door & Plywood Co.), 357 U.S. 93, 94–97 (1958).

131. *Id.* at 95, 97.

132. *Id.* at 107–08.

133. *Id.* at 108.

134. *Id.* at 100.

135. *See id.* at 106.

As the dissent suggested, the majority's interpretation of Congress's intent based on its silence rather than its expression was questionable,[136] and in hindsight, after the enactment of section 8(e), probably unsupportable. But for my purposes, the remarkable thing about the decision is its rejection of the Board's attempt to resolve an apparent conflict in the second case between the NLRA and the Interstate Commerce Act (ICA). In argument before the Court, the Board pointed out that the secondary employers in the second and third cases happened to be common carriers subject to regulation by the ICA, which required them to provide nondiscriminatory service and to engage in just and reasonable practices.[137] Even if the drivers' hot cargo clause comported with the NLRA, reasoned two incumbent members of the Board, it nevertheless ran afoul of the ICA—and had to give way.[138]

Justice Frankfurter was skeptical. Only the Interstate Commerce Commission had jurisdiction to apply the ICA "in the first instance."[139] Other federal agencies, he wrote, "must be cautious not to complicate the Commission's administration of its own act by assuming as a fixed and universal rule what the Commission itself may prefer to develop in a more cautious and pragmatic manner through case-by-case adjudication."[140] He also doubted whether "a determination under one statute [should] be mechanically carried over in the interpretation of another statute involving significantly different considerations and legislative purposes."[141]

The majority's refusal to accept the Board's attempt to harmonize the imperatives of section 8(b)(4) with those of the ICA is perplexing in two ways. First, it shows that when it comes to the NLRB, there is no pleasing the Supreme Court. The Board was proposing that balancing the two regimes required an adjustment, a pulling back, in the application of the statute over which it had primary jurisdiction, the NLRA. Such restraint is rare among federal agencies, yet exactly what the Court seemed to want after *Southern S.S.*, a case in which the Board was "admonished not to apply the policies of its statute so single-mindedly as to ignore other equally important congressional objectives."[142] Yet in *Hoffman*, *Bildisco*, and *Connell*, cases in which the NLRA was enforced

136. *Id.* at 111, 113 (Douglas, J., joined by Warren, C.J., and Black, J., dissenting) ("The present decision is capricious. The boycott is lawful if the employer agrees to abide by this collective bargaining agreement. It is unlawful if the employer reneges.").

137. *See* Act of Aug. 9, 1935, 49 U.S.C. § 316 (2000).

138. *See* Truck Drivers and Helpers Local Union No. 728, Int'l Bhd. of Teamsters, 119 N.L.R.B. 399 (1957). This decision was actually issued after the grant of certiorari by the Supreme Court in *Carpenters (Sand Door)*, but nevertheless argued to the Court in that case. *See Carpenters (Sand Door)*, 357 U.S. at 103–04, 108–09.

139. *Carpenters (Sand Door)*, 357 U.S. at 109.

140. *Id.* at 109–10.

141. *Id.* at 110.

142. *Id.* at 111 (citing Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942)).

in some measure, the Board was essentially accused of overstepping its authority when it considered other congressional objectives.

Second, the Board's approach turned out to be prescient. As the majority knew but discounted, shortly after the Board adopted the policy that carrier employers' consent to hot cargo clauses was void under the ICA, the Interstate Commerce Commission issued a similar decision.[143]

If nothing else, *Carpenters (Sand Door)* stands for the proposition that judicial policymaking can be no less capricious than the legislative variety. Instead of sending the message that the Board would be rewarded for its balance and restraint, the Court seemed to be saying that the labor agency's views were irrelevant, so it should avoid commenting on the application of competing federal laws altogether.

III. THE FORMULA REVISITED: *HOFFMAN* IN PERSPECTIVE

I began this Article by suggesting that *Hoffman* is but the latest in a series of decisions issued by the Supreme Court in its role as final arbiter of federal labor policy. The Court plays this role at the margins, whenever it is called upon to resolve borderline conflicts between federal labor law and federal "other" law. In *Hoffman*, if not in other cases, the Court's making of federal labor policy happens to run toward four distinctive policy choices: activism, isolationism, protectionism, and anarchism. Because these are not necessarily the same choices that Congress would have made, or that the American public would have permitted Congress to make, it is important to explore them, which I do below.

