

Article

Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of *Hoffman Plastic Compounds, Inc. v. NLRB*

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In *Hoffman Plastic Compounds, Inc. v. NLRB*, the U.S. Supreme Court denied the National Labor Relations Act (NLRA) back-pay claims of a worker wrongfully discharged for union organizing.¹ The Supreme Court's 2002 decision reasoned that the worker should not be able to recover back pay under the NLRA because he was a noncitizen and not entitled to employment.² The Inter-American Court of Human Rights and the International Labor Organization (ILO) Freedom of Association Committee have rejected the *Hoffman* decision and criticized the United States for its discrimination against noncitizens.³ The Inter-American Court of Human Rights and the ILO Committee held that, while a noncitizen may not have the right to enter the United States or to seek employment, once he has been employed he is entitled to equal treatment with U.S. workers regarding freedom of association and the right to or-

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1. 535 U.S. 137, 140–41 (2002).

2. *Id.* at 151.

3. See Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. Ct. H.R. Advisory Op. OC-18/03, at 113 (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf [hereinafter Advisory Opinion OC-18/03]; Int'l Labor Org. [ILO], Comm. on Freedom of Ass'n, *Complaints Against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM)*, Report No. 332, Case No. 2227, Vol. LXXXVI, 2003, Series B, No. 3 (Oct. 18, 2002).

ganize trade unions.⁴ Since 2002, some U.S. courts have narrowed the application of *Hoffman*.⁵ Other courts have widened the scope of the holding to prevent noncitizens from accessing other forms of recovery.⁶ This Article examines how U.S. courts have applied the *Hoffman* decision to employment cases under Title VII of the Civil Rights Act of 1964. The Article argues that interpreting Title VII through the lens of relevant treaties, including the International Covenant on Civil and Political Rights, would render the decision in *Hoffman* inapplicable to Title VII employment cases and would sufficiently narrow the *Hoffman* decision to comply with the Inter-American Court of Human Rights and the ILO decisions.

I. THE *HOFFMAN* DECISION AND THE RESPONSES OF U.S. AND INTERNATIONAL COURTS

The Court in *Hoffman* denied back pay to José Castro on the basis of his noncitizen status. Courts have encountered difficulties applying *Hoffman* to subsequent cases concerning employment and labor rights of undocumented noncitizens. While some courts have narrowed the holding in *Hoffman*, others have broadened the decision and applied it to deny Title VII relief on the basis of the plaintiff's immigration status. Two prominent international bodies have examined the *Hoffman* decision. The Inter-American Court of Human Rights and the ILO Committee on Freedom of Association both issued opinions strongly critical of *Hoffman*.

4. Advisory Opinion OC-18/03, *supra* note 3, at 106.

5. *E.g.*, *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 248–49 (2d Cir. 2006).

6. *E.g.*, *Oro v. 23 E. 79th St. Corp.*, 810 N.Y.S.2d 779, 783 (App. Div. 2005). The Supreme Court's refusal to find undocumented noncitizens a suspect class may also hinder plaintiffs' attempts to gain relief for discrimination on the basis of their immigration status. *See Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982); *see also Papasan v. Allain*, 478 U.S. 265, 284 (1986); *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 528 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005); *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 697 (8th Cir. 2002). This difficulty may be less applicable in Title VII cases because the discrimination alleged by the plaintiffs would be based upon membership in another suspect class category (e.g., race, gender). In that instance, courts are likely to rely on equal protection rights for undocumented noncitizens and find the plaintiffs entitled to relief. *See Plyler*, 457 U.S. at 215; *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003); *Doherty v. Thornburgh*, 943 F.2d 204, 208 (2d Cir. 1991); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987).

A. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating on the basis of race, color, religion, sex, or national origin in hiring, firing, compensation, or other terms and conditions of work.⁷ This Act provides individuals with several forms of relief if a court determines an employer discriminated against an employee. The court may order “reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.”⁸ Because the court cannot legally compel the employer to rehire a noncitizen who has no authorization to work in the United States,⁹ the court’s only option when the employer of a noncitizen has engaged in discrimination is to order back pay or other equitable relief.

B. *HOFFMAN PLASTIC COMPOUNDS, INC. v. NLRB*

Hoffman Plastic Compounds, Inc., hired José Castro to mix its products in 1988.¹⁰ At that time, Castro presented documents to the company indicating that he could legally work in the United States.¹¹ At a hearing in 1993, Castro testified that he had been born in Mexico and was not legally authorized to work in this country.¹² Castro stated that he had borrowed another person’s documentation when he began work at Hoffman in order to demonstrate legal authorization to work.¹³

In December 1988, Castro distributed authorization cards to other workers as part of a unionization effort.¹⁴ Hoffman responded to Castro’s union activities by firing him in January 1989.¹⁵ In 1992, the National Labor Relations Board (NLRB) found that Hoffman had illegally fired Castro for his work with the union and ordered the company to give Castro back pay as relief.¹⁶ The Supreme Court vacated the NLRB’s award of back

7. 42 U.S.C. § 2000e-2(a)(1) (1964).

8. *Id.* § 2000e-5(g).

9. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

10. *Id.*

11. *Id.*

12. *Id.* at 141.

