
**Patrick D. Kenneally**

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B. ARGUMENT: “ILLINOIS LAW, AS IT STANDS, UNIFORMLY DISPENSING DAMAGES FOR LOST FUTURE EARNINGS IS NOT PREEMPTED...” 89

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I. INTRODUCTION

Justice Brennan observed that there exists in this country “a substantial ‘shadow population’ of illegal migrants – numbering in the millions – within our borders [and] [t]his situation raises the specter of a permanent caste of undocumented resident aliens . . . denied the benefits that our society makes available to citizens and lawful residents.”1 This “situation,” once a mere apparition, has begun to take form, shaped in part by judicial opinions denying undocumented immigrants commensurate legal protections and privileges. Hoffman Plastic Compounds, Inc. v. NLRB is one such opinion.2 In Hoffman, the United States Supreme Court revoked the authority of the National Labor Relations Board (NLRB) to award backpay to undocumented workers who are the victims of unfair labor practices, which are proscribed in the National Labor Relations Act (NLRA).3 An award of backpay, the Court remarked, excessively “trench[ed] upon” the provisions of the Immigration Control and Nationality Act (IRCA), making the employment of undocumented immigrants unlawful.4 Though, ostensibly, Hoffman would seem confined to the realm of federal jurisprudence, the defense bar has lauded this opinion for its supposed broader implications. The defense bar maintains that the decision in Hoffman similarly revokes the authority of state courts to measure an undocumented plaintiff’s award of damages based on lost future earnings by his projected earning in the United States. Thus far, three separate jurisdictions, avowedly compelled by Hoffman, have limited the measure of an undocumented plaintiff’s lost future earnings to that amount he would have been expected to earn in his country of origin.5 While Illinois appellate courts have yet to speak to this issue, the grumblings over Hoffman have grown more vociferous.

The position of this article, embodied by three main points, is that Illinois law, as it stands, uniformly measuring lost future earnings for all plain-

3. Id. at 151-52.
4. Id. at 144.
tiffs, regardless of immigration status, should not be overridden in view of Hoffman. The article's three main points are as follows: 1) Hoffman is a narrow ruling based on a remote United States Supreme Court precept that has no application to the manner in which Illinois civil courts measure lost future earnings; 2) even if applicable in Illinois civil courts, the decision in Hoffman is not controlling as its factual underpinnings are distinct from and legal reasoning inapposite to an award for lost future earnings; and 3) Illinois law as it stands is not constitutionally preempted by the IRCA. This article is also layered with various other points intended to convince its reader that a denial of future earnings at projected earnings in the United States is not in the best interest of Illinois.

II. PERSPECTIVE

A. A "SHADOW POPULATION" OF PROSPECTIVE PLAINTIFFS

As calculated by the INS in 2000, there were approximately 7 million undocumented immigrants residing in the United States. Of these, the INS estimated that 432,000 resided in Illinois. If its growth during the 1990s was any indication, the United States can expect to see a 100% increase in the undocumented immigrant population nationwide and Illinois a 200% increase by 2010.

Although there are multiple and varied engines driving immigration without documentation, most individuals have migrated without border inspection in search of work or higher wages (sometimes after being ac-


8. See id. The estimated total unauthorized population increased from 3.5 million in January of 1990 to 7.0 million in January 2000 – a 100% increase. Id. The estimated unauthorized population in Illinois increased from 194,000 in January of 1990 to 432,000 in January of 2000 – a 223% increase. Id.

tively recruited by employers), to seek refuge from unsafe, even deadly, exigencies in home countries, and/or to re-unite with family. Another large share of undocumented immigrants arrived in the United States with a valid visa and stayed beyond its expiration.

The image of the undocumented immigrant as an unattached transient nomadically roaming the country in search of work has been largely discredited. Most undocumented immigrants live in firmly-staked families and communities; in fact, in 2004, it was estimated that fewer than half of the undocumented men and one in five undocumented women were single. It was also estimated in 2004, that there existed 13.9 million people in the United States who were members of families who made up entirely of undocumented immigrants or in which at least one member of the family was undocumented (i.e. "mixed" families). "Mixed" families appear to be increasingly common. As an indication, it was estimated that 3.1 million

10. See Midwest: Meat/Poultry Processing, RURAL MIGRATION NEWS, Jan. 1998, available at http://migration.ucdavis.edu/rmn/more.php?id=244_0_2_0. This article discusses the meatpacking industry, a $95 billion dollar a year industry, where an estimated 25% of the workforce is undocumented because of its ardent dependency on low-wage labor. Id. The article reports that the meatpacking industry is one of the foremost examples in which employers actively encourage undocumented immigration. Id. It is common practice, the article reveals, for these employers to use independent contractors to recruit undocumented immigrants for a "finder’s fee." Id.

11. See Cecilia Menjivar, Salvadorans and Nicaraguans: Refugees Become Workers, in ILLEGAL IMMIGRATION IN AMERICA 232, 234-37 (David Haines & Karen Rosenblum eds., 1999); Samuel Martínez, Migration from the Caribbean: Economic and Political Factors versus Legal and Illegal Status, in ILLEGAL IMMIGRATION IN AMERICA 273, 275-80 (David Haines & Karen Rosenblum eds., 1999) (Revealing prominent categories of undocumented immigrants fleeing turmoil or oppressive regimes in their countries of origin include Salvadorans, Nicaraguans, Cubans, Haitians, and Dominicans).

12. See Karen A. Woodrow-Lafield, Labor Migration, Family Integration, and the New America, in ILLEGAL IMMIGRATION IN AMERICA 17, 19 (David Haines & Karen Rosenblum eds., 1999) (indicating that the incentive to reunite with family is strengthened by United States immigration policy giving preferential visa status to family-sponsored applicants).


15. Id.
children who are United States citizens have at least one undocumented parent.\textsuperscript{16}

The prospect of certain companionship once inside United States’ borders is not limited to those with established kin. Because immigration to the United States for certain groups has been a way of life for years, many undocumented immigrants, upon arrival, are welcomed into highly organized and integrated communities, capable of providing indispensable assistance to new arrivals, such as housing, food, and job leads.\textsuperscript{17} In the task of procuring employment, at least in Chicago, these communities have been largely successful: approximately 90\% of undocumented immigrants in Chicago looking for work have found some type of employment.\textsuperscript{18}

Because of these compelling pull factors, as well as rooted families and communities, a large share of the undocumented population is likely to stay for good. The Census Bureau estimated in 2000 that an average of 400,000 new undocumented immigrants settle permanently in the United States each year.\textsuperscript{19} Of the 3.5 million undocumented residents in 1990, the INS estimated that 1.5 million were still residing in the United States and undocumented in 2000.\textsuperscript{20} It is important to note, however, that not all of the 2 million residents leaving the undocumented population had emigrated or been removed by the INS. Rather, between 1994 and 2000, roughly 42\% of all undocumented immigrants that left this population did so as a result of death or legalization.\textsuperscript{21} In further support of the intimate link between legal and undocumented immigration, studies conducted by the INS reveal that 22\% of all legal immigrants had at one time been undocumented.\textsuperscript{22} Moreover, during the 1990s the INS handed out 1.5 million green cards to undocumented candidates,\textsuperscript{23} and as of 2005, an estimated 1-1.5 million undocumented immigrants had full legal statuses pending.\textsuperscript{24} Perhaps, figures

\textsuperscript{16} Id.

\textsuperscript{17} See Center for Immigration Studies, \textit{Illegal Immigration}, \url{http://www.cis.org/topics/illegalimmigration.html} (last visited Oct. 8, 2007) ("[C]ommunities of recently arrived legal immigrants help create immigration networks used by illegal aliens and serve as incubators for illegal immigration, providing jobs, housing, and entry to America for illegal-alien relatives and fellow countrymen.") [hereinafter \textit{Illegal Immigration}].


\textsuperscript{19} \textit{Illegal Immigration}, \textit{supra} note 17.


\textsuperscript{21} Id.

\textsuperscript{22} See, e.g., Mark Krikorian, \textit{The Link: Legal and Illegal Immigration}, \url{http://www.cis.org/articles/1997/msk2-16-97.html}.

\textsuperscript{23} \textit{Illegal Immigration}, \textit{supra} note 17.

\textsuperscript{24} Passel, \textit{supra} note 14.
such as these are what the United States Supreme Court drew upon when it excerpted, “the illegal alien of today may well be the legal alien of tomorrow.”

For those who have yet to attain legal status, however, there are few options for reprieve from consignment into the ranks of the impoverished and subservient, which creates only an increased likelihood of falling victim to another’s impropriety and personal injury. In the Chicagoland area alone, where 88% of Illinois’ undocumented population resides, the average hourly wage of undocumented immigrants was only $7.00 as of 2002 (compared to $9.00 for documented immigrants) and 10% reportedly received less than the minimum wage, which is $5.15.