A. Activism

In the Rehnquist Era, the Court has earned a solid reputation for conservatism in matters of statutory construction; the Justices hew to a very narrow path in the exercise of their authority, out of a fear of trampling the true will of Congress. In most areas of the law, the Supreme Court takes pains to point out that it is the job of the legislature, not the judiciary, to make policy choices. Even in the run of labor law cases, the Court adheres to this philosophy.[144]

In contrast to this professed conservatism stands the actual activism found in the borderline decisions touching on federal labor policy. *Hoffman* represents judicial activism in two ways.

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143. *See* Galveston Truck Line Corp. v. Ada Motor Lines, Inc., 73 M.C.C. 617, 626–30 (1957) (holding that the hot cargo clause did not relieve the carriers of their obligations under the ICA).

144. *See, e.g.*, Cameron, *Language of the Law*, *supra* note 94, at 1152, n.50 (recounting the use of federal antitrust laws to penalize union organizing efforts).

First, *Hoffman* makes no serious effort to reconcile conflicting, yet presumably coequal, federal policies. Chief Justice Rehnquist assumed without any meaningful discussion that given a conflict between labor policy and immigration policy, the labor policy should give way.[145] He did not even use language suggesting that the Court had a responsibility to give practical effect to both policies. Ignoring Hoffman's "crude and obvious violation of the labor laws,"[146] the Chief Justice focused exclusively on Castro's violation of the immigration laws: He had committed a "crime" by attempting "to subvert the employer verification system";[147] his "use of false documents to obtain employment with Hoffman violated these provisions";[148] "awarding [him] backpay not only trivializes the immigration laws, it also condones and encourages future violations."[149] That the employer might be accused of trivializing the labor laws did not appear to bother the Chief Justice. It was reminiscent of *Bildisco*, in which he had focused on the debtor-employer's rights under the Bankruptcy Code to the exclusion of the union's rights under the NLRA.[150]

Second, *Hoffman* makes a programmatic policy choice. It enacts in effect, if not in so many words, a new Bracero Program, because the decision places outside the law an underclass of low-wage Latino immigrants who are promised workplace rights in theory but not in practice. As so many others have documented, the history of the old Bracero Program is a history of illusory protections: prevailing wages that went underpaid, guaranteed benefits that went unaccounted for, promised working conditions that went unfulfilled.[151] Even today, almost forty years after the old Bracero Program ended, litigation to recover pensions promised to retired *braceros* is pending in our courts.[152]

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145. Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 144–45, 147 (2002).

146. *Id.* at 153 (Breyer, J., dissenting).

147. *Id.* at 148.

148. *Id.*

149. *Id.* at 150. The same idea is found in the Chief Justice's citation to *Southern Steamship*, which compares in effect, if not in so many words, the strike weapon to a mutiny. *See id.* at 143 (characterizing the employees' shipboard strike as "amount[ing] to a mutiny in violation of federal law").

150. NLRB v. Bildisco, 465 U.S. 513, 532 (1984) (finding that the enforcement of an NLRB order as to the employer's breach of duty to bargain "would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space"). *Cf. Hoffman*, 535 U.S. at 149 (finding that the enforcement of an NLRB backpay order "r[an] counter to policies underlying IRCA, policies the Board has no authority to enforce or administer").

151. *See, e.g.*, CALAVITA, *supra* note 2, at 29, 45–46, 64–66; *see also* ERNESTO GALARAZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 183–98 (1964).

152. *See, e.g.*, Cruz v. United States, Case No. C-01-0892-CRB (N.D. Cal. Complaint filed Apr. 2001) (on file with author); *see also* Lafferty, *supra* note 7, at 1 (describing a suit by retired *braceros* against the U.S. government, Mexican government, Wells Fargo Bank, and other banks for failure to remit 10 percent of wages that employers withheld as mandatory savings).