13. *Id.*

14. *Id.* at 140.

15. *Id.*

16. *Id.* at 140–41.

pay, holding that awarding this type of remedy to an “illegal alien[]” conflicted with the public policy goals of the Immigration Reform and Control Act of 1986 (IRCA).¹⁷ The Court reasoned that allowing back pay to noncitizens would both encourage and condone undocumented immigration to the United States.¹⁸

The Court’s decision leaves many issues unresolved. While this case involved an act of fraud by the undocumented worker, the Court admits that the violation of IRCA can be caused by the employer, since either “the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA’s enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.”¹⁹ In instances where the employer is at fault, the Court declined to address whether back pay may be appropriate.²⁰ The policy reasoning of the decision could be used to deny noncitizens other benefits that may induce them to seek unauthorized employment in the United States.²¹ The decision does not, however, mention any benefits or remedies other than back pay under the NLRA. The decision does not even mention the NLRB’s ability to award other remedies. Facing other undocumented workers’ employment claims, lower courts must assess the breadth of the Supreme Court’s decision in *Hoffman*.

C. THE DOMESTIC EFFECTS OF *HOFFMAN*

Several cases have addressed the application of the *Hoffman* decision to other labor contexts. Courts have considered *Hoffman*’s effect outside the NLRA context and in cases where employees seek relief other than back pay. Some courts have narrowed its effects; others have used its reasoning more broadly to limit noncitizen employees’ access to relief.

In *Madeira v. Affordable Housing Foundation, Inc.*, the Second Circuit allowed a noncitizen to receive monetary damages for workplace injuries, thus narrowing the *Hoffman* holding to apply solely to back-pay awards.²² Questions about the

17. *Id.* at 151; see also Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

18. *Hoffman*, 535 U.S. at 150.

19. *Id.* at 148.

20. *Id.*

21. See *id.*

22. *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 249 (2d Cir.

broader applicability of *Madeira* persist due to the court's reasoning. The Second Circuit allowed the award because New York law explicitly included noncitizens in the list of eligible workers and the Second Circuit was reluctant to use the Court's interpretation of IRCA to circumvent state law.²³ In instances where state law does not explicitly include noncitizens, the court's ruling may be of little help in asserting a claim for damages.

Courts have come to differing conclusions regarding *Hoffman* and discrimination complaints. In *Rivera v. NIBCO, Inc.*, the Ninth Circuit found the reasoning in *Hoffman* inapplicable to Title VII complaints.²⁴ The court ordered relief under that Act for a noncitizen whose employer violated the discrimination prohibitions of Title VII.²⁵ The contrary holding of the Fourth Circuit in *Egbuna v. Time-Life Libraries, Inc.*²⁶ generates confusion concerning the application of *Hoffman* to discrimination complaints. Decided prior to *Hoffman*, *Egbuna* relied on the policies of IRCA in refusing to require employers to rehire an undocumented worker.²⁷

District courts and state courts have added to the uncertainty when interpreting the scope of *Hoffman* in an employment context. In *Escobar v. Spartan Security Service*, the District Court for the Southern District of Texas allowed the plaintiff to seek relief under Title VII.²⁸ That court's reasoning may not be widely applicable to the undocumented noncitizen because the plaintiff subsequently acquired authorization to work in the United States after suffering Title VII discrimination.²⁹ In *Mora v. Workers' Compensation Appeal Board*, a Pennsylvania state court allowed the suspension of weekly wage benefits to an undocumented noncitizen injured on the job.³⁰ The court, however, required the defendant-employer to

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23. *Id.* at 236; *see also* *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (holding that New York's public policy does not prohibit back pay for noncitizens injured at work); *Safeharbor Employer Servs. I, Inc. v. Velasquez*, 860 So. 2d 984, 985–86 (Fla. Dist. Ct. App. 2003) (holding that the Florida legislature's ability to allow workers' compensation benefits to noncitizens is not prohibited by *Hoffman*).

24. 364 F.3d 1057, 1065 (9th Cir. 2004).

25. *Id.* at 1061.

26. 153 F.3d 184 (4th Cir. 1998).

27. *Id.* at 187.

28. 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003).

29. *Id.*

30. 845 A.2d 950, 954 (Pa. Commw. Ct. 2004).

continue paying medical benefits.³¹ In *Renteria v. Italia Foods, Inc.*,³² the District Court for the Northern District of Illinois allowed undocumented workers' claims for back pay and compensatory damages to go forward under both the Fair Labor Standards Act of 1938³³ and the Illinois Minimum Wage Law.³⁴

Other lower courts have widened their application of the *Hoffman* holding. These courts have considered *Hoffman* relevant in various ways to workplace claims by noncitizens. In *Oro v. 23 East 79th Street Corp.*, the New York Appellate Division held that a plaintiff can seek at trial to establish a claim for lost earnings, but his immigration status may be the subject of discovery and will be relevant to the amount of damages that may be claimed.³⁵ In *Sanchez v. Eagle Alloy Inc.*, a Michigan court permitted the defendant to suspend weekly wage benefits under the state unemployment compensation law to an employee it had fired and then later learned was undocumented.³⁶ The court held that because the employee committed a crime in unlawfully seeking employment, the employer could suspend weekly wage benefits.³⁷ In *Veliz v. Rental Service Corp. USA*, the District Court for the Middle District of Florida cited *Hoffman* in denying the plaintiff's IRCA claim for lost wages since he was an undocumented worker.³⁸ Other courts have only allowed claims for lost wages in the amount the noncitizen could expect to earn if working within his or her home nation.³⁹ The Superior Court of New Jersey held that *Hoffman* prevents undocumented noncitizens from receiving both economic and non-

31. *Id.* at 955.