Because of this torpid earning power, not surprisingly, nearly a quarter of all immigrants were living at or near the poverty line in 2004, and undocumented immigrants continue to endure the worst working conditions, housing conditions, and medical care. Nationwide, immigrant workers are 40% more likely to die at work and over a third of undocumented workers in the Chicagoland area reported unsafe working conditions. The reason for this heightened risk of injury on job sites can be arrived at intuitively—undocumented immigrants are much less likely to be as well-educated, English proficient, or economically integrated as their native counterparts and, as such, are relegated to the lower wage, manual labor intensive undergrowth of our economy.

27. Id.
30. Mehta, Theodore, Mora & Wade, supra note 18, at 27.
31. See also Enrico Marcelli, Undocumented Latino Immigrant Workers: The Los Angeles Experience, in ILLEGAL IMMIGRATION IN AMERICA 193, 205 (David W. Haines & Karen E. Rosenblum cd., 1999). Enrico Marcelli, a research fellow at the Harvard School of Public Health, in a study based on data from Los Angeles, discovered that undocumented immigrants were more highly represented in service-oriented, textile, and agricultural occupations and less highly represented in technical and professional occupations than other groups. Id. One glaring example of these findings was the fact that undocumented immigrants filled less than 2% of technical and managerial jobs in Los Angeles. Id. See also Marc Cooper, The Heartland’s Raw Deal: How Meatpacking is Creating a New Immigrant Underclass, THE NATION, Feb. 3 1997, at 11, available at http://www.tacomacc.edu/home/ssandwe/cooper.htm. In the article, one undocumented immigrant who was asked to comment on the state of undocumented immigration provided, “Everyone knows they are never going to arrest all of us. Who would do this shitty work for them? We know that every now
In addition to work, undocumented immigrants contend with dangers at home. While there is little information elucidating the quality of housing inhabited by immigrants in Illinois, data collected in New York City indicated that immigrant households are more likely to be “burdened with excessive housing costs . . . to be crowded . . . plagued by maintenance deficiencies, and to live in unsound structures.”32 These hazardous living conditions are not confined to inner cities. Rather, every year, the thousands of undocumented immigrants employed on farms,33 due to seasonal variations in housing demands, overrun available shelters with two to three times the number of inhabitants they were built to house, forcing many to live in garages, utility sheds, and farm storage areas.34

In the event that these noxious living and working conditions do culminate in disease or injury, undocumented immigrants face the enhanced risk that their condition will be exacerbated by inept medical care. It has been documented that individuals not proficient in English are misdiagnosed and prescribed inappropriate medications more frequently, and receive a poorer quality of overall care than average patients.35 Additionally, a study commissioned by the United States Department of Health and Human Services concluded, based on a review of available information, that ethnic minorities receive “sub-optimal” care after presenting themselves at the hospital.36

Despite the considerable risks of personal injury that undocumented immigrants run in primary aspects of their lives, most remain reluctant to report these dangerous conditions or to seek redress if they do end up in-

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33. Phillip L. Martin, Unauthorized Workers in U.S. Agriculture: Old versus New Migrations, in ILLEGAL IMMIGRATION IN AMERICA 133, 133-34 (David W. Haines & Karen E. Rosenblum ed., 1999) (indicating that of the 2.5 million people employed on U.S. farms for wages each year, as many as 50% were undocumented).


36. Kevin Fiscella, Assessing Health Care Quality for Minority and Other Disparity Populations, (2003), http://www.ahrq.gov/QUALJqdisprep.pdf (report prepared for the Agency for Healthcare Research and Quality in Rockville, Maryland). Specifically, the report found that Hispanics received, “fewer cardiovascular procedures including reperfusion therapy, fewer appropriate medications following a myocardial infarction, and less analgesia for metastatic cancer and trauma.” Id. (footnotes omitted).
jured. This litigious temperance is an outgrowth of the fear that their status will be exposed by a lawsuit and/or reported in retaliation, thereby subjecting them and their families to the risk of being uprooted through deportation.37

The responsibility, then, falls to a few undeterred, undocumented plaintiffs and their attorneys to pave the way to commensurate legal status in Illinois free from the disincentive of intrusive discovery or reduced capacities for worthwhile recovery. To this end, the information in this section, as will be more fully explained, is relevant in court to undercutting the perception that lost future earnings calculated at projected earnings in the undocumented plaintiff’s country of origin can adequately sustain or compensate that plaintiff who, despite any legal designation, is invested and firmly rooted in this country and likely to remain. Fully compensating the plaintiff is, after all, the bedrock on which Illinois tort law for damages was built.

B. ILLINOIS LAW ON DAMAGES FOR LOST FUTURE EARNINGS AND THE IRCA: AN OVERVIEW

In Illinois, the general rule of damages in personal injury or wrongful death actions is that "the wrongdoer is liable for all injuries resulting directly from the wrongful acts . . . provided the particular damages are the legal and natural consequences of the [wrongdoing]."38 It is long settled in Illinois that the purpose of compensatory tort damages is to compensate the victims and/or their beneficiaries for [their] injuries, not to punish defendants.39 This compensation is designed to place plaintiffs in a “position substantially equivalent in a pecuniary way to that which [they] would have occupied had no tort been committed."40

More broadly, this compensation restoring a plaintiff to his former position is deemed to promote corrective justice.41 Corrective justice denotes that in suitably compensating victims, good social effects result and/or bad social problems are avoided.42 In the presence of compensation, for example, individuals are less inclined to seek their own violent form of retribu-

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37. See Mehta, Theodore, Mora & Wade, supra note 18. See also Rivera v. NIBCO, 364 F.3d 1057 (9th Cir. 2004). In Rivera, the court upheld a protective order precluding the defendant from inquiring into the plaintiffs' immigration status when they were suing under Title VII. Id. The court reasoned that undocumented immigrants, fearing the threat of criminal prosecution or deportation, would be unduly reluctant to bring a Title VII claim if forced to reveal their undocumented status. Id. at 1064-65.
40. Id. (quoting Restatement (Second) of Torts § 903 cmt. A (1979)).
42. See id.
tion and they are safeguarded against insurmountable costs proceeding from the injury.43

In cases where the injured plaintiff survives, the costs stemming from a loss or impairment of his future earning capacity is a proper element of compensation, provided the loss is reasonably certain to occur.44 A plaintiff’s attorney must present evidence establishing that the plaintiff will, because of the injury, suffer future financial losses.45 Generally, the plaintiff’s attorney provides a formula or rule, based in evidence, regarding the plaintiff’s earning capacity by which the jury can make the computation.46 The exposition of this evidence might entail a comparison of the plaintiff’s earnings both before and after the injury,47 the plaintiff’s inability to work after the injury,48 a physician’s testimony,49 or a statement by the plaintiff as to his earnings since the time of the injury.50 However, there is no primary authority in Illinois that has ever held that a plaintiff’s undocumented immigration status operates as a per se deduction on an award of lost future earnings.

In wrongful death actions, beneficiaries are entitled to damages corresponding to the present value of the future financial support the decedent would have provided during an uninterrupted lifetime.51 This amount is based in large measure on the estimated future income of the decedent.52 In practice, evidence as to the estimated lost future income is customarily supplied by expert testimony based on statistical wage averages in the United States and not the decedent’s actual earning history.53 Like damages for lost future earnings, Illinois courts have never held that a decedent’s undocumented immigration status mitigates damages for future financial support.

For brevity’s sake, this paper will focus its discussion on undocumented immigrants’ entitlement to personal injury damages for lost future earnings.

43. Cf. id. at 17 (“Injury also has ripple effects especially when it promotes economic hardship. Children and others within a family stressed by serious injury and consequent economic difficulty may reflect that stress by inflicting still further economic costs upon society, for example, by abusing alcohol.”).
52. Id.
earnings. However, because compensation for a beneficiary's lost future financial support is, basically, a percentage of the decedent's lost future earnings, the following discussion is equally applicable to damages in wrongful death cases.

The IRCA, enacted in 1986, created an extensive, partially self-enforcing scheme designed to restrict and to deflate the swell of undocumented immigration by choking off the lifeblood feeding this swell—employment. As stated in Hoffman, the IRCA "made combating employment of illegal aliens central to '[t]he policy of immigration law.'"

Under the IRCA, it is unlawful for an employer to knowingly hire or continue to employ an "unauthorized alien," or hire an individual without first verifying that he is not an "unauthorized alien" by examining specified documents. Upon hiring, the employer and employee are required to fill out and sign a form attesting that they have complied with the terms of the IRCA. Employers who violate the IRCA are punished by civil fines and may be subject to criminal prosecution. The IRCA also makes it a crime for an "unauthorized alien" to attempt to circumvent its verification system by producing "forged, counterfeit, altered, or falsely made" identification documents for employer inspection.