Like the old Bracero Program, the new one offers illusory protections. Paying lip service to the notion that undocumented workers are still considered "employees" within the meaning of the NLRA,[153] while denying them the make-whole remedy of backpay, frees law-breaking employers from the only incentive they have to respect the NLRA rights of undocumented workers: the threat of having to open their pocketbooks. No one who has toiled in the vineyards of labor relations really believes the Chief Justice's salve that cease and desist orders and notice postings are sufficient to prevent employers from getting off "scot-free";[154] these remedies are little more than slaps on the wrist.[155]

All of which represents the policy choice to subordinate undocumented workers, despite the key role they play in supporting our economy. After all, the term "undocumented worker," like its politically incorrect predecessors, "illegal alien," or even, "wetback," is practically a synonym for "Latino," or perhaps, "Mexican."[156] *Hoffman* renders the institution of collective bargaining—one of the few effective tools for improving the wages and working conditions of low-wage workers—inaccessible to one of the groups needing it the most.

As I have written elsewhere, Los Angles County is home to over 700,000 manufacturing jobs, the largest concentration of manufacturing employment in the country.[157] Most of these jobs are nonunion, and about half of them are filled by immigrant Latinos, documented and undocumented alike.[158] These workers,

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153. *See Hoffman*, 535 U.S. at 144 (affirming the Board's determination "that the NLRA applie[s] to undocumented workers"); *see also* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892 (1984) (holding same), *cited in* Memorandum to All Regional Directors From Arthur Rosenfeld, General Counsel, No. GC 02-06, at 1 (July 19, 2002) ("The *Hoffman* Court reaffirmed its prior holding in *Sure-Tan* . . . that undocumented aliens are employees under the National Labor Relations Act.").

154. *Hoffman*, 535 U.S. at 152.

155. *See id.* at 154 (Breyer, J., dissenting). Justice Breyer wrote:

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

Id. (Breyer, J., dissenting); *see also* A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 415 n.38 (1995), *enforced* NLRB v. A.P.R.A. Fuel Buyers Group Inc., 134 F.3d 50 (2d Cir. 1997).

156. *See* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 187–90 (forthcoming 2003) (unpublished manuscript, on file with author).

157. *See* Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1097 (1999) [hereinafter Cameron, *Labyrinth*].

158. *See id.* at 1114. The role of immigrant Latino labor is the focus of a growing body of academic literature. For example, Professor Abel Valenzuela, Associate Director of the César Chavez Center at UCLA, has studied day laborers in Los Angeles. *See, e.g.*, Abel Valenzuela Jr., *Day Labourers as Entrepreneurs?*, 27 J. ETHNIC & MIGRATION STUD. 335, 335 (2001) (describing day laborers as "survivalist entrepreneurs"); *see also* Abel Valenzuela Jr., Working Day Labor: Bottom of the Barrel or Alternative Employment?, at 1 (Mar. 7, 2001) (unpublished manuscript, on file with author) (describing day labor as "unregulated, unstable, prone to work place abuses, and difficult to secure steadily," yet providing "some workers the ability to earn a modicum of living").

who are overwhelmingly of Mexican origin, occupy the bottom rung on the pay ladder. For example, according to Census Bureau data, as recently as 1996, the median weekly wage of the typical nonunion Hispanic worker was only $319; the same wage for his white counterpart was $480.[159] Having a union improves the picture dramatically. The median weekly wage of the typical unionized Hispanic worker was $482—a 50 percent increase.[160] But at just $2 more than the typical *non*unionized white employee, even this figure is paltry. During the same period, the median weekly wage of the typical unionized white worker was $630—an astonishing gap of nearly 42 percent.[161] Although joining unions pays dividends to most workers, and especially, Asians, African Americans, and other people of color, no group of workers has more to gain from collective bargaining than immigrant Latino workers.[162]

Los Angeles County is not alone. Nor is the presence of Latino workers any longer confined primarily to certain industries, like agriculture. Across the nation, from the packing houses of the Midwest to the poultry factories of the deep South, from the gaming resorts of Las Vegas to the sweat shops of New York City's garment district, undocumented Latino immigrants increasingly provide the low-wage muscle.[163] Why should they be singled out and denied access to the trappings of the middle class?