32. No. 02 C 495, 2003 WL 21995190, at *6-7 (N.D. Ill. Aug. 21, 2003).

33. 29 U.S.C. § 201 (1940).

34. 820 ILL. COMP. STAT. 105/4(a) (2006).

35. *Oro v. 23 E. 79th St. Corp.*, 810 N.Y.S.2d 779, 783 (App. Div. 2005).

36. 658 N.W.2d 510, 512 (Mich. Ct. App. 2003).

37. *Id.* at 520.

38. *Veliz v. Rental Serv. Corp. USA*, 313 F. Supp. 2d 1317, 1336 (M.D. Fla. 2003).

39. *See, e.g., Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1000 (N.H. 2004) (allowing the plaintiff's claim for lost earnings; maintaining that, in most circumstances, lost earnings must be measured in the prevailing rate of the plaintiff's home country, unless the employer knew or should have known the employee's undocumented status; and finding that an undocumented noncitizen's status is relevant to the question of lost earnings and can be introduced by the defendant at trial); *Sanango v. 200 E. 16th St. Hous. Corp.*, 788 N.Y.S.2d 314, 321 (App. Div. 2004) (holding that the injured plaintiff, who was an undocumented noncitizen, could only receive back pay under the workers' compensation law for the wages he would be able to earn in his home country).

economic relief under Title VII for discriminatory termination where the plaintiff was fired due to her pregnancy.⁴⁰

D. INTERNATIONAL RESPONSE TO *HOFFMAN*

Following the *Hoffman* decision, the government of Mexico requested an advisory opinion from the Inter-American Court of Human Rights concerning the legality of depriving noncitizen workers of employment rights.⁴¹ The government was especially concerned with two potential implications of the *Hoffman* decision. First, Mexico feared that migrant workers' "vulnerability makes them an easy target for violations of their human rights, based, above all, on criteria of discrimination and, consequently, places them in a situation of inequality before the law as regards the effective enjoyment and exercise of these rights."⁴² Mexico was also concerned that *Hoffman's* interpretation of national labor laws could allow for more widespread abuse of noncitizens. As the Inter-American Court of Human Rights explained, "This could encourage employers to use those laws or interpretations to justify a progressive loss of other labor rights; for example: payment of overtime, seniority, outstanding wages and maternity leave, thus abusing the vulnerable status of undocumented migrant workers."⁴³ The court determined that member states "may not subordinate or condition observance of the principle of equality before the law and nondiscrimination to achieving their public policy goals, whatever these may be, including those of a migratory character."⁴⁴

The court's opinion stressed that a member state could legally distinguish between undocumented and documented workers. Once the employment relationship has begun, however, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."⁴⁵ The court argued that principles of equality and nondiscrimination are *jus cogens* norms, applicable to all states, because

the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or

40. *Crespo v. Evergo Corp.*, 841 A.2d 471, 472 (N.J. Super. Ct. App. Div. 2004).

41. Advisory Opinion OC-18/03, *supra* note 3, at 1–2.

42. *Id.* at 2.

43. *Id.*

44. *Id.* at 114.

45. *Id.* at 105–06.

aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker).⁴⁶

In addition, the ILO Committee on Freedom of Association issued a decision concerning *Hoffman*.⁴⁷ The Committee, while especially concerned about the effects of this case on unionization efforts, noted that removing back pay as a form of relief for noncitizens could devastate worker safety and well-being.⁴⁸ The United States asserted that it had no international responsibilities under the ILO Declaration on Fundamental Principles and Rights at Work or ILO Conventions 87 (upholding the right of workers to form labor unions) and 98 (establishing worker protections from acts of antiunion discrimination).⁴⁹ The Committee, however, found the *Hoffman* decision so egregious as to violate the fundamental aims and principles behind the ILO Constitution.⁵⁰ The Committee stated that *Hoffman* harmed the ILO's ability to protect peace and social justice since it functionally denied undocumented noncitizens in the United States freedom to associate and join labor unions.⁵¹ The Committee stridently criticized the Supreme Court's decision to weigh the goals of the NLRA against the IRCA. "Human rights cannot be abrogated to achieve policy goals," the Committee wrote, "but rather must always have priority over these goals. Policy options must be formulated in compliance with basic human rights standards."⁵² The Committee recommended that the United States create or amend legislation that would "bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of antiunion discrimination in the wake of the *Hoffman* decision."⁵³

46. *Id.* at 113–14.

47. ILO, *supra* note 3.

48. *Id.* ¶ 565.