Lastly, the IRCA contains explicit preemption language providing, "[t]he provisions of this section preempt any State or local law imposing

54. See 131 CONG. REC. 11,414 (1985). Senator Hawkins described the IRCA's purpose as "prevent[ing] and deter[ring] the illegal entry of aliens into the United States." Id. Senator Symms offered that the IRCA is "an attempt to halt illegal immigration into the United States and try to transfer responsibility for law enforcement from the Government over to the private sector. Id. See also 131 CONG. REC. 11,730 (1985) (Senator Symms stated, "[w]ithout doubt, the promise or even hope of employment is the strongest lure drawing illegals across the border."); 132 CONG. REC. 9,708 (1985). Congressman Mazzoli expanded on how denying employment opportunities to undocumented immigrants was intrinsic to achieving the bill's objective; he noted: "These people do not come to the United States for our spectacular vistas, our climate, or our clean air. They come to work and to improve their lot in life. As long as work is available, they will continue to come." Id.


civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee . . . unauthorized aliens.\footnote{8 U.S.C. § 1324a(h)(2) (2000).}

C. **HOFFMAN PLASTIC COMPOUNDS, INC. V. NATIONAL LABOR RELATIONS BOARD**

In *Hoffman*, Joe Castro, an undocumented immigrant who had acquired his manufacturing job with the defendant through false identification, was laid off after he began participating in a union organization campaign.\footnote{Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002). Hoffman Plastic Compounds, Inc. custom formulates chemical compounds for businesses that manufacture pharmaceutical, construction, and household products. \textit{Id.}} The NLRB found that the defendant had laid off Castro "in order to rid itself of known union supporters" in derogation of the NLRA.\footnote{\textit{Id.}} The NLRB issued an order requiring the defendant to cease and desist its unfair labor practices, post a notice on its premises setting forth the employees’ rights under the NLRA, detailing its unfair labor practices, and awarding Castro backpay.\footnote{\textit{Id.} at 140-41. Backpay is an award available to an employee whose employer has violated the NLRA and consists of lost or unpaid wages or salary that the employee would have earned but for the employer's impermissible conduct. See 29 U.S.C. § 160(c) (2000).}

The Court, striking the award of backpay in a 5-4 decision, commenced its discussion by declaring that while the NLRB has broad authority to select and fashion remedies for violations of the NLRA, this discretion is not unbridled.\footnote{\textit{Hoffman}, 535 U.S. at 142.} Drawing upon a line of Supreme Court cases beginning with *Southern Steamship Co. v. NLRB*,\footnote{316 U.S. 31 (1942). In *Southern Steamship*, a ship-owning employer refused to bargain with a sailors’ union. \textit{Id.} at 33-34. In response, the sailors went on strike while the boat was docked at a distant harbor. \textit{Id.} at 33. The strike was successful and an agreement to negotiate was forged. \textit{Id.} at 35. However, upon returning from their voyage, five strikers were informed that they would not be reshipped. \textit{Id.} The NLRB determined that these sailors’ discharges constituted unfair labor practices and entered an order requiring the employer to cease and desist, bargain with the union, and reinstate the sailors with backpay. \textit{Id.} at 36. The Supreme Court reversed the NLRB’s order in part, holding that the reinstatement and backpay provisions must be overridden to accommodate federal mutiny and shipping articles laws. \textit{Id.} at 46, 48-49. The relationship of seaman with the captain, the Court observed, is different from that of a typical employer and employee as the captain is charged with the lives of his crew and security of the property aboard. \textit{Id.} at 38. The Court continued, stating that Congress found it necessary to enact shipping articles and mutiny laws, generally providing that the crew agrees to be obedient to the lawful commands of their master during the course of a voyage. \textit{Id.} at 39-40. The Court determined that the crew’s conduct in striking was a violation of both the mutiny and shipping articles laws since orchestrating the strike necessarily required the sailors to disregard the captain’s authority and commands. \textit{Id.} at 40.} the Court observed that it...
should not defer to the NLRB’s remedial discretion where the remedy “trench[es] upon” or undermines other federal statutes or policies outside the NLRB’s expertise (i.e. unrelated to the NLRA). The Court concluded that the NLRB’s award of backpay “r[an] counter” to and “trivialize[d]” the IRCA and must yield.

The Court reasoned that an award of backpay “trivialize[d]” the statute’s concept and underlying policies in that it was impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. The court stated, “[e]ither the undocumented alien tenders fraudulent identification . . . or the employer knowingly hires the undocumented alien in direct contravention of . . . IRCA obligations.”

Moreover, the Court found that awarding backpay “r[an] counter” to the objectives of the IRCA by inviting future violations. Permitting an alien to pursue backpay through lengthy proceedings, the Court conceived, would only prolong an undocumented immigrant’s presence in the United States and lead to additional IRCA violations. Similarly, the Court noted that in all cases involving backpay, the potential recipient has a duty to mitigate damages. This duty when assumed by undocumented immigrants, the Court pointed out, would bring about further unauthorized work.

As in Southern Steamship, however, the Court was careful to assure that its decision, meant to shield the IRCA, was not paradoxically used as a sword to diminish the corrective power of the NLRA. Rather, it pointed out that the employer was not getting away “scot-free.”

By permitting reinstatement, the Court concluded, it would be allowing the NLRB to “effectuate the policies of the [NLRA] so single-mindedly that it . . . wholly ignore[s] other . . . [c]ongressional objectives” embodied in the mutiny laws and articles of shipping. Id. at 47. The Court, however, “stressed” that its holding did not thwart the purposes of the NLRA nor reverse the advances the sailors’ union had achieved by striking. Id. at 48. It noted that sailors were still provided redress for their labor grievances by the NLRB’s order requiring the employer to bargain with the union. Id. Moreover, the Court found that nothing would have prevented the union from “striking, picketing or resorting to [some] other means of self-help” so long as the ship was stationed at its home port. Id. at 49.

69. Hoffman, 535 U.S. at 144.
70. Id. at 149-50.
71. Id. at 150.
72. Id. at 148.
73. Id. at 149.
74. Id. at 150-51.
75. Id. at 150.
76. Id. at 150-51.
77. Id. at 151-52.
78. Id. at 152.
as the cease and desist order and the requirement that the employer post a notice to employees detailing its unfair labor practices, as sufficient to effectuate the NLRA’s objectives. 79

D. POST-HOFFMAN: THE FALLOUT

Since being handed down, defense attorneys have quickly seized upon Hoffman and have managed to convince three courts, one each in Kansas, Florida, and New York, to redefine the measure of lost future earnings as applied to undocumented plaintiffs. 80 Undocumented plaintiffs, these courts have concluded, should be limited in their recovery to those earnings they would have accrued in their countries of origin and have employed Hoffman in two ways to undercut recovery at United States wage rates. 81 These courts, citing Hoffman as controlling authority, found no meaningful distinction between backpay and damages for lost future earnings when set against the backdrop of the IRCA. 82 The New York court also found that after Hoffman, the IRCA should be construed as preempting all laws awarding damages to undocumented plaintiffs based on United States wages. 83

In Hernandez-Cortez v. Hernandez, an undocumented plaintiff brought suit for injuries resulting from a car accident in the United States District Court for the District of Kansas. The plaintiff’s injuries were so severe that after being questioned by the INS, he was released to continue living in the United States. 84 The court found that the plaintiff was precluded from recovering damages for lost income based on his projected earnings in the United States due to his undocumented status. 85 In a conclusory decision most noteworthy for its lack of exposition, the court’s discussion amounted to little more than reciting the reasoning in Hoffman. 86

In Veliz v. Rental Service Corp., the decedent, an undocumented immigrant working as a roofer was killed after a lift on which he was standing

79. Id.
83. Sanango, 788 N.Y.S.2d at 321.
85. Id. at *20.
86. Id. at *16-19.
tipped over. 87 Suit was filed in the District Court for the Middle District of Florida against the lift’s manufacturer for damages, including lost future earnings. 88 Though sitting in diversity and expected to apply Florida common law, the court, following Hoffman, instead concluded that Florida’s laws which extend worker’s compensation benefits to undocumented aliens were inapplicable in this instance because “worker’s compensation benefits are significantly different from backpay” or lost wages. 89 Co-opting the language of Hoffman, the court stated, “[i]n addition to trenching upon the immigration policy of the United States and condoning prior violations,” awarding the plaintiff damages based on an undocumented decedent’s earnings at United States wage rates would be tantamount to violating the IRCA because “it is akin to compensating an employee for work [he] cannot lawfully perform.” 90

Sanango v. 200 East Housing Corp. involved an undocumented laborer suing the owner and general contractor of the work-site on which he was injured while working as a subcontractor. 91 The New York Appellate Division, First Department, reversed a jury award for lost future earnings based on the plaintiff’s projected earnings in the United States, professing that it was “compelled” by Hoffman to limit the calculation of lost future earnings to that which the plaintiff would have earned in his country of origin. 92 The court reasoned that “an award of damages herein based on the United States wages plaintiff might have earned unlawfully but for his injury, would ‘unduly trench upon’ IRCA’s federal immigration policy in substantially the same manner as did the NLRB backpay award in Hoffman.” 93 The court added that if “the NLRA is preempted by the IRCA, ‘as Hoffman holds,’ it follows ‘ineluctably’ that a subordinate state law (for lost future earnings) must give way to IRCA, as well.” 94