There is a message in the advent of the new Bracero Program, with its illusory protections so similar to those of the old Bracero Program. The message is not simply that the merits of the new Bracero Program are debatable, but that its merits will not be debated at all. Had the Bush Administration followed through on its "guest worker" proposal of August 2001, then the new Bracero Program could not have become law without facing the sort of scrutiny we have come to expect in our democratic republic: hearings before and markups by congressional committees, debates on the floors of the House and Senate, lobbying by labor and business advocates, commentary in editorials by and letters to the *Washington Post* and the *Los Angeles Times*, and talk show coverage on *Meet the Press* and *Larry King Live*.

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159. *See* Cameron, *Labyrinth*, at *supra* note 157, at 1101 (citing MATTHIAS H. WAGENER, SURVEY OF U.S. HISPANIC LABOR 7 (1997)).

160. *Id.* at 1101–02.

161. *Id.*

162. *Id.* at 1103. Latinos are by no means the only group of undocumented workers who are routinely denied access to the institutions of the law, such as collective bargaining, that could enable them to secure better wages and working conditions. The infamous case of the El Monte, California, Thai garment workers—who were alleged to have been smuggled into the United States, held against their will, and forced to work eighteen-hour days—is one of the more prominent examples. *See* Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry*, 1 J. GENDER RACE & JUST. 405, 409 (1998).

163. I have made the point elsewhere that Latino workers are becoming increasingly important to the parts of our national economy that lie outside the big cities of the Southwest. *See* Cameron, *Labyrinth*, *supra* note 157, at 1092–93.

I do not like the old Bracero Program, and as a member of the law academy, I would have had access to forums in which to say so in an attempt to prevent the enactment of the new one. Had the usual processes of democratic decisionmaking been allowed to occur, and had the new Bracero Program passed anyway, I could have accepted its passage as the product of that process.[164]

Of course, the usual processes of democratic decisionmaking did not occur. Instead, the *Hoffman* majority announced the new Bracero Program as a fait accompli. The oral argument and briefing by parties and amici that preceded the decision can hardly be thought of as taking the place of the robust debate that a congressional forum would have ensured.

B. Isolationism

The majority's opinion in *Hoffman* is significant as much for what it says as for what it does *not* say. And among the things it does not say is that the United States, no less than the poorest third world country, is part of a system of international law.

For better or worse, and in practically every subject matter, the inexorable pressure exerted by a force called globalization gets the credit for changing the way that the American legal system regulates, and ought to regulate, the U.S. economy. As it blurs the lines between intrastate, interstate, and international commerce, the global economy demands that legal institutions in this country pay attention to how they influence, and are influenced by, people and events overseas.[165]

To this end, the United States has become party to two significant multilateral agreements. The first is the North American Agreement on Labor Cooperation (NAALC or Labor Side Accord), the rider to the controversial North American Free Trade Agreement (NAFTA), whose member States

164. Of course, even democratically arrived-at decisions can produce legislative and executive programs that treat immigrants, especially people of color, much more harshly than they treat citizens and immigrants of European extraction. For a thoughtful exploration of this subject, see, for example, Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998). For a more comprehensive view, see JOHNSON, *supra* note 56. For an examination of some of the special problems facing immigrant women, see Elvia R. Arriola, *Voices From the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Legal Theory, and Gender at the U.S.-Mexico Border*, 49 DE PAUL L. REV. 729 (2000); M. Isabel Medina, *In Search of Quality Childcare: Closing the Immigration Gate to Childcare Workers*, 8 GEO. IMMIGR. L.J. 161 (1994); Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!"*, 53 U. MIAMI L. REV. 1045 (1999).

165. Of the countless pieces of literature that I could cite in support of this notion, I have chosen the one closest at hand: the program from the recent annual convention of legal educators. *See generally* AMERICAN ASSOCIATION OF LAW SCHOOLS, 2003 ANNUAL MEETING INFORMATION (Jan. 2003) (listing no fewer than seventeen panels or presentations having titles containing some variant of the word "global"), *at* http://www.aaals.org/am2003/program.html.

have agreed to enforce their domestic laws so as to ensure adherence to minimum labor standards.[166] Among these minimum standards is the right of workers to form and join labor organizations of their own choosing—that is, the very right José Castro was denied. The second is found in the conventions of the International Labor Organization (ILO),[167] an agency of the United Nations whose signatory countries have agreed to observe certain basic human rights in the workplace. Among these basic human rights is, once again, the right to join unions.[168] Each agreement creates various mechanisms for enforcement, usually through a combination of administrative and diplomatic proceedings.[169]

Oddly, none of these developments can be learned from reading the majority's opinion in *Hoffman*, even though the federal government's failure to vindicate Castro's attempt to form or join a union, and to engage in concerted activities for that purpose, would seem to be clear violations of both the and Labor Side Accord and the ILO treaty.[170] Not a word is written about either source of law, much less whether that law has been violated.

