Fall 2011

The Uneasy Reality: Undocumented Workers in the United States and Rural Peasant Workers in China

Alice Chen Anderson

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: http://scholarship.law.unc.edu/ncilj/vol37/iss1/5
The Uneasy Reality: Undocumented Workers in the United States and Rural Peasant Workers in China

Cover Page Footnote
International Law; Commercial Law; Law

This comments is available in North Carolina Journal of International Law and Commercial Regulation:
http://scholarship.law.unc.edu/ncilj/vol37/iss1/5


The Uneasy Reality: Undocumented Workers in the United States and Rural Peasant Workers in China

Alice Chen Anderson†

I. Introduction ............................................................ 199

II. The U.S. Clash of Principles in Immigration Law—Equality versus Sovereignty ........................................... 202
   A. History: Balance of Contradictions............................. 203
   B. Equality through Employment/Labor Law and Sovereignty through Immigration Law..................................... 207
   C. The Clash Between Immigration and Employment/Labor Law ............................................................... 211
      1. The Immigration Reform and Control Act .................. 212
      3. Hoffman’s Effect..................................................... 217

III. China and Their Treatment of the Migrant Peasants ............ 221
   A. Background .......................................................... 221
   B. The Hukou System .................................................. 222
   C. China’s Labor Laws ................................................. 225

IV. International Law’s Influence ...................................... 229
   A. The Effect of International Forces and Agreements .......... 230
   B. Considering International Law .................................... 233
   C. Critiques .............................................................. 236

V. Towards a Solution ............................................... 238

I. Introduction

A nation-state’s treatment of laborers within its territory traditionally belongs to the government’s domestic policies, while the international law principle of sovereignty gives each nation-state the right to control the affairs of its domestic issues. However, the United States’ treatment towards its undocumented

† B.A., Middlebury College, 1996; M.Div., Regent College, 2001; J.D. Candidate, University of North Carolina School of Law, 2012. I am grateful to my husband and family for their love and support. I would also like to thank the team at the North Carolina Journal of International Law and Commercial Regulation for their suggestions and work on this comment. This comment is dedicated to my parents.
workers triggers human rights law violations and warrants the attention of the United Nations International Labour Organization (hereinafter “ILO”). Though it may be too simple to observe that the United States’ immigration policy switched from border control to labor control in 1986, with the Immigration and Reform Control Act (hereinafter “IRCA”), there is no doubt about IRCA’s adverse effect: the creation of a subclass of workers. This uneasy reality in the United States goes mostly unnoticed in the international arena. Yet the United States, now scrambling to hold onto its economy, is also losing its reputation for preserving basic human rights for all individuals. An unlikely comparison with China, a fast-growing international economic player that also faces pressure from international human rights watch organizations, distills the United States’ poor treatment of undocumented workers. China, like the United States, created a subclass of workers through a government-implemented registration system.

It is this Comment’s hope to pull back the lens on the immigration debates in the United States, kick-starting a breakthrough on the current impasse the United States faces in its immigration reform efforts. It will pursue this goal by comparing the current status of undocumented workers in the United States to the current status of peasant migrants in China and using well-accepted international human and labor rights norms as a guide. A wake-up call through this uneasy comparison might spur the United States to look to international human and labor rights norms for guidance in improving its treatment of undocumented workers without compromising immigration goals and policies.

Part II outlines the current status of undocumented workers in the United States by looking at immigration law’s clash with employment and labor law principles in that country. Before

---


2 See generally Kati L. Griffith, U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law, 31 COMP. LAB. L. & POL’Y J. 125, 127-28 (2009) (noting the failed coherence between immigration law and employment/labor law and suggesting a coherent framework to which both regimes could sustain). Though labor law and employment law are distinct areas of law, both pursue an “equal and wide application of employees’ rights as necessary for ‘public deterrence,’” and, thus, will be used interchangeably as one general law regime for the purposes of this paper. Id. at 129. The impact and effect of distinguishing employment law from labor law for undocumented workers will not be discussed in this paper.
IRCA, immigration policies and employment/labor law principles reflected an uneasy balance between sovereignty and equality—two core aspects of the United States’ identity. However, the United States’ current approach, criminalizing undocumented workers without effectively enforcing employer sanctions under IRCA, results in the opposite desired effect on immigration policy—a greater number of undocumented workers and the creation of a new subclass of workers. The current approach provides greater incentive for employers to hire undocumented workers, thereby failing to deter illegal immigration in the first place. While it is possible to uphold sovereignty and equality, current U.S. immigration law’s interference with employment and labor law policies disrupts the balance of equality, ultimately giving rise to international human rights concerns.