Notwithstanding the loom of Hoffman, an equal number of jurisdictions addressing this issue have resisted the call to stratify plaintiffs into hierarchical groups based on immigration status for discriminatory dispensation of damages. 95 In Majlinger v. Cassino Contracting Corp., the New York Appellate Division, Second Department split with the First Department by holding that a plaintiff’s undocumented status does not create an

87. Veliz, 313 F. Supp. 2d at 1321.
88. Id. at 1321-22.
89. Id. at 1336.
90. Id.
92. Id. at 319.
93. Id. at 318.
94. Id. at 319.
PROTECTING COURT BORDERS

automatic barrier to future earnings based on projected earnings in the United States.96 There, an undocumented subcontractor was seriously injured while working and brought suit against the general contractor.97 The trial court summarily dismissed the plaintiff's claim for lost future earnings, being bound by the First Department's decision in Sanango.98 The Second Department, reversed, finding the holding in Sanango as to the scope of Hoffman overly broad.99 Above all else, the court believed that if read expansively and out of context, Hoffman would require "the conclusion that any sort of employment-related payment to an undocumented alien violates federal immigration policy" and should be withheld.100 The court also rejected the argument that an award of lost future earnings based on projected earnings in the United States would encourage future undocumented immigration. The court reasoned that undocumented immigrants are motivated to immigrate "so as to earn wages," not with dreams of serious injuries and windfall payments.101 The court ruled that the jury may take the plaintiff's immigration status into account "in determining . . . whether the plaintiff would have continued working in the United States throughout the relevant period."102

In Madeira v. Affordable Housing Foundation, Inc., a New York District Court also weighed in on the issue, upholding the jury's verdict awarding an undocumented plaintiff damages for future earnings based on his projected earnings in the United States.103 The court reasoned that "the jury obviously concluded that [the] plaintiff would have obtained employment in the United States, where he has continuously resided since the accident, if he had not been severely injured by his fall . . . [a]nd the fact is, undocumented aliens do obtain work in the United States."104

Lastly, Tyson Foods, Inc. v. Guzman involved a plaintiff who was permanently handicapped while working in Texas after being struck by a forklift.105 The jury awarded the plaintiff lost future earnings based on his minimum wage salary.106 On review, a Texas state appellate court affirmed, holding that Hoffman did not restrain the court "from awarding [an]
III. ARGUMENT

A. THE MISMEASURE OF HOFFMAN: "A PRINCIPLED READING OF HOFFMAN REVEALS A NARROW RULING ... CONFINED EXCLUSIVELY WITHIN THE FEDERAL ARENA ... AND WITHOUT PRECEDENTIAL VALUE IN THE ADMINISTRATION OF STATE COMMON LAW."

The courts in Veliz, Hernandez, and Sanango depict Hoffman as having precedential value - something that can and must be followed in state courts. This mismeasure of Hoffman, however, is wholly unmoored from the case’s doctrinal underpinnings and particular facts. A principled reading of Hoffman and correct understanding of its origins reveals a narrow ruling solely balancing worker protections under the NLRA with immigration law, confined exclusively within the federal arena, and without precedential value in the administration of state common law.

Hoffman was based on a narrow Supreme Court precept established in Southern Steamship balancing the NLRA with other federal statutes. Southern Steamship was an effort by the Supreme Court to rein in the broad discretion afforded to the NLRB in fashioning remedial orders when they conflicted with or undermined another federal statute outside the NLRB’s authority to enforce. Southern Steamship held that the NLRB cannot fashion a remedial order “so single-mindedly” that it “wholly ignores” other congressional objectives embodied in independent federal laws. However, in ensuring that an NLRB order did not trench upon other federal statutes, the Court was also careful to ensure that its own ruling did make the NLRA subordinate to the interests of the other federal law deemed to be

107. Id. at 244.
108. Id.
111. See id.
112. See id.
113. See id.
trenched upon. Rather, the Court attempted to adjust the NLRB order to accommodate and balance the objectives of both statutes.

In keeping this balance, the Court in *Hoffman* "aimed to show that denying backpay could be reconciled with the judicial precedent and policy goals of the NLRA." Congress's primary purpose in enacting the NLRA was to "stop and prevent unfair labor practices" and the NLRB's power to order affirmative relief in favor of an individual victim is "merely incidental to . . . [that] purpose." Accordingly, the Court in *Hoffman* concluded that the primary objective of the NLRA was fully realized without awarding backpay because the cease and desist order, contempt sanctions, and public notice requirements in the NLRB's order were sufficiently authoritative to "stop" the employers unfair labor practices and austere enough to "prevent" future violations, i.e., these remedies were sufficient to "effectuate national labor policy." The Court, therefore, sought to achieve the objectives of both statutes and found that awarding backpay "would harm the IRCA and, conversely, that denying this protection could further immigration enforcement without harming labor law." *Hoffman*, therefore, merely took the *Southern Steamship* doctrine, aimed exclusively at integrating the NLRA with other federal schemes by checking the discretion of the NLRB, one small step further by applying it to the IRCA. This understanding is certainly incongruous with the giant interpretive leap made in *Hernandez*, *Veliz*, and *Sanango*, holding that state common law for damages, having no relation to the NLRA, can be similarly rewritten when deemed to merely "trench upon" the IRCA. In fact, the question of whether state common law uniformly dispensing damages for lost future earnings to undocumented and documented plaintiffs alike is valid in view of the IRCA necessarily implicates federalism and separation of powers considerations. Accordingly, a state law's validity must be evaluated under the more exacting analysis of the preemption doctrine.

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114. See id.
115. See id.
118. *Id.*
123. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 374-76 (2d ed. 2002). A state law can be invalidated pursuant to three Supreme Court doctrines. "If Congress has passed a law and it is a lawful exercise of congressional power, the ques-
which does not include considerations into whether the state law "trench[es] on," "runs counter" to, or "trivializes" federal law. 124 Sanango, while correctly acknowledging the germaneness of the preemption doctrine to this question,125 utterly failed in administering its principles and formulaic tests (as will be explored in a later section) and, accordingly, reached the wrong conclusion.

B. EVEN IF APPLICABLE IN ILLINOIS CIVIL COURTS, HOFFMAN IS DISTINCT:

As previously discussed, Hoffman, in keeping with Southern Steamship, sought to balance the application of the NLRA with the IRCA to ensure the objectives of both statutes would be effectuated.126 Denying compensation for future earnings at projected earnings in the United States, unlike the middle path forged by Hoffman, would completely frustrate the singular objective of Illinois personal injury law.

This objective is compensating the victim for his injuries so that he is put in the same position he would have been in but for his injury, thereby promoting "corrective justice."127 Unlike the NLRA, Illinois personal injury law possesses only one form of redress in its remedial arsenal – money damages.128 As such, how well Illinois courts achieve the sole purpose of its personal injury law is consonant with how well money damages restore plaintiffs to their former, pre-injury position.

As was also stated before, a large percentage of undocumented immigrants work and live permanently in the United States and are tied to this country by their families and communities.129 To deny individual plaintiffs emerging from this enormous group the right to earnings that they, no doubt, would have received in the United States if they had not fallen victim to another’s wrongdoing is essentially a denial of this reality and constitutes a significant impediment to realizing the sole objective of Illinois personal injury law.

125. See supra Part II.A.
126. See supra Part II.B.
127. See supra Part II.A.
129. See supra Part II.A.
Suppose, for example, that Fred is an undocumented immigrant from Mexico living in Chicago. Fred is thirty years old and has two children. His children are two of the 3.1 million children who are United States citizens with an undocumented parent. Fred, understandably, has no intention of abandoning his children by emigrating from the United States. Like most undocumented immigrants, Fred is employed, works full time and earns $7.00 an hour, the average hourly wage for an undocumented immigrant in Chicago. This amounts to $20,440 annually. Suddenly, Fred is injured by the tortious conduct of another and is no longer able to work. Moreover, suppose that, like the plaintiff in Hernandez, Fred’s injuries are so serious that is unable to leave the country. Assuming that Fred would have retired at sixty five and his wages remained constant, Fred could have expected to earn $495,040 in wages. However, if compensated for wages he might be expected to earn in Mexico, these damages would be drastically diminished. The average annual salary in Mexico is approximately $1,460. At sixty five and assuming he would be an average wage earner in Mexico, Fred would be expected to earn $49,640, or about 7% of his expected earnings in the United States. Seven-percent of the wages Fred would have earned means Fred’s children will have to make do with 7% of the support Fred would have provided them. The ripple effects of Fred’s injury could be severe. Fred’s family members or friends, out of vengeance, may attempt to seek their own retribution on the tortfeasor. Additionally, the absence of a meaningful substitute for Fred’s wages could precipitate the family’s rapid decline into a state of poverty - the root of any number of other social ills. Far from making the victim whole, Illinois courts have now set Fred and his family up for a trying, if not ruinous, future.