Although so far no complaint has been made against the United States under the Labor Side Accord, one has been filed by organized labor under the ILO treaty.[171] Less than eight months after *Hoffman* was decided, AFL-CIO President John Sweeney charged the United States with violations of two conventions: one guaranteeing workers the right "without distinction whatsoever . . . to establish . . . [and] join organisations of their own choosing,"[172] and the other requiring "adequate protection against acts of anti-union

166. North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1993); North American Free Trade Agreement Implementation Act, 101 Stat. 2057 (1993).

167. *See* 1 INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919–1951 (1996) [hereinafter ILO, CONVENTIONS AND RECOMMENDATIONS].

168. Convention No. 87 Concerning Freedom to Associate and Protection of the Right to Organise, July 9, 1948, art. 2 (entered into force July 4, 1950) [hereinafter ILO Convention No. 87], *reprinted in* ILO, CONVENTIONS AND RECOMMENDATIONS 527 (1996).

169. *See generally* RALPH H. FOLSOM, MICHAEL WALLACE, & DAVID LOPEZ, NAFTA: A PROBLEM-ORIENTED COURSEBOOK 598–671 (2000) (describing the interaction of NAALC and ILO obligations of member States).

170. At least, this was the opinion of Professor Marley Weiss and other scholars who attended the panel on *Hoffman* presented at the AALS Annual Meeting in Washington, D.C., in January 2003. Professor Weiss ought to know. *See, e.g.*, Marley S. Weiss, *Foreword: Proceedings of the Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada*, 22 MD. J. INT'L L. & TRADE 185 (1998) (summarizing key provisions of NAALC, including its incorporation of some of the basic labor standards contained in the ILO Treaty).

171. *See* Complaint Presented by the American Federation of Labor and Congress of Industrial Organizations to the ILO Committee on Freedom of Association Against the Government of the United States of America for Violation of Fundamental Rights of Freedom of Association and Protection of the Right to Organize and Bargain Collectively Concerning Migrant Workers in the United States (filed Nov. 8, 2002) [hereinafter ILO Complaint], *reported in* 2002 DAILY LAB. REP. (BNA) No. 218, at E-36 (Nov. 12, 2002).

172. ILO Convention No. 87, *supra* note 168.

discrimination . . . ."[173] The complaint also charged the United States with violating a separate declaration on fundamental human rights, which includes the right to organize unions.[174]

The ILO's Committee on Freedom of Association will eventually take up the complaint, but the involvement of such a body can hardly substitute for the involvement of the U.S. judiciary in the application of international labor standards.[175] International law is still law, and our courts too have responsibility for ensuring that the nation comports with the minimum standards expected of participants in the global economy.

Like the old Bracero Program, the new one affects an important transborder market for the labor of Latino workers. By ignoring international law, however, the Supreme Court has declared that our country may reap the benefits of this labor market without accepting its burdens. This is the path of isolationism, at least insofar as international labor standards are concerned. Whatever its wisdom, a decision to choose such a policy is one for the executive and legislative branches, not for the judicial branch.

C. Protectionism

In the bottom-line workplace of the modern American economy, the cost of wages and benefits drives most personnel decisions. Employers favor the employee who is perceived to produce more and cost less. So employers resist unionization, because a union workforce both costs more in wages and benefits and is more likely to complain about its working conditions than a nonunion workforce. And in many industries, employers embrace illegal immigration, not only because an undocumented workforce costs less than a documented one, but also because someone who works in the law's shadow is less likely to assert his legal rights than someone who works in broad daylight.[176]

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173. Convention No. 98 Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, June 8, 1949, art. 1 (entered into force July 18, 1951), *reprinted in* ILO, CONVENTIONS AND RECOMMENDATIONS, *supra* note 167, at 639.

174. Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (1998).

175. The "fundamental problem" posed by the globalization of the workforce is that "there is no global legislature, no global labor court or inspectorate or administrative tribunal, no global regulatory regime which can fully replicate at the transnational level the national systems of protective and empowering labor legislation." Harry W. Arthurs, *Where Have You Gone, John R. Commons, Now That We Need You So?*, 21 COMP. LAB. L. & POL'Y J. 373, 389 (2000). Besides, it may be a year or more before the ILO's Freedom of Association Committee even takes up the complaint. *See AFL-CIO Files Complaint With ILO Protesting Hoffman Plastic Decision*, DAILY LAB. REP. (BNA) No. 218, at A9 (Nov. 12, 2000) (remarks of ILO spokeswoman Mary Covington).

176. *See, e.g.*, Convention No. 89 Concerning Night Work of Women Employed in Industry, June 17, 1948 (entered into force Feb. 27, 1951), *reprinted in* ILO, CONVENTIONS AND RECOMMENDATIONS, *supra* note 167, at 546.

Although the law of the marketplace makes such preferences completely understandable, the law of the land makes the discriminatory personnel decisions necessary to achieve them squarely against public policy. National labor policy, as articulated in section 1 of the NLRA,[177] still favors the resolution of workplace disputes by resort to collective bargaining, including the formation of labor unions, to level the playing field between workers and their employers. National immigration policy, as codified in IRCA,[178] disfavors the hiring of undocumented aliens, both by sanctioning employers who knowingly hire them and by requiring employers to verify employees' immigration status.

By imposing limits on the natural desire of employers to hold down labor costs by resisting unionization and hiring undocumented workers, both legislative schemes impose significant costs. Recognizing and bargaining with the unions of immigrant workers and verifying their work papers are obligations that require investments of time and money. Before *Hoffman*, these facts of life fell equally on employers; in the eyes of the law, none were favored with protection from the hardships of competitive labor markets. But after *Hoffman*, employers are asked to choose between the high-cost road of obeying the law and the low-cost road of breaking it. This is really no choice at all, for according to a majority of the Supreme Court, there is no upside to taking the high road. In fact, there is a subsidy in the form of lower labor costs—a sort of protectionism—for taking the low road. The rational employer must choose to break the law and free some of his precious capital for investment in other ventures. An employer who does otherwise will effectively invite his cost-cutting rivals to be "free riders" and may be crushed in the marketplace.[179]

In this respect, *Hoffman* recalls once again the labor policies supporting the old Bracero Program. Of the many advantages that *bracero* labor conferred

177. 29 U.S.C. § 151 (2000). In pertinent part, section 1 provides:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . .
>
> . . . .
>
> It is declared hereby to be the policy of the United States to eliminate causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

178. 8 U.S.C. § 1324a(h)(1) (2000). IRCA made "forcefully" combating the employment of undocumented aliens central to "[t]he policy of immigration law." INS v. National Center for Immigrants' Rights, Inc., 502 U.S. 183, 194 & n.8 (1991).

179. *Cf.* Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should Be Charged to "Financial Core" Employees*, 47 CATH. U. L. REV. 979, 985 (1998) (discussing the "free rider" problem in union organizing).

on agricultural employers, the most important was probably its captivity of affected workers. In her thoughtful book on the subject, Professor Kitty Calavita writes:

> The long hours, sporadic employment, and arduous working conditions of agricultural production made the retention of workers problematic. In this context, the captivity of the braceros was extremely valuable. Unlike domestic workers or illegal aliens, the bracero was *confined by law* to a given crop and employer. As the Chief of the Farm Placement Service of the Department of Labor put it in 1957, "These workers [braceros] are not free agents in the labor market. They do not have freedom to move about as they please and shop for the best job the labor market could afford."[180]

The Bracero Program, by "operating outside of the free labor system," delivered temporary workers who were assigned to particular tasks for short periods—and thus "provided an important element of predictability."[181] Growers had less incentive to compete in the labor market on the basis of high wages and better working conditions. The right of *braceros* to remain in the country depended on the availability of work, not to mention the goodwill of their contract employer. So *braceros* were less likely than undocumented workers, who had no right to remain in the country at all, to "skip" their present jobs in search of greener pastures elsewhere.[182] And once Operation Wetback was underway, and growers became accustomed to calling out the INS to track down "skips," the *bracero* knew that he could be picked up and deported just as easily as any undocumented alien.[183] For most *braceros*, it was easier to stick with their contract employers, no matter how undesirable things got.