Part III compares this situation to China’s treatment of peasant migrants in its hukou house registration system. This system was designed to ration limited benefits, resources, and food from the urban centers to migrant workers who have poured in from the countryside looking for work. The hukou system is reflective of what has always been systemic, statewide discrimination against the rural peasants. The denial of access to basic services such as food, shelter, and safe working conditions for the workers from the countryside has created a perpetual subclass of workers. Scholars and researchers in China have extensively criticized this system.

Due to China’s interest in participating in the international arena, the country is beginning to listen to these critiques. Most notably, China revamped its labor laws in 2007 to emphasize the protection of laborers’ rights. This section not only will outline the critiques

---


4 See C. Cindy Fan, China on the Move: Migration, the State, and the Household 4 (2008).

5 Id. at 47.

of the hukou system and its impact on the rural peasants, but also the development of China's response to these critiques through a series of labor laws designed to protect laborers' rights. Ironically, the United States would be well advised to take a back seat and follow China's effort in reforming laws for protecting a marginalized group of workers. Reform would not only support the United States' value of equality but also substantiate the country's role as an active participant in the international law community.

Part IV looks to international law as an oversight and overview tool to guide the United States and China in the development of policies affecting migrant labor populations. Whereas China has been a habitual target for international human rights critique, the United States has flown under the radar. International scrutiny on China's human rights record has been greater than scrutiny on the United States, especially as China re-emerges as one of the world leaders. Yet current U.S. immigration policies deserve the same amount of scrutiny and must include the influence of international forces, such as economic globalization and international agreements, as crucial factors in guiding the immigration debates.

II. The U.S. Clash of Principles in Immigration Law—Equality versus Sovereignty

This section will focus on how the United States' treatment of undocumented workers in immigration law creates an imbalance when it comes to the American core values of sovereignty and equality. Because current immigration law upholds neither

---

7 See Ian Morris, Location, Location and How the West was Won, BBC NEWS MAGAZINE (Nov. 10, 2010, 06:42 AM), http://www.bbc.co.uk/news/magazine-11721671 (noting that for most of the world's history China has been an economic world leader and is now “reclaiming” its role).

equality nor sovereignty,9 our values become severely compromised. This section highlights how current immigration law’s treatment of undocumented workers betrays both of these values.10

It is well known that undocumented workers constitute a substantial part of American society. American businesses hire at least an estimated eight million undocumented workers,11 making up a substantial part of certain industries: 25% of farmworkers, 19% of maintenance and building workers, and 17% of construction workers.12 Their presence sparks numerous debates on immigration policy and highlights the controversy of their legal status. From one perspective, their immigration status is unauthorized and warrants deportation. From another perspective, when this class enters into the workplace, the temptation to deprive them of workplace rights because of their non-legal immigration status leads to a subversive attack on basic employment/labor rights that undermines the country’s value of equality.

A. History: Balance of Contradictions

To understand why current U.S. immigration law may be compared to Chinese policies towards rural peasant laborers, it is important to analyze the United States balancing act in the proper historical and legal context. On one hand, this country values equality; each person is treated equally and given an equal opportunity to pursue his or her goals, regardless of his or her

9 See John S. W. Park, Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights 130-31 (2004) (using the treatment of Asians in immigration law history as an example of how U.S. policies enhance the tension between national sovereignty and equality); see also Ibrahim J. Wani, Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law, 11 Cardozo L. Rev. 51, 51 (1989) (“[C]aptur[ing] the spirit of a nation can be challenging because there are often conflicting ideals, values, symbols and goals involved.”).

10 See generally Griffith, supra note 1 (noting the failed coherence between immigration law and employment/labor law, and suggesting a coherent framework both regimes could sustain).


12 Id.
national origin. On the other hand, this nation also values the principle of sovereignty, which results in controlled borders and regulated “membership” of a defined “political communit[y].” This community has a “presumptive right to pursue collectively what is in [its] own self-interest.” These apparently opposing values of exclusion and inclusion are upheld through immigration and employment law.