Furthermore, denying compensation for future earnings at projected earnings in the United States would significantly frustrate Illinois personal injury law by deterring undocumented immigrants from bringing claims in the first place. By making a plaintiff’s award of future earnings contingent

131. See Mehta, Theodore, Mora & Wade, supra note 18, at 12.
132. $7.00 * 8 hours * 365 = $20,440.
134. $20,440 * 34 years = $694,960.
136. $1,460 * 34 years = $49,640.
137. $49,640 / $694,960 = 7.14%.
upon immigration status, Illinois courts would necessarily be injecting an additional step into the discovery process - inquiring into a plaintiff’s immigration status. This would have the effect of chilling the willingness of documented and undocumented victims alike from seeking redress for their injuries; this chilling effect was explained in *Rivera v. NIBCO, Inc.*. 138

There, Latin and Asian immigrant plaintiffs who were once employed by the defendant, brought suit in district court under Title VII after being laid off. 139 The plaintiffs sought backpay, compensatory damages, punitive damages, and attorneys’ fees. 140 The plaintiffs ended up securing a protective order that precluded the defendant from inquiring into their immigration status during discovery. 141

The Ninth Circuit upheld the protective order, ruling that permitting the disclosure of a plaintiff’s immigration status would “unacceptably” chill a plaintiff’s “willingness and ability” to effectuate their rights and enforce the provisions of Title VII. 142 Granting employers this right of inquiry, the court observed, would permit employers to “raise implicitly the threat of deportation and criminal prosecution every time a worker . . . reports illegal practices,” allowing countless acts of illegal conduct to go unreported. 143 Even documented workers, the court determined, would be chilled out of fear that an inquest into their immigration status would reveal the undocumented statuses of family and friends or defects in their own, seemingly, lawful standing. 144

The court then distinguished itself from *Hoffman*. 145 Foremost of the distinctions drawn by the court was that Title VII depends principally on private actions to enforce its provisions, whereas, the NLRA is enforced through the actions of the NLRB. 146 The court found this difference significant because an immigrant plaintiff privately suing under Title VII would be far more easily chilled from bringing or carrying on with an action, all on his own, under the threat of having his immigration status scrutinized than would the NLRB if directed to disclose the immigration status

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138. 364 F.3d 1057 (9th Cir. 2004).
139. Title VII, part of the Civil Rights Act of 1964, makes it unlawful for an employer to hire or discharge any individual, or otherwise discriminate against employees because of their race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (2000). Title VII permits individuals who have been discriminated against to prosecute their own claims and seek damages, including, backpay, compensatory damages, punitive damages, and attorney fees. *Id.*
140. *Rivera*, 364 F.3d at 1061.
141. *Id.*
142. *See id.* at 1064-65.
143. *Id.* at 1065.
144. *Id.*
145. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004).
146. *See id.*
of an unfair labor practice victim.\textsuperscript{147} Under the NLRA, the victim of an unfair labor practice does not even have to report an abuse or file the complaint – it can be filed by anybody.\textsuperscript{148} Once filed, the NLRB, under its prodigious authority and drawing upon its own resources, is responsible for investigating and prosecuting the charge with or without the cooperation of the actual victim.\textsuperscript{149} Consequently, the court found that discovery into a Title VII plaintiff’s immigration status has far greater capacity to undermine the enforcement and objectives of Title VII than an analogous inquiry into the immigration status of the victim of an unfair labor practice.\textsuperscript{150}

It goes without saying that documented and undocumented plaintiffs in Illinois suing for personal injury, like Title VII plaintiffs, may likely forego seeking compensation for their injuries if defendants are permitted discovery into their immigration statuses, thereby undermining the objective of Illinois personal injury law. Faced with the catastrophic prospect of deportation, uprooting immigrants and loved ones from their families, homes, and communities,\textsuperscript{151} a population of entitled plaintiffs would be effectively deterred from bringing claims or coerced into abandoning their rights when threatened by unscrupulous defendants. This chilling effect would not only fly in the face of the aims of Illinois personal injury law (i.e. making the victim whole), but would also unduly restrict the ability of Illinois courts to further public policy commitments to “punish a wrongdoer and to deter the wrongdoer and others from committing similar acts in the future” through the imposition of punitive damages.\textsuperscript{152} While it is impossible to say how many meritorious suits the immigrant population would likely disavow in order to avoid even the possibility of detection, to offer some perspective the Supreme Court has asserted that the mere threat of deportation is enough to induce an undocumented immigrant into involuntary servitude.\textsuperscript{153}

Moreover, like Title VII and unlike the NLRA, consummating the aims of Illinois personal injury and punitive damages law depends entirely on the initiation of individual actions. As stated in \textit{Rivera}, immigrant victims are far more likely to shrink from enforcing their rights when faced

\begin{enumerate}
\item \textsuperscript{147} See id. at 1064-70.
\item \textsuperscript{148} See Jeffrey A. Norris & Michael J. Shershin, Jr., How To Take A Case Before the NLRB 314-16 (6th ed. 1992) (giving examples of the breadth of this standing rule, including: an attorney on behalf of individual employers, a “stranger” who is not an employee, a discriminatorily discharged employee on behalf of himself and other employees, a labor organization, and a civil rights group).
\item \textsuperscript{149} DOUGLAS E. RAY, Calvin William Sharpe & Robert N. Strassfeld, Understanding Labor Law 32-37 (1999).
\item \textsuperscript{150} See \textit{Rivera}, 364 F.3d at 1064-70.
\item \textsuperscript{151} See \textit{supra} Part II.A.
\item \textsuperscript{152} Kleinwort Benson N. Am., Inc. v. Quantum Fin. Servs., Inc., 692 N.E.2d 269, 275 (Ill. 1998).
\item \textsuperscript{153} See United States v. Kozminski, 487 U.S. 931, 948 (1988).
\end{enumerate}
with intrusive discovery than the NLRB when enforcing an immigrant victim's rights under the NLRA. Consequently, while the Hoffman decision, recognizing the right of employers to delve into the immigration status of employees seeking backpay, is unlikely to scare off the NLRB from attending to the aims of the NLRA, an analogous discovery practice pertaining to tort victims goes much further in subduing the objectives of Illinois personal injury law.

In sum, damages for lost future earnings, especially in cases involving serious injury, are an indispensable part of compensating an undocumented immigrant and thereby effectuating the purposes of Illinois personal injury law. Given the prevalent and often drastic disparities between United States wages and those in other countries, in many instances, denying future earnings calculated by projections based on United States salaries is akin to denying them altogether. In addition, amending Illinois common law so that damage amounts turn on the immigration status of a plaintiff would have the insidious effect of tempering the willingness of immigrant victims, who for good reason would prefer to avoid altogether discovery into their immigrant standing, from seeking any compensation. All of this has the consequence of relegating immigrant plaintiffs to a far inferior position than the one they would have occupied but for the injury and, consequently, provoking further social costs and problems for Illinois. Unlike the NLRA, which can still fully effectuate its purpose without backpay by falling back on any number of alternative measures and the authority of the NLRB, Illinois personal injury law is fatally impaired if damages for future earnings are made subordinate to the IRCA. Far from balancing interconnected laws to ensure the objectives of both can be achieved, denying future earnings at United States wages requires Illinois courts to surrender, in large measure, its own objectives and purposes for those of the IRCA.

C. EVEN IF APPLICABLE IN ILLINOIS CIVIL COURTS, HOFFMAN IS DISTINCT: BACKPAY IS A FORM OF COMPENSATION FOR LOST WAGES THAT WERE DIMINISHED IN THE PAST WHEREAS LOST FUTURE EARNINGS IS COMPENSATION FOR THE FUTURE

The thrust of Hoffman seems to be powered by an alluringly simple syllogism. Undocumented immigrants are not legally entitled to earn wages in the United States. Backpay is a form of damages that compensates a plaintiff for wages he should have earned at United States wage rates. Therefore, an undocumented immigrant is not entitled to backpay.

154. See Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-70 (9th Cir. 2004).
155. See supra notes 14, 17.
156. See supra Part II.B.
157. See supra Part II.C.
The court in Veliz adopted this logic without prevarication, holding that awarding lost wages would be tantamount to violating the IRCA because “it is akin to compensating an employee for work [the plaintiff] cannot lawfully perform.”158 However, Hoffman’s progression in logic, as the court in Veliz failed to recognize, is reduced to a non sequitur if an undocumented immigrant awarded backpay is substituted with one who is awarded damages for future United States wages that he may be lawfully entitled to earn in the future.