49. *Id.* ¶ 578; see also ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, June 19, 1998, 37 I.L.M. 1233, 1237–38; ILO, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17; ILO, Convention (No. 98) Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, 96 U.N.T.S. 257.

50. ILO, *supra* note 3, ¶ 600.

51. *Id.*

52. *Id.* ¶ 573.

53. *Id.* ¶ 612.

II. EXTENDING THE HOLDING IN *HOFFMAN* TO EMPLOYMENT DISCRIMINATION WOULD INCREASE WORKPLACE ABUSES

Extending the Supreme Court's holding in *Hoffman* to preclude noncitizens from receiving relief under Title VII would have several deleterious effects. At least seven million and as many as twenty million noncitizens reside and work in the United States without authorization.⁵⁴ While these workers can no longer receive back-pay remedies through the NLRA, they may also be unable to receive back pay under Title VII as a remedy for employment discrimination.⁵⁵ If *Hoffman* were extended to Title VII cases, noncitizens would face greater threats in the workplace. Employers could use discovery to determine an individual's immigration status.⁵⁶ Noncitizens, fearing that discovery could lead to removal, would thus be deterred from reporting forbidden discrimination and abuse.⁵⁷ Post-*Hoffman*, employer attempts to determine the immigration status of plaintiff-employees have drastically increased, and employers have also attempted to intimidate current workers with these discoveries.⁵⁸

Many noncitizens employed in the United States suffer abusive or exploitative working conditions. Migrants often receive lower wages for dangerous work in agricultural and garment manufacturing industries.⁵⁹ Noncitizens are often employed in

54. Brad Knickerbocker, *Illegal Immigrants in the U.S.—Just How Many?*, CHRISTIAN SCI. MONITOR, May 16, 2006, at 1.

55. See *supra* notes 24–27 and accompanying text.

56. See *supra* note 35 and accompanying text.

57. See *Colindres v. Quietflex Mfg.*, No. H-01-4319, 2004 U.S. Dist. LEXIS 27982, at *13 (S.D. Tex. Apr. 19, 2004) (holding that the plaintiffs must provide lists of current employees who do not assert back pay or lost future wages and the documents proving those persons' legal authorization to work); *Thorpe v. City of New York*, No. 116924/03, 2005 N.Y. Misc. LEXIS 3535, at *13 (N.Y. Sup. Ct. Nov. 30, 2005) (granting the defendant additional discovery of the plaintiff's identity and immigration status because the request was "material and relevant" to the jury's determination of whether to award lost earnings based on wages the plaintiff may have earned in the United States). *But see EEOC v. Rest. Co.*, 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006) (denying discovery of the plaintiff's immigration status in a Title VII sexual harassment and retaliation suit).

58. See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. (forthcoming 2008).

59. Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 HASTINGS RACE & POVERTY L.J. 35, 41–43 (2005).

sweatshops or held in forced labor camps within the United States and its territories.⁶⁰ Professors Connie de la Vega and Conchita Lozano-Batista determined that these “workers often work up to seven days a week for extremely low wages; 80-hour working weeks are common; and the health and safety of workers . . . [are] constantly undermined. Additionally, workers have no security of employment, and women are discriminated against and harassed, sometimes sexually.”⁶¹ Employers who hire noncitizens are less likely to comply with labor regulations, create safe working conditions, or provide security from harassment and discrimination, because they are already violating the law by hiring undocumented noncitizens.⁶² Such employers are “known for low wages, dangerous conditions, and frequent violations of labor laws.”⁶³

Extending the *Hoffman* decision to deny back-pay relief in Title VII and other claims would further discourage noncitizens from reporting abuse and discrimination by employers. Many workers fear that filing a complaint could lead to retaliation resulting in removal or criminal prosecution.⁶⁴ Employers could threaten noncitizens with dismissal if they complain of discrimination or harassment. Employers have capitalized upon such fears by exaggerating the holding in *Hoffman* and attempting to deny other forms of recovery to noncitizens. For example,

[a] New York attorney representing a meat market owner in a dispute over minimum wage wrote in a letter to a labor advocacy group, “I am sure you are aware of the ruling by the Supreme Court of the United States that illegal immigrants do not have the same rights as U.S. citizens.” The letter also maintained that after *Hoffman*, a fired worker was not entitled to the difference between what he or she was paid and minimum wage because those wages owed constitute backpay.⁶⁵

60. *Id.* at 40, 43.

61. *Id.* at 43 (footnotes omitted).

62. See Sara R. Bollerup, Comment, *America's Scapegoats: The Undocumented Worker and Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 38 NEW ENG. L. REV. 1009, 1012 (2004).

63. Sarah Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. FOR SOC. JUST. 795, 805 (2003).

64. See de la Vega & Lozano-Batista, *supra* note 59, at 42 (noting that workers are afraid to report poor working conditions in part out of a “fear of retaliation by employers”).

65. Christine Dana Smith, *Give Us Your Tired, Your Poor: Hoffman and the Future of Immigrants' Workplace Rights*, 72 U. CIN. L. REV. 363, 374 (2003).