Hoffman is protectionist, and therefore anticompetitive, in two ways. First, it places today's undocumented workers "outside of the free labor system," at least insofar as the benefits of collective bargaining are concerned. If undocumented workers no longer have effective remedies for employer interference with their right to form and join labor unions, then they no longer have access to their most effective agent for improving wages and working conditions. Employers everywhere may offer undocumented workers take-it-or-leave-it deals, because those who dare to organize for change can be fired now and denied reinstatement and backpay later.

Second, *Hoffman* creates a tremendous disincentive to obey the immigration laws. Employers need not invest in conducting the background checks called for by IRCA, because now it is the worker asserting his NLRA rights, not

180. CALAVITA, *supra* note 2, at 56 (citation omitted).
181. *Id.* at 58.
182. *See id.*
183. *See id.* at 58–59.

the employer violating those rights, who is assumed to be the more nefarious lawbreaker.

D. Anarchism

Finally, and perhaps most disturbing for a society espousing governance by the rule of law, *Hoffman* creates incentives for employers to break the law. Although encouraging folks to disobey the NLRA may be a mild form of anarchy—a saying among attorneys of my acquaintance in the Southern California regional offices of the NLRB goes, "we don't have a jail at the Labor Board"—it is anarchy nonetheless. By forbidding backpay awards to undocumented workers victimized by retaliatory discharges in violation of section 8(a)(3), the decision sends the message that lawbreakers may profit from their misdeeds.

Of course, attempting to profit from his misdeeds was the very charge Chief Justice Rehnquist leveled at José Castro. As the Chief Justice put it, "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. . . . We find . . . that awarding back pay to illegal aliens runs counter to [these] policies."[184]

I understand this reasoning, because it has a superficial appeal. After all, José Castro broke the immigration laws. He admitted that he had passed himself off as a U.S. citizen in order to get a Social Security card, driver's license, and various jobs, including the job at Hoffman Plastic Compounds. I won't defend that. Like millions of other undocumented aliens, Castro is subject to summary deportation and the other privations of life faced by those who live in the shadows of the law.

What I do not understand is why Castro's employer, who also broke the law, should get off "scot-free," the denial by Chief Justice Rehnquist notwithstanding. Making matters worse is the fact that Hoffman is arguably the bigger sinner. Castro's sin injured nobody in particular, certainly not any of the native-born citizens or undocumented aliens who would have passed on his low-wage job. But Hoffman's sin injured lots of folks. By retaliating against him, the company undermined the NLRA rights not only of José Castro, but also the coworkers in his bargaining unit who were coerced out of exercising their right to choose union representation, not to mention the millions of people like Castro—undocumented Latinos, Asians, and others around our country—who will be forced to remain in the shadows.

184. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 149 (2002).

There is also the matter of IRCA's dirty little secret: Although the statute outlaws the hiring of undocumented aliens, few employers have been prosecuted, much less sanctioned, for doing so. This is due in large part to the requirement that the employer must have "knowingly" hired the alien. The prevalence of forged identity papers and the lack of will to prosecute violators make this form of scienter hard to prove. Although Hoffman was not charged with violating IRCA, those with some experience in these matters understand that, with a wink and a nod, employers like Hoffman will accept practically any form of immigration status documentation in order to hire the low-wage laborers they need to run their businesses profitably.[185]

Nor did the Court give the Board sufficient credit for its creativity in attempting to resolve two problems: the conflict between the NLRA and IRCA and the probability that Castro and Hoffman had each violated one, if not both, of these laws. In reversing the ALJ, the Board did not award a blank check for backpay; instead, it cut off Hoffman's liability as of the date of the hearing in which Castro admitted his true immigration status, when the company, at the latest, knew or should have known that he was ineligible to work under IRCA. The Board also reduced Castro's backpay by his interim earnings, which he was obliged to pursue under well-settled mitigation principles. This was a balanced approach to the conflict, which is exactly the sort of solution that one might expect a reviewing court to honor.[186] Instead, the Chief Justice

185. *See, e.g., id.* at 155–56 (Breyer, J., dissenting).