Backpay is a form of compensation for lost wages that were diminished in the past whereas lost future earnings is compensation for the future—this matters! With backpay, a court can glean with certainty the immigration status of a plaintiff in the past and, therefore, whether or not he may have been entitled to compensation at United States wage rates. Lost future earnings, conversely, is a form of compensation for the future and the future immigration status of any undocumented immigrant, if the past is any indication, is subject to change.159 As a result, compensating an undocumented immigrant for United States wages he may be lawfully entitled to earn as his immigration status is adjusted cannot be said to trench upon the IRCA in a manner interchangeable with backpay.

The prevailing current of pushing undocumented immigrants into the ranks of the documented has already been described.160 Nearly a quarter of all card carrying immigrants had at one time been undocumented.161 Moreover, over 1.5 million green cards were conferred to undocumented immigrants in the 1990’s alone,162 and in 2005, another estimated 1.5 million undocumented candidates had full legal statuses pending.163 Therefore, even assuming Hoffman holds precedence in Illinois state courts, the arch of its reasoning is without a cornerstone when applied to personal injury cases where the plaintiff’s immigration status is, as the data reveals, reasonably susceptible to adjustment.

159. See supra Part II.A.
160. See supra Part II.A.
D. **EVEN IF APPLICABLE TO ILLINOIS CIVIL COURTS, HOFFMAN IS DISTINCT: PERMITTING UNDOCUMENTED IMMIGRANTS TO RECOUP LOST FUTURE EARNINGS AT PROJECTED EARNINGS RATES IN THE UNITED STATES WOULD NOT PROLONG AN UNDOCUMENTED IMMIGRANT'S PRESENCE IN THE UNITED STATES, THEREBY ENCOURAGING FUTURE VIOLATIONS.**

One repercussion of the NLRB's order in *Hoffman* that the Court sought to avoid by denying backpay deals with future IRCA violations. The Court foresaw the possibility of future violations during the period that the undocumented victim's presence in the United States was prolonged while awaiting backpay during the NLRB proceedings. Under the NLRA, backpay and reinstatement are the only individual remedies available to a victim of an unfair labor practice. As reinstatement would be prohibited by the IRCA, refusing backpay, the Court likely thought, would effectively abate any self-interest an undocumented immigrant would have to remain in the United States.

However, permitting an undocumented immigrant to seek lost future earnings at projected earnings in the United States would not prolong an undocumented immigrant's presence in the United States, thereby inviting future violations. This is because refusing such an award would do little to negate an undocumented immigrant's incentive to remain in the United States, to seek compensation for lost future earnings at rates defined by his country of origin, or to redress other injuries.

A personal injury victim can seek compensation for all losses proximately caused by the tort, including: past and future medical and other expenses, punitive damages, past and future suffering, disability, disfigurement, and loss of society and consortium. Given that these other forms of damages may be intrinsic to ensuring an injured party can afford the past and future costs of required expenses arising from the injury, denying a plaintiff future earnings at projected earnings in the United States, unlike backpay, is unlikely to abate an undocumented immigrant’s incentive in seeing a personal injury action through to its conclusion.

Another repercussion that the Court was concerned about was the possibility that the duty to mitigate damages, a requisite undertaking for all backpay claimants, would further instigate IRCA violations. However, a duty to mitigate applies only to damages already incurred that could have

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been avoided, not a future estimation into the degree an individual's future earning capacity is impaired.

IV. PREEMPTION

A. PERSPECTIVE

As recognized in *Sanango*, the proper challenge to a state law thought not to square with federal law or congressional authority is preemption. However, where the court in *Sanango* incorrectly and presumptively found the New York law for lost future earnings preempted by the IRCA as to undocumented immigrants in light of the decision in *Hoffman*, a principled preemption analysis requires a more in-depth discussion.

Preemption derives from the Supremacy Clause, which provides that the Constitution and laws made pursuant to it are the supreme law of the land and, accordingly, the Supreme Court has held inimical state legislation void. The Supreme Court has fleshed out, conceptually, two situations in which preemption is found. The first of these situations is express preemption. Express preemption is found where Congress has explicitly pronounced that federal law is exclusive in a particular legislative field. The second is implied preemption. The Court has identified three types of implied preemption. First, implied preemption can be found where there is a "conflict between federal law so that compliance with both state and federal legislation is a physical impossibility." Second, implied preemption is found where the state law "impedes the achievement" of federal law by standing as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The third kind of implied preemption is field preemption. Field preemption adheres where the scheme of federal law and regulation is "so pervasive as to make reasonable the inference that Congress left no room for the states to supple-

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168. DAN B. DOBBS, THE LAW OF TORTS 510 (2000) (stating, "[t]he first rule of [mitigation] denies the plaintiff a recovery for negligently inflicted damages that she could have avoided or minimized by reasonable care or expenditure").
170. *See Sanango*, 788 N.Y.S.2d at 319; *see also supra* Part III.A.
171. U.S. CONST. art. VI, cl. 2.
173. *Id.* at 98.
174. *Id.*
175. *Id.* at 96.
176. *Id.* at 98.
ment it.”

Because excluding state legislation in particular fields necessarily treads upon the “very sensitive area” of state sovereignty and separation of powers by restricting the states’ room for governance, the Court declines to find preemption unless it is the “clear and manifest purpose of Congress.”

Beginning in the late 19th century, the Supreme Court came to see federal control over the area of foreign affairs, and immigration in particular, as supreme and began preempting state laws intruding into this area even in the absence of grounds for express or implied preemption. More specifically, the Court concluded that the federal government has plenary and exclusive authority to directly regulate all considerations within the realm of immigration, which the Court first defined in the landmark case *Truax v. Raich* as the conditions under which a “legal immigrant may enter, remain, or acquire naturalization and the regulation of their conduct while in the country.”

Because Congress is solely responsible for immigration, state regulation in this area is forbidden despite the fact that Congress has not affirmatively exercised its power through the enactment of positive immigration law. This federal authority proceeds from various sources, including the federal government’s power to establish uniform rules of naturaliza-

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180. *Id.*
181. *Id.*
182. *See Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).*
183. *See Truax v. Raich, 239 U.S. 33, 42 (1915) (holding that the “authority to control immigration . . . is vested solely in the Federal Government”); Takahashi v. Fish & Game Comm., 334 U.S. 410, 419 (1948) (holding that discriminatory state laws applicable to aliens were preempted as states “can neither add nor take away from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens”).
184. *Takahashi, 334 U.S. at 419 (emphasis added); see generally Truax, 239 U.S. 33.* Truax involved an Austrian immigrant who sought to invalidate an Arizona law that sanctioned employers who commissioned more than five workers from having 20% or more of his ranks staffed with non-citizens. *Id.* at 36. Despite the fact that Congress had not raised any laws regarding employment quotas and immigrants, the Court upheld Raich’s preemption challenge on the grounds that the scope of the state law brought it “into hostility” with congressional authority over immigration “vested solely” in the federal government. *Id.* at 40. The Court reasoned that denying aliens the opportunity of earning a livelihood was consonant with denying them entrance and abode as “they cannot live where they cannot work.” *Id.* at 42. Congress, the Court indicated, by granting entrance to immigrants, intended that they would enjoy in a “substantial sense . . . the privileges conferred by admission” in all states. *Id.* This law, the Court concluded, would impinge on a federal interest by permitting states to dictate the terms of its “hospitality,” thereby segregating aliens in more accommodating states. *Id.*
185. *See Truax, 239 U.S. at 41-42.*
tion, its power to regulate commerce with foreign nations, and its broad authority over foreign affairs.

However, despite the breadth of federal supremacy in the area of foreign affairs and immigration, some courts have recognized that not every law affecting aliens or having foreign resonances is preempted. "Otherwise, for instance, states could not apply generally applicable civil and criminal law to aliens within the jurisdiction because of potential external effects." Rather, preemption is reserved for those laws which, owing to the execution of their provisions, impinge on or diminish a federal interest or purpose.

*Hines v. Davidowitz* held that, in the event Congress has acted affirmatively and created a complete scheme of regulation pursuant to its authority over immigration, state laws covering the identical subject are preempted. In *Hines*, the validity of Pennsylvania’s 1939 Alien Registration Act was before the Supreme Court. The Act: 1) required all legal aliens eighteen and over to register once a year; 2) required them to carry a registration card at all times for inspection by state officials upon request; and 3) imposed criminal penalties if an alien neglected to comply with its provisions. A year after the Pennsylvania Act’s passage, Congress enacted its own Alien Registration Act. The federal law diverged from that of Pennsylvania in that it required only a single registration, did not require the carrying of registration cards, and only criminalized willful failures to register.