In addition, many of these employees only learn about their legal rights through their employers, furthering the employer's ability to disseminate false and deleterious information to noncitizens concerning their ability to access legal relief.⁶⁶ If courts bolster a wider reading of *Hoffman*, then employers will have even more support for their attempts to further dissuade employees from complaining. As the ILO Committee on Freedom of Association noted, "Eliminating the backpay remedy grants *carte blanche* to employers to violate undocumented workers' rights with impunity, and discourages workers from exercising their rights."⁶⁷

The consequences extend further. Not only are workers denied their rights, but as Michael Wishnie pointed out in his amicus brief in the *Hoffman* proceedings, law-abiding companies are also harmed by competition with rogue employers who hire undocumented noncitizens and then cut business costs by refusing to pay minimum wages or maintain adequate safety standards.⁶⁸

III. APPLYING INTERNATIONAL LAW TO NARROW *HOFFMAN* IN U.S. COURTS

Courts will undoubtedly face further cases concerning whether *Hoffman* prevents undocumented noncitizens from receiving remedies for employment discrimination under Title VII, workers' compensation claims, and other employment-related problems. The extremely negative reaction of the Inter-American Court of Human Rights and the ILO should dissuade U.S. courts from applying *Hoffman* to possibly analogous situations and should even encourage the Supreme Court to reconsider the balance it reached in *Hoffman* between the goals of preventing unauthorized immigration and ensuring fairness in the workplace.

66. *Id.* at 374–75.

67. Cleveland et al., *supra* note 63, at 909.

68. Brief Amici Curiae of Employers and Employer Organizations in Support of Respondent at 4, *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), 2001 WL 1631729, at *4 (noting that one association's members "face unfair competition from contractors who ignore labor, health, and safety standards"); see Catherine Fisk & Michael Wishnie, *The Story of Hoffman Plastic Compounds, Inc. v. NLRB: Labor Rights Without Remedies for Undocumented Immigrants*, in *LABOR LAW STORIES* 399, 438 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

A. THE *JUS COGENS* NORM OF NONDISCRIMINATION

If a norm qualifies as *jus cogens*—that is, as a peremptory norm of international law⁶⁹—then a “controlling executive or legislative act or judicial decision,”⁷⁰ a contrary treaty, a reservation, or a persistent objection would not excuse U.S. violation of that norm.⁷¹ The Vienna Convention on the Law of Treaties recognizes and defines the concept of *jus cogens* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁷² If a new peremptory norm of international law is identified, Article 64 of the Vienna Convention declares “any existing treaty which is in conflict with that norm becomes void and terminates.”⁷³

The Inter-American Court of Human Rights determined that the principle of nondiscrimination against noncitizens in the workplace had risen to the status of *jus cogens*.⁷⁴ The court had three reasons to support that conclusion. First, the court demonstrated that the principle of nondiscrimination was a norm of general international law through locating it in several treaties and other instruments.⁷⁵ The court identified prohibitions against discrimination in the American Convention,⁷⁶ the Charter of the Organization of American States,⁷⁷ the American Declaration,⁷⁸ the International Covenant on Civil and Po-

69. BLACK'S LAW DICTIONARY 876 (8th ed. 2004).

70. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”).

71. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980).

72. *Id.*; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) (“Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation.”).

73. Vienna Convention on the Law of Treaties, *supra* note 71, art. 64.

74. Advisory Opinion OC-18/03, *supra* note 3, at 113.

75. *Id.* at 94.

76. Organization of American States [OAS], American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

77. Charter of the OAS, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, *amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324, *amended by* Protocol of Cartagena de Indias, Dec. 5, 1985, O.A.S.T.S. No. 66, 25 I.L.M. 527, *amended by* Protocol of Washington, Dec. 4, 1985, 33 I.L.M. 1005, *amended by* Protocol of Managua, June 12, 1993, 33 I.L.M. 1009.

78. OAS, *American Declaration of the Rights and Duties of Man* (1948),

litical Rights,⁷⁹ and the Universal Declaration of Human Rights.⁸⁰ Second, the court stressed the duties of states to respect human rights since these rights inherently stem from human dignity and are widely recognized within the relevant treaties.⁸¹ Third, the court broadly interpreted the duty of states to guarantee nondiscrimination, reasoning that discrimination included any “exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.”⁸² Preventing such discrimination had risen to the status of *jus cogens* because discrimination would destroy other *jus cogens* norms, such as equality before the law.⁸³ The court examined the effects of raising the norm of nondiscrimination to the status of *jus cogens* and found it necessary in order to preserve both international public order and the legal structure of international law.⁸⁴

United States courts, however, have been reluctant to apply *jus cogens* to cases involving claims by U.S. citizens or against the U.S. government. Prior to 1988, no federal court had considered the concept of *jus cogens* as a basis of its decision.⁸⁵ By 1999, U.S. courts had only recognized rights under *jus cogens* as applying to foreign governments and citizens, principally under the Alien Tort Claims Act,⁸⁶ but had never recognized a cause of action for U.S. citizens against the U.S. government based upon *jus cogens*.⁸⁷

compiled in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1992).

79. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter Civil and Political Covenant].

80. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc A/810 (Dec. 12, 1948).

81. Advisory Opinion OC-18/03, *supra* note 3, at 92.

82. *Id.* at 95.