Equal treatment and opportunity attracts immigrants to the United States. Each year, immigrants are drawn to the United States by a desire to make a better life for themselves and their families or a desire to be treated equally and fairly and not based on a “characteristic for which he or she is not responsible.” The country is a “refuge for freedom-seeking peoples” and a place that allows each person to pursue economic opportunities based on his or her “ingenuity and industry,” not on arbitrary restrictions or definitions. This notion of universal equality forms the “American creed” that emerged from the Revolutionary era.

Prior to the American Revolution, colonial Americans defined themselves based on race, ethnicity, and culture. Following the Revolution, a newly emerged notion of universal equality changed

---

13 PARK, supra note 9, at 13-16.
14 Id. at 12; see also MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 11 (2004).
15 PARK, supra note 9, at 12.
16 See DVD: BROTHER TOWNS/PUEBLOS HERMANOS (The Center for Documentary Studies at Duke University 2010) (noting examples of Guatemalan immigrants desiring to seek a better life in the United States as the primary reason for immigrating).
17 PARK, supra note 9, at 12.
18 Bill Piatt, Immigration Reform From the Outside In, 10 SCHOLAR 269, 273 (2008) (internal citation omitted).
19 Wani, supra note 9, at 114.
20 SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 46-47 (2004). Huntington argues key components of American identity are immigration and the “Creed,” a set of political beliefs relating to liberty, equality and democracy. Id. at 37. At the same time, Huntington faced much critique for his treatise on discouraging immigration and policies in immigration “assimilation;” he views Mexican immigration as a “threat” to the American identity. See also Kevin R. Johnson & Bill Ong Hing, National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants, 103 MICH. L. REV. 1347, 1351 (2005).
21 HUNTINGTON, supra note 20, at 37.
how Americans identified themselves. Americans then began to claim a "civic national identity" rather than one based on race or religion. President Jefferson’s claim that each person has the inalienable right to "life, liberty, and the pursuit of happiness" captures this new sense of equality. This notion of equality shows "more continuity than change with respect to the main elements in the national value system." Though American history has not always supported this view, Americans have identified, in theory, with the value of equality. It was not until the Civil Rights Act of 1964 and the Voting Rights Act of 1965 that the United States expressly attempted to reconcile American reality with the purported American value of equality.

As a counterbalance, the United States also adheres to a version of sovereignty, a nation-state’s right to self-determination and "territorial integrity." In other words, the country has a right of exclusion in order to preserve its national identity and protect its limited benefits available exclusively to “members” of the "political community." Originally, this principle of sovereignty was first established as an international law norm where each “entity” had the right to control both its foreign and domestic affairs “within the confines of its territory." This was later reflected in the Article 2 of the United Nations Charter of 1945.

22 Id.
23 Id.
24 The Declaration of Independence para. 2 (U.S. 1776).
25 Huntington, supra note 20, at 37.
26 Id.
27 Id. at 147.
28 Park, supra note 9, at 44 (showing that the underlying rationale for restrictive immigration policies are not based on the U.S. Constitution, but the "inherent sovereignty" of nations, an international law principle); see also Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. Rev. 1559, 1572 (2008) (discussing inherent sovereignty as the foundation to the plenary power doctrine).
31 U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the
A key aspect of this principle is the nation-state’s power to control its borders by “controlling the movement of people across its borders.” Yet it was not until the late 1800s and early 1900s that “Anglo-American” nation-states declared that they had an absolute right to “deny foreign nationals access to [their] territor[ies]” based on the principle of sovereignty.

This notion of membership reflects a gatekeeper function, granting benefits only if certain criteria are met, such as place of birth and citizenship. This sense of sovereignty also includes controlling borders, determining “polities,” and “regulat[ing] domestic employment markets.” Therefore, the sovereignty principle limits migrating people’s rights to come and go based on their legal immigration status.

Even though the concept of sovereignty grants a nation-state the right to deport people who enter the country without authorization, there remains certain fundamental rights guaranteed to all persons, though “subject to [a state’s] jurisdiction,” such as access to due process of law. Generating a tension between nationalistic sovereignty and equal treatment. The following sections outline two legal regimes related to undocumented workers and how the clash between these regimes created such an imbalance of sovereignty and equality that the U.S. treatment of undocumented workers can be compared to China’s treatment of its rural peasant laborers.

---

sovereign equality of all its Members.”).

32 Id.

33 Id.; see also Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (describing historic US immigration policy); Nishimuru Ekiu v. United States, 142 U.S. 651, 659 (1892) (“[I]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions”).