186. This approach represented a shift in the Board's post-IRCA thinking, which began in the early 1990s. *See, e.g.*, Nessel, *supra* note 22, at 364–71 (discussing the strengths and weaknesses of *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 320 N.L.R.B. 408 (1995)).

It is not beyond comprehension that, given the room to work, the NLRB might fashion other creative solutions, perhaps by borrowing them from administrative agencies such as the EEOC.

For example, there is a potential conflict between the second proviso to section 8(a)(3) of the Labor-Management Relations (Taft Hartley) Act of 1947, 29 U.S.C. § 158(a)(3) (2000), which allows employers to require that every employee in the bargaining unit pay either union dues or their "financial core" equivalent attributable to the costs of union representation, and sections 703(c)(1) and 701(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(c)(1) & 2000e-2(j) (2000), which impose on the union an obligation to accommodate a financial core employee who holds a sincere belief that paying dues or its equivalent violates the tenets of her church or her religious views, and on that basis, objects to paying anything to the union. Such an employee is entitled to a reasonable accommodation, unless such accommodation would cause the union undue hardship. *Id.* at § 2000e(j). The EEOC has resolved the conflict by issuing a rule requiring the employee to remit the agency fee to a charitable organization instead of the union. *See* EEOC Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d)(iii)(2) (2000). The courts have approved. *See, e.g.*, Yott v. N. Am. Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); Anderson v. General Dynamics Corp., 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

The creativity of the EEOC's compromise lies in its equity: the objecting employee, like other employees in the bargaining unit, is still compelled to pay her fair share of the costs of union representation, but without being compelled to violate her religious views. The policy of discouraging the "free rider" is at least partially vindicated. *See* Cameron, *Wages of Syntax*, *supra* note 179, at 985.

used language dismissive of the NLRB's efforts to address the nonlabor immigration statute: "the Board's interpretation of a statute *so far removed from its expertise* [is entitled to] no deference. . . .";[187] "the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is *novel* . . . .";[188] and, most unkindly, the remedy was "*outside the Board's competence* to administer."[189]

In short, *Hoffman* is an invitation to ignore the law. It "offers employers immunity in borderline cases, thereby encouraging them to take risks, that is, to hire with a wink and a nod those potentially unlawful aliens whose unlawful employment (given the Court's views) ultimately will lower the costs of labor law violations."[190]

CONCLUSION

This is the part of most law review articles in which the author calls for change, usually in the form of amending legislation by Congress. Although I would support such a course, I doubt it will happen, certainly not anytime soon. As the history of these "borderline decisions" suggests, Congress is unlikely to return to any active role in the setting of federal labor policy. For now, I think it sufficient to call attention to the Supreme Court's emergence as final arbiter of that policy, with all its implications for choosing activism, isolationism, protectionism, and anarchism over the alternatives that Congress might choose. Forewarned is forearmed.[191]

Similarly, in *Hoffman*, an equitable remedy might have denied Castro reinstatement and backpay, but required the employer to pay the equivalent of his backpay into an organizing fund controlled by the affected union. Such a remedy would reward neither Hoffman for violating the NLRA nor Castro for violating the IRCA. Yet it would vindicate, at least in part, the right of employees to be free from discriminatory discharge under section 8(a)(3), because the employer would not get off "scot-free" for firing union adherents in violation of the law.

187. *Hoffman*, 535 U.S. at 143–44 (emphasis added).

188. *Id.* (quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529 n.9 (1984)) (internal quotations omitted).

189. *Id.* at 147 (emphasis added).

190. *Id.* at 156 (Breyer, J., dissenting).

191. *See, e.g.*, Estlund, *supra* note 27, at 1527 ("By impelling private parties to find their own paths outside of the existing legal regime, the ossification of labor law is setting in motion forces that may eventually produce legal change.").