83. *Id.* at 99 (“Accordingly, this Court considers that the principle of equality before the law, equal protection before the law[,] and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”).

84. *Id.*

85. See *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (“So far as we know, no federal court has ever considered the concept—much less the effect—of *jus cogens*.”).

86. 28 U.S.C. § 1350 (2000); see also *id.* § 41 (1940) (codifying the original Alien Tort Claims Act).

87. See *Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255 (C.D. Cal. 1999) (“There is no reported case of a court in the United States recogniz-

United States courts have been reluctant to rule on cases on the basis of *jus cogens* primarily due to the widespread disagreement concerning the methodology for identifying *jus cogens* standards. Without a method to determine what norms qualify as *jus cogens*, states also disagree on which principles have achieved that status.⁸⁸ In cases raising questions concerning *jus cogens*, U.S. courts have relied on narrow definitions of these norms. The Court of Appeals for the D.C. Circuit in 1988 described only two categories of *jus cogens* norms: “the principles of the United Nations Charter prohibiting the use of force” and “fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination.”⁸⁹ The D.C. Circuit later narrowed that definition by relying upon the *Restatement (Third) of Foreign Relations Law of the United States* to limit potential *jus cogens* violations to occasions when a state

practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.⁹⁰

While the *Restatement* identifies “systematic racial discrimination” as a *jus cogens* violation, it is doubtful that courts would consider other forms of discrimination (such as discrimination against noncitizens) as having achieved the status of *jus cogens*. For example, while the Inter-American Commission on Human Rights argued that the principle of nondiscrimination

ing a cause of action under *jus cogens* norms of international law for acts committed by United States government officials against a citizen of the United States.”), *rev'd on other grounds*, 251 F.3d 1230 (9th Cir. 2001).

88. These disagreements may stem from confusion concerning how to determine the status of various norms, along with widely differing perspectives on both the basis for *jus cogens* status and which norms ought to achieve that status. “[T]he extensive assertions of peremptory norms made by some writers and international tribunals, without presenting any evidence to support the claimed superior status of the norms under consideration, pose risks for the international legal order and the credibility of the authors and tribunals.” Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 292 (2006).

89. *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 941 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987)).

90. *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 & cmt. n (1987) (defining those rights listed in section 702 as *jus cogens* principles)).

is a *jus cogens* norm,⁹¹ it also conceded that the principle of nondiscrimination is not universally accepted as *jus cogens*.⁹²

B. APPLICATION OF TREATY OBLIGATIONS IN U.S. COURTS

Since courts have been reluctant to apply *jus cogens* within the United States, the next step may be for claimants to ask courts to require the United States to follow its treaty obligations under the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. Before courts apply these principles, they must first determine whether the holding in *Hoffman* conflicts with those treaty obligations.

1. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (Civil and Political Covenant), ratified by the United States in 1992, protects a wide range of rights, ranging from personal security to labor rights.⁹³ Article 2 of the Covenant provides the following framework for interpreting the scope of the other articles and broadly prohibiting discrimination:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁴

The prohibition of discrimination in Article 2 is further developed by Article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law

91. The Commission described the principle opposing racial discrimination as one that the “international community is unanimous in considering that the prohibition of racial discrimination and of practices directly associated with it is an obligation *erga omnes*.” Advisory Opinion OC-18/03, *supra* note 3, at 23.

92. Instead, the Commission suggested that some states have failed to codify norms of nondiscrimination: “The *jus cogens* nature of the principle of non-discrimination implies that, owing to their peremptory nature, all States must observe these fundamental rules, *whether or not they have ratified the conventions establishing them*, because it is an obligatory principle of international common law.” *Id.* (emphasis added); *see also* Shelton, *supra* note 88, at 310 (discussing the Commission’s conclusion that the international community had not yet reached consensus on prohibiting discrimination other than racial discrimination).

93. *See* Civil and Political Covenant, *supra* note 79, arts. 8, 9.

94. *Id.* art. 2.

shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁵

In its General Comment interpreting the Covenant, the Human Rights Committee recognized that Article 2 was immediately required of all branches of government within the state. If a state's laws create distinctions between persons based on national origin,

States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.⁹⁶

2. The International Convention on the Elimination of All Forms of Racial Discrimination

The prohibitions concerning discrimination on the basis of national origin are further elaborated in the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention).⁹⁷ The Race Convention, ratified by the United States in 1994, prohibits discrimination relating to employment.⁹⁸ The Convention defines racial discrimination very broadly as

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁹⁹

Article 2 of the Convention requires parties to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by

95. *Id.* art. 26.

96. U.N. Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

97. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2, 660 U.N.T.S. 195.

98. *See id.* art. 5.

99. *Id.* art. 1.

any persons, group or organization.”¹⁰⁰ Article 5 further requires parties to undertake to guarantee, without racial discrimination, “[t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.”¹⁰¹ The Committee on the Elimination of Racial Discrimination also affirmed that parties must “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects.”¹⁰² It also clarified that parties must “[r]ecognize that . . . all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.”¹⁰³

The Race Convention and Civil and Political Covenant provide courts with two reasons to narrow or overturn *Hoffman*. Courts, however, have been reluctant to apply treaty law domestically, often following the Senate declarations that the treaties are non-self-executing and therefore cannot be enforced by U.S. courts or utilized to create a private right of action.¹⁰⁴

3. Applying Treaty Law in U.S. Courts

The Supremacy Clause of the U.S. Constitution states that a treaty ratified by the United States is part of the supreme law of the land, equal in dignity to federal statutes:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁰⁵

100. *Id.* art. 2.