"[I]n the general field of foreign affairs," the Court began, "the federal government’s power surpasses that of the states." The original and constitutional purpose of this ascendancy, the Court explained, was to permit the federal government to act as steward for the interests of the states where

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187. Id. at cl. 3.
188. *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936) (tracing the transfer of the foreign affairs power from Great Britain to the federal government upon independence which existed without regard to any express constitutional grant); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889) (viewing the power over foreign affairs as an incident of national sovereignty as every national government has the inherent authority to protect matters of national public concern).
191. 312 U.S. 52 (1941).
192. Id. at 59-60.
193. Id. at 60-61; *see generally* 8 U.S.C. § 1302 (1994).
195. Id. at 62.
those interests are collective – as is the case with their relations with other nations. Extracting the words of various constitutional framers, the Court stated that it was intended that this field of foreign affairs was to be left totally devoid of “local interference,” as it was perceived dangerous to allow provincial state legislation, outwardly offensive to other nations, to exist, which could embroil the whole nation in conflict. Drawing on experience, the Court found that “injurious discrimination” against the nationals of other countries had lead to controversies of the “gravest moment, sometimes . . . war.” Accordingly, state immigration laws potentially imposing “indiscriminate and repeated interception” or interrogation of non-nationals, the Court concluded, bore inseparably on the welfare of all states and was within that field of foreign relations where federal law was supreme.

Though having established that the Pennsylvania Act could be invalidated as an impermissible intrusion into the federal government’s exclusive control over the field of foreign affairs, the Court set out to establish that it was, alternatively, impliedly preempted as it “st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” as articulated in the Federal Act. In assessing the legislative histories, the Court found that Congress was aware of the “deep-seated” hostility in the United States to registration acts, which subjected aliens to burdensome, irritating, and intimidating registration systems and conflicted with the “fundamental principles of our free government.” The Court further discovered that Congress had declined to include many of the provisions in the Federal Act that were the hallmarks of the Pennsylvania Act, with the purpose of forging a middle ground and ensuring the Federal Act comported with notions of free government. In other words, the Pennsylvania Act’s imposing certain requirements on immigrants not included in the Federal Act conflicted directly with the countervailing judgment of Congress not to impose these requirements. In view of this congressional intent, the Court concluded that the Pennsylvania Act “st[ood] as an obstacle” to the federal objective of ensuring that aliens remain unshackled by

196. *Id.* at 63.
197. Hines v. Davidowitz, 312 U.S. 52, 63-64 & n.12 (1941) (“The peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.” (quoting THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).
198. *Hines*, 312 U.S. at 64.
199. *Id.* at 66-67.
200. *Id.* at 67.
201. *Id.* at 71.
202. *Id.* at 71-73 (stating that Congress had dismissed earlier provisions requiring card carrying, multiple registrations, and criminal penalties for non-willful violations).
mandates in the Pennsylvania Act deemed in conflict with free government and that it sandbagged a legislative scheme deemed appropriately balanced. Consequentially, the Court found indicia of an intent on the part of Congress to occupy the field based on statements in the Federal Act's legislative history that Congress' avowed purpose in passing the Act was to create a "harmonious whole."  

De Canas v. Bica, the seminal case in the context of this section, held that a state law is not preempted if it indirectly regulates undocumented immigrants or deals in an area peripherally addressed by federal immigration law. In De Canas, migrant workers sought to invalidate a California statute, enacted prior to the IRCA, imposing sanctions on an employer who knowingly employed undocumented immigrants. The Court, in a unanimous decision, admonished that "[l]ittle aid can be derived from the vague" mantra reasserting that Congress has occupied the field of immigration, thereby excluding all state legislation, no matter how remote, touching on the field. The Court discerned that its precedent did not reveal "that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted," especially if the impact on immigration is merely "speculative and indirect." Rather, the Court stated that state legislation, enacted pursuant to police powers, should only be precluded in view of "persuasive reasons" grounded in three inquiries: 1) whether the state statute is a direct regulation of immigration; 2) whether Congress, by so completely occupying a regulatory field through the enactment of positive legislation, has indicated its "clear and manifest" intent to effect a "complete ouster of state power - including state power to promulgate laws not in conflict with federal laws," and 3) whether the state statute conflicts with federal law by standing as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."  

First, the Court ruled that the California statute was not an immigration regulation. The Court reiterated that the power to regulate immigra-

204. Id. at 71-74.  
205. Id. at 72-73.  
207. Id. at 352 n.1.  
208. De Canas, 424 U.S. at 360 n.8 (quoting Hines v. Davidowitz, 312 U.S. 52, 78 (1941) (Stone, J., dissenting)).  
211. Id. at 357.  
212. Id. at 363 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The Court declined to address this third inquiry as the court of appeals had not reached the issue and the record before it was incomplete. Id.  
213. Id. at 354-57.
tion was exclusively a federal responsibility and defined “immigration regulation” in accordance with *Truax* as “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”

By reaffirming *Truax’s* definition limiting congressional control over immigration to “legal entrants,” the Court seemed to intimate that a state’s regulation of undocumented immigrants was outside the realm of federal dominion. Moreover, finding that the California statute was enacted within the bounds of California’s police power “to protect workers within the state,” and that the statute’s purpose was merely to “strengthen [California’s] economy by adopting federal standards against . . . state employers,” the Court concluded that the statute had only a “purely speculative and indirect impact on immigration.”

Second, the Court determined that the respondents had failed to demonstrate that, in passing the Immigration and Nationality Act (INA), Congress had “unmistakably so ordained” its intent to “occupy the field” to the exclusion of California law. In its independent review of the INA and its legislative history, the Court found no mention of any federal interest in precluding state legislation governing the employment of undocumented immigrants nor did it glean such a purpose from the comprehensiveness of the scheme itself. The Court reasoned that the INA dealt exclusively with the terms and conditions of admission and the comprehensiveness of the statute was more an indication of the “complexity” of the subject matter than an indication of a Congressional intent to preclude state legislation.

Lastly, the Court found its decision consonant with earlier precedent set forth in *Hines*. In *Hines*, the Court explained, the Pennsylvania Act sought to remedy a broader societal concern federal legislation had already addressed. While here, the Court noted, the INA made no mention of in-

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214. *Id.* at 355 (emphasis added).
216. *See id.*
217. *Id.* at 356.
218. *Id.* at 355.
219. *Id.* at 355.
220. 8 U.S.C. §§ 1101-1537 (2000). Essentially the INA consolidated previous immigration laws into one coordinated statute; its provisions set regional quotas on the number of immigrant entrants, established preferences for types of immigrants, and required the INS to share duties with other agencies at ports of entry. *See also De Canas*, 424 U.S. at 359 (“The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.”).
221. *De Canas*, 424 U.S. at 357-59.
222. *Id.*
223. *Id.* at 357-60.
224. *Id.* at 362-63.
corporated provisions targeting the employment of undocumented immigrants.\(^{225}\) Furthermore, the Court observed that, unlike *Hines*, the purpose of the California Statute was "to remedy local problems, and operate[d] only on local employers."\(^{226}\)

B. ARGUMENT: "ILLINOIS LAW, AS IT STANDS, UNIFORMLY DISPENSING DAMAGES FOR LOST FUTURE EARNINGS IS NOT PREEMPTED..."

*De Canas* will serve as the framework for our discussion. Under *De Canas*, in order to survive a preemption challenge, the state law must not: 1) constitute an impermissible regulation on immigration; 2) operate in the same arena in which Congress had intended to fully occupy with its own legislative scheme; or 3) stand as an obstacle to congressional objectives.\(^{227}\) Illinois law for lost future earnings as it stands, uniformly measuring damages for lost future earnings, is not preempted under any of these *De Canas* tests.

First, Illinois uniform damage law for lost future earnings is not an impermissible immigration regulation having the tendency to meddle in foreign affairs. Illinois law for lost future earnings was set down long before the evolution of modern United States immigration policy and designed without regard to influencing or supplementing this policy.\(^{228}\) Rather, Illinois law for lost future earnings was established, like the California law at issue in *De Canas*, to further an interest particular to the state and within its police power—promoting the public good by ensuring full and fair redress is available to persons injured within state borders.\(^{229}\)

More importantly, Illinois uniform law for lost future earnings cannot be said to be an immigration regulation as defined by the Supreme Court.\(^{230}\) Specifically, providing undocumented immigrants with lost future earnings at projected earnings in the United States has no direct impact on what persons may "be admitted into the country" nor the "conditions under which legal entrant[s] may remain."\(^{231}\) While arguably, Illinois uniform law for

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\(^{225}\) Id.

\(^{226}\) Id. at 363.


\(^{228}\) See generally Chicago & J.E.R. Co. v. Spence, 213 Ill. 220 (1904); *supra* note 39.

\(^{229}\) See id.; see also Geir v. Am. Honda Motor Co., 529 U.S. 861, 894 (1999) ("Because of the role of states as separate sovereigns in our federal system, we have long presumed that state laws -- particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the states' historic police powers -- are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.").

\(^{230}\) See *De Canas*, 424 U.S. at 355; Takahashi v. Fish & Game Comm., 334 U.S. 410, 419 (1948). See generally Truax v. Raich, 239 U.S. 33 (1915).

\(^{231}\) See *De Canas*, 424 U.S. at 355 (emphasis added).
lost future earnings pertains to immigration on account of the fact that it may operate on immigrants, its effect on immigration is manifestly indirect and purely speculative. Indeed, if Illinois law for lost future earnings is an impermissible regulation on immigration, so too are any number of generally applicable state laws applying to immigrants and citizens alike.