101. *Id.* art. 5.

102. U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non Citizens*, ¶ 7.33, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005).

103. *Id.* ¶ 7.35.

104. See *White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004); *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

105. U.S. CONST. art. VI, § 2.

If a treaty and a federal statute conflict, the more recent prevails.¹⁰⁶ In this instance, the Civil and Political Covenant, ratified in 1992, would predominate over the Labor Relations Act of 1935,¹⁰⁷ IRCA of 1984, and Title VII of the 1964 Civil Rights Act—due to the “last-in-time” doctrine.¹⁰⁸

Though the Constitution states that treaties are the supreme law of the land,¹⁰⁹ the Supreme Court has developed a doctrine that provides that only self-executing treaty provisions are judicially enforceable or create a private right of action.¹¹⁰ Sometimes the rule is phrased in the alternative: treaty clauses are enforceable if they are either self-executing or have been implemented by legislation.¹¹¹ The Supreme Court has declined to find any provision of the Civil and Political Covenant or the Race Convention to be self-executing.¹¹² In *Sosa v. Alvarez-Machain*, the Supreme Court bolstered its call for judicial restraint in applying the Civil and Political Covenant by citing the Senate’s declaration in ratifying the treaty: “Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”¹¹³

Courts are not bound by the Senate’s declaration on ratification because the task of interpreting treaties rests with the courts.¹¹⁴ In *The Federalist*, Alexander Hamilton explained that “treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascer-

106. See *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 325 (2005).

107. 29 U.S.C. §§ 151–169 (2000).

108. While the United States has certainly updated immigration statutes since the 1986 Immigration Reform and Control Act, the Court’s decision in *Hoffman* was based exclusively upon the policy rationale within the IRCA. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147–52 (2002).

109. U.S. CONST. art. VI, § 2.

110. See *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992); *Mellin v. Texas*, 128 S. Ct. 1346, 1356 (2008).

111. *Alvarez-Machain*, 504 U.S. at 667.

112. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

113. *Id.* at 728.

114. See Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 531 (1991).

tained by judicial determinations.”¹¹⁵ Under the Supremacy Clause, courts maintain the privilege to treat treaties as they do other forms of law, meaning that courts ought to be allowed to both interpret and apply those provisions. Courts, however, have so far been loathe to question the Senate’s declarations that the Civil and Political Covenant and the Race Convention are non-self-executing.¹¹⁶

C. USING INTERNATIONAL LAW AS AN INTERPRETIVE TOOL IN U.S. COURTS

Even if courts are not bound by the prohibition of discrimination against noncitizens as an arguably *jus cogens* norm and as a provision of the Civil and Political Covenant and the Race Convention, courts can still consider the extremely negative international response to *Hoffman* and the nondiscrimination norm as it relates to U.S. statutes such as Title VII. United States discrimination in employment against noncitizens has persuaded the Mexican government to file a complaint in the Inter-American Court of Human Rights and to get a judgment that opposes the U.S. practice.¹¹⁷ Further, in 2006, the U.N. Human Rights Committee questioned the United States about this decision when the United States filed its report under the Civil and Political Covenant.¹¹⁸

The *Hoffman* Court weighed the objective of the immigration law to deter undocumented workers from entering the United States against the desire of workers to organize unions.¹¹⁹ In its balancing analysis, the Court failed to take adequate account of the principle of nondiscrimination as emphasized by the Inter-American Court of Human Rights. Instead of

115. THE FEDERALIST NO. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

116. See, e.g., *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 150–51 (1st Cir. 2005) (en banc) (determining that neither the Constitution nor the Civil and Political Covenant requires the United States to extend the right to vote to citizens of Puerto Rico).

117. Advisory Opinion OC-18/03, *supra* note 3, at 1–2.

118. See generally U.N. Human Rights Comm., *List of Issues to Be Taken up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America*, U.N. Doc. CCPR/C/USA/Q/3 (Apr. 26, 2006); see also International Convention on the Elimination of all Forms of Racial Discrimination, Geneva, Switz., Feb. 18–Mar. 7, 2008, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 28, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

119. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 149–50 (2002).

weighing the goals of preventing entry into the United States of undocumented workers versus unionization rights, the Court should weigh immigration policy versus both the right to organize and the principle of nondiscrimination. Even if U.S. courts do not recognize nondiscrimination as a *jus cogens* norm,¹²⁰ the Inter-American Court of Human Rights decision should increase the attention courts pay to the precept of nondiscrimination in interpreting Title VII and other workplace issues.

In cases involving human rights, courts have often looked to international law for evolving standards of legal protection. For example, in *Murray v. Schooner Charming Betsy*, the Supreme Court determined that the principles of the law of nations should apply to the task of statutory interpretation since “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.”¹²¹ In a case where the court must consider the IRCA prohibition on the employment of undocumented noncitizens, the courts should use the international norm against discrimination and relevant treaty obligations as interpretive tools determining both the extent of Title VII coverage and whether *Hoffman* should be overturned.