Nor can Illinois common law uniformly dispersing damages for lost future earnings be said to interfere with the federal government’s dominion over foreign affairs by sowing the seeds of discontent abroad. As stated in *Hines*, outwardly offensive state laws having the potential to debase United States international relations constitute immigration regulations and are preempted. The Court in *Hines* invalidated the Pennsylvania Registration Act out of concern that it could foment international controversy by subjecting nonnationals to "injurious discrimination" through repeated interference and interrogation. Illinois law, however, indiscriminately providing a uniform means of calculating lost future earnings for citizens, immigrants, and undocumented immigrants alike, creates no similar provocation.

Second, Congress has not "unmistakably so ordained" its intent to occupy a regulatory field with the enactment of the IRCA to the exclusion of Illinois’ uniform law for lost future earnings. To begin with, even assuming Congress intended for the IRCA to be sovereign within its field (i.e. regulating the relationship between employers and undocumented immigrants), Illinois damages law for lost future earnings strays far outside the limits of this "field."

In *Hines*, where the Court found that the Pennsylvania Registration Act illicitly encroached upon the field intended by Congress to be occupied exclusively by the Federal Registration Act, the Pennsylvania Act was directed at the same individuals, employed almost identical mechanisms of enforcement, and sought to encourage the same, non-local objectives as the INA. Unlike *Hines*, Illinois damages common law for lost future earnings shares no such resemblance with the IRCA. Whereas the IRCA is directed primarily at the employers and their hiring conduct, Illinois uniform law for lost future earnings sets its focus on the victims of tortious conduct. Whereas the IRCA institutes an extensive system for verifying an employee’s eligibility to work by obligating the employer to check specified documents and punishes those seeking to circumvent the system as its
mechanism of enforcement, Illinois uniform law for lost future earnings calls only for payment of money to the injured party.\textsuperscript{239} Whereas the IRCA seeks to effect a minimization of undocumented immigration on a national level, Illinois uniform law for lost future earnings undertakes only to compensate the victim of tortious conduct in order to resolve local, individual disputes.\textsuperscript{240}

In addition, as with the INA in \textit{De Canas}, there is no mention in either the IRCA’s statutory language or legislative history of any indication “unmistakably so ordain[ing]” Congress’ intent to occupy the field to the exclusion of Illinois uniform law for lost future earnings. As highlighted, the IRCA explicitly identifies for preemption only state laws imposing civil or criminal sanctions on employers who “employ, or recruit or refer for a fee for employment” undocumented immigrants.\textsuperscript{241} Far from a Congressional expression of intent to preempt Illinois’ uniform law for lost future earnings, the explicit language of the IRCA indicates that Congress has already manifested its limited design with respect to the IRCA’s preemptory reach. Moreover, not one of the hundreds of Senators and Congressmen debating the IRCA ever even hinted that this bill would have any impact on the administration of state common law, let alone trump it.

Third, Illinois common law uniformly dispensing damages for lost future earnings to all plaintiffs does not “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”\textsuperscript{242} in enacting the IRCA. Although the \textit{De Canas} Court declined to rule on this issue for procedural reasons,\textsuperscript{243} the Court in \textit{Hines}, operating under this third inquiry, preempted the Pennsylvania Registration Act.\textsuperscript{244} The Court found that the Pennsylvania Act, containing certain enforcement requirements explicitly rejected by Congress when debating the Federal Registration Act as anathema to notions of free government, undermined Congress’ purpose of forging a “middle ground” (i.e. not imposing such burdensome restrictions on undocumented immigrants).\textsuperscript{245} Unlike the Federal Registration Act, there is no indication exhibited in the IRCA’s provisions or legislative history of a Congressional purpose to deny undocumented immigrants any type of remuneration based on United States employment wages regardless of its source. Rather, Congress’ sole purpose in enacting the

\begin{itemize}
\item\textsuperscript{239} See \textit{id}.
\item\textsuperscript{240} See \textit{id}.
\item\textsuperscript{241} 8 U.S.C. § 1324(a)(2) (2000).
\item\textsuperscript{242} \textit{Hines} v. Davidowitz, 312 U.S. 52, 67 (1941).
\item\textsuperscript{243} See supra note 202.
\item\textsuperscript{244} \textit{Hines}, 312 U.S. at 62.
\item\textsuperscript{245} \textit{Id.} at 73-74.
\end{itemize}
IRCA was to reduce undocumented immigration by prohibiting remunera-
tion, specifically, through employment.\textsuperscript{246}

Moreover, Congress’ purpose in enacting the IRCA of reducing un-
documented immigration is in no way impeded by Illinois common law in
that the possibility of an award for future earnings at projected earnings in
the United States does not encourage undocumented migration or an un-
documented immigrant’s incentive to remain in the United States. Such a
speculative future prospect of receiving damages for lost future earnings at
projected earnings in the United States could not realistically be surmised to
factor into the weighty decision to leave one’s home and move to another
country or remain in the United States.

Finally, it should be noted that permitting an undocumented immigrant
an award of future earnings at projected earnings in the United States would
in no way interfere with the implementation of the IRCA, nor its corrective
provisions designed to fully achieve its purposes. Specifically, fully com-
pensating an undocumented immigrant for lost wages would not interrupt
the administration of the verification system, prevent an undocumented
immigrant who subverts the employer verification system from being
criminaly prosecuted, or mitigate the fines an employer would face if he
knowingly hired an undocumented immigrant or failed to comply with the
verification system.\textsuperscript{247}

It might be argued that a uniform award of lost future earnings “stands
as an obstacle to the accomplishment” of Congress’ purposes in enacting
the IRCA by “trivializ[ing]” its provisions in the same way as an award of
backpay.\textsuperscript{248} In Hoffman, the Court found the award of backpay trivialized
the IRCA because backpay is an award for wages that should be unavail-
able to an undocumented immigrant, but for some party contravening the
IRCA.\textsuperscript{249} The Court seemed to find discordant the conceptual incongruity
of awarding a surrogate United States salary to an individual Congress has
sought to preclude from earning the same through United States employ-
ment.\textsuperscript{250}

However, regardless of how cerebrally unsettling this contradiction is
in the abstract, its recognition is not enough to pass muster under a princi-
pled application of the preemption doctrine. In passing the IRCA, Congress
set out to deny undocumented immigrants actual employment, not all forms
of compensation measured at United States wage rates. As such, an un-
documented plaintiff’s award for lost future earnings measured at projected

\textsuperscript{246}. See supra Part III.A.
\textsuperscript{247}. See supra Part II.B.
\textsuperscript{248}. See Hines, 312 U.S. at 67; Hoffman Plastic Compounds, Inc. v. NLRB, 535
\textsuperscript{249}. Hoffman, 535 U.S at 150.
\textsuperscript{250}. See id.
earnings in the United States presents no obstacle to the IRCA in accomplishing its purpose. While some might find compensating an undocumented plaintiff for lost future earnings at projected earnings in the United States potentially awkward in an academic sense, this discomfort is manifestly outweighed by Illinois’ interest in determining for itself the manner in which it exercises its historic police power in the area of tort remedies for personal injuries.\footnote{See Geir v. Am. Honda Motor Co., 529 U.S. 861, 894 (1999); see also supra Part IV.A.}

V. CONCLUSION

In attempting to digest \textit{Hoffman} into the makeup of its jurisprudence, Illinois courts would be eating apples while calling them oranges. \textit{Hoffman} was never meant for state courts because its progeny and scope are defined exclusively by federal labor law. Moreover, in embracing \textit{Hoffman}, Illinois courts would be denying the state’s interests by withholding the most fundamental protection afforded by civil law—being made whole if injured by another’s wrongdoing—from a substantial and integrated segment of its population. The inquiry governing the question of whether undocumented immigrants are entitled to lost future earnings at projected earnings in the United States, then, is whether Illinois law, as it stands uniformly dispensing damages to undocumented and documented plaintiffs, can withstand the glare of preemption—and this is largely a question of interests. The federal interest, however, in the arena of immigration, determined by the three criteria set forth in \textit{De Canas}, is left largely unaffected by Illinois’ affording undocumented immigrants commensurate recovery.

Legal questions regarding undocumented immigrants are invariably distorted by perceptions, animosities, and fears—whether just, unjust, real, or imagined—surrounding the divisive issue of undocumented immigration generally. This article is an attempt to sidestep this torrid political debate and conduct a principled analysis focused exclusively through the lens of the mandates of current law. What is clear is that Congress, with the enactment of the IRCA and other legislation, has largely failed in stopping or even slowing undocumented immigration. The natural response to such inadequate policies is to take matters into one’s own hands by making life for undocumented immigrants in this country less comfortable. Clutching at \textit{Hoffman} or constitutional principles to effectuate these ends by denying undocumented immigrants equal application of civil remedies, however, is ineffectual.