The Supreme Court has even used this approach in interpreting the U.S. Constitution. In *Atkins v. Virginia*, Justice John Paul Stevens, writing for himself and five other Justices, relied in 2002 upon the fact that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved” and concluded that the execution of persons with mental retardation would offend civilized standards of decency in interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment.¹²² In *Lawrence v. Texas*, the Supreme Court

120. See *supra* notes 85–90 and accompanying text (discussing the reluctance of U.S. courts to consider *jus cogens* norms).

121. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

122. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The Court similarly cited international norms in juvenile death penalty cases. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (acknowledging “the overwhelming weight of international opinion against the juvenile death penalty”); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion).

In 1989, then-Chief Justice William Rehnquist stated that, since “constitutional law is solidly grounded in so many [foreign] countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.” William Rehnquist, *Constitutional Courts—Comparative Remarks*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul

cited international protections for the right to privacy and non-discrimination in declaring unconstitutional a state law prohibiting consensual sodomy between same-sex persons.¹²³ “The right the petitioners seek in this case,” said the Court, “has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”¹²⁴ Following a similar approach, Justice Ruth Bader Ginsburg’s concurring opinion in *Grutter v. Bollinger* cited the Race Convention in support of an international consensus for race-conscious affirmative action programs.¹²⁵

United States courts could use the Inter-American Court of Human Rights decision as an interpretive or comparative tool, as advocated by Justice Breyer:

Kirchhof & Donald P. Kommers eds., 1993). Other advocates have documented the Supreme Court’s history of applying international law. *See e.g.*, Brief Amici Curiae of Mary Robinson et al. in Support of Petitioners at 3–8, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151, at *3–8. The Court has a significant history of considering international law. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 488–89 (1966) (comparing U.S. practice with that of India, Sri Lanka, and Scotland); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (delimiting the notion of privacy in the home by looking to “common understanding throughout the English-speaking world”); *Quinn v. United States*, 349 U.S. 155, 167 (1955) (finding the practice of allowing a witness to object “supported by long-standing tradition here and in other English-speaking nations”); *Rochin v. California*, 342 U.S. 165, 169 (1952) (holding that the Due Process Clause obliges courts to ascertain whether laws offend “those canons of decency and fairness which express the notions of justice of English-speaking peoples”); *Malinski v. New York*, 324 U.S. 401, 413 (1945) (Frankfurter, J., concurring) (“The safeguards of ‘due process of law’ and ‘the equal protection of the laws’ summarize the history of freedom of English-speaking peoples . . .”); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (explaining that a constitution embodies “only relatively fundamental rules of right, as generally understood by all English-speaking communities” (quoting *Otis v. Parker*, 187 U.S. 606, 609 (1903))).

123. *Lawrence*, 539 U.S. at 573.

124. *Id.* at 577. The Supreme Court cited to a decision of the European Court of Human Rights, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), as persuasive authority when it held that a Texas law criminalizing homosexual sodomy was unconstitutional. *Id.* at 573; *id.* at 576 (“Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 50–55 (2004).

125. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *see* David Weissbrodt, *International Human Rights Law Perspective on Grutter and Gratz*, 21 CONST. COMMENT. 275, 276–77 (2004) (examining Justice Ginsburg’s use of international law).

These growing institutional and substantive similarities [between the U.S. and other nations] are important because to a degree they reflect a common aspiration—a near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity. Through their respect for basic human liberty, they may help to make that liberty a reality.¹²⁶

Following this comparative approach, the Court would value Title VII's remedies to deter discrimination over immigration policies because of the status given to nondiscrimination in international court decisions and treaties.

CONCLUSION

In *Hoffman*, the Supreme Court refused to allow undocumented noncitizens to obtain back-pay remedies for an illegal firing stemming from their unionization activities. In the six years since that decision, U.S. courts have appeared confused about the reach of the *Hoffman* decision and what employment remedies are foreclosed to undocumented noncitizens. Two prominent international adjudication bodies have criticized the *Hoffman* decision in opinions stressing the necessary protections of labor rights and the primary status of nondiscrimination.

In addition, both the Civil and Political Covenant and the Race Convention have provisions that conflict with *Hoffman*. In challenges to *Hoffman*, U.S. courts may be reluctant to rely upon either a new application of *jus cogens* or treaty provisions that may not be self-executing. Nonetheless, the principles elaborated by the Supreme Court in *Charming Betsy* and applied by judges in *Atkins*, *Grutter*, *Lawrence*, and other decisions might assist courts in using international decisions and treaty provisions against discrimination as interpretive tools to avoid further discrimination against undocumented employees in the workplace.

126. Stephen Breyer, Assoc. Justice, Supreme Court of the U.S., Keynote Address at the 97th Annual Meeting of the American Society of International Law Proceedings: Conflict and Coordination Across International Regimes (Apr. 2003), in 97 AM. SOC'Y INT'L L. PROC. 265, 267 (2003).