35 Id. at 487.

36 Id. at 488.

37 Id.
B. Equality through Employment/Labor Law and Sovereignty through Immigration Law

In the workplace, principles of employment and labor law embody the American concept of equality. A core tenet is that each worker should have “individual and collective rights in order to avoid creating a sub-class of workers.”\textsuperscript{38} Hence, the effectiveness of employment and labor law depends on the equal treatment of all workers.\textsuperscript{39} A classic example is Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”).\textsuperscript{40} This statute prohibits employers from hiring or depriving employees of employment opportunities based on race, color, religion, sex or national origin.\textsuperscript{41} Undocumented workers are also protected because they are considered employees under the National Labor Relations Act (hereinafter “NLRA”),\textsuperscript{42} which is the primary labor law protecting the rights of employers and employees.\textsuperscript{43}

In addition, most federal courts, as well as Congress, agree that undocumented workers should be protected under certain provisions such as classic worker protection acts, the federal minimum wage standard set by the Fair Labor Standards Act (hereinafter “FLSA”),\textsuperscript{44} safe working conditions mandated by the Occupational Safety and Health Act (hereinafter “OSHA”),\textsuperscript{45} and

\begin{itemize}
\item \textsuperscript{38} Griffith, supra note 2, at 159.
\item \textsuperscript{39} Id. at 128.
\item \textsuperscript{41} Id. § 2000e-2.
\item \textsuperscript{42} National Labor Relations Act 29 U.S.C. §§ 151-169 (2006) [hereinafter NLRA].
\item \textsuperscript{43} See Gordon, supra note 8, at 539. The Supreme Court interpreted undocumented workers as employees under the definitions of the NLRA; see also Sure-Tan, Inc. v. NLRB, 467 U.S. 891 (1984) (holding in a 5-4 decision that undocumented workers are within the definition of employees under the NLRA but that the unauthorized worker may not receive an award of backpay). The Supreme Court resolved the split with a subsequent decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding an undocumented worker fired for union-organizing activities is not eligible for backpay award under NLRA when the employer did not know of the worker’s immigration status). See also Michael J. Wishnie, Emerging Issues for Undocumented Workers, 6 U. PA. J. LAB. & EMP. L. 497, 498, 502 (2004).
\end{itemize}
anti-discrimination laws. The Equal Employment Opportunity Commission (hereinafter “EEOC”), a federal agency that acts as a mandatory clearinghouse for workers’ Title VII complaints, asserted that undocumented workers are covered by and thereby entitled to the remedies of Title VII regardless of their immigration status. Undocumented workers may also find recourse through other federal statutes such as the Trafficking Victims Protection Reauthorization Act of 2003 and the Alien Claims Tort Act, giving them the right to sue under certain claims regardless of their immigration status.

The premise in treating undocumented workers as “on par” with other workers is based on the “universalist rationale that employees must have the same baseline individual and collective rights nationally in order to avoid creating a sub-class of workers.” Hence, the equal treatment of undocumented workers benefits not only the recipients, but also the U.S. labor force. If all are equal, there is less threat of creating a subclass of workers and unfair labor competition. This notion of equality exemplified in employment/labor law has a ripple effect benefiting all workers.

However, the notion of sovereignty is different as demonstrated through U.S. immigration policies. Before 1882, there were no regulatory restrictions on immigration. Free global movement was exalted between the seventeenth and nineteenth centuries and seen as “essential to economic development in the New World.” This view was tainted because much of the movement involved enslaved labor and “immigration was

---

46 Gordon, supra note 8, at 538.


50 Griffith, supra note 2, at 153.

51 Cunningham-Parmeter, supra note 29, at 1365.

52 Griffith, supra note 2, at 159.

53 See PARK, supra note 9, at 68 (referencing The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943), as the first regulatory restriction on immigration in the United States).

54 NGAI, supra note 14, at 17.

55 Id.
encouraged and virtually unfettered” in the United States. The dramatic rise of Chinese labor immigrants in the nineteenth century prompted a spurt of exclusionary acts, most significantly the Chinese Exclusion Act of 1882. Challenges to this act led the Supreme Court to declare that immigration was based on the U.S. principle of sovereignty. Therefore, immigration regulation lies within the absolute power of Congress. In 1893, the Supreme Court restated this plenary power based on its view that immigration policies are “incident to the nation’s control over foreign affairs.”

By making sovereignty a central issue for immigration law and granting Congress absolute power, policy formation shifted away from foreign affairs considerations (such as global interdependence and human rights relations) to the creation of exclusionary rules based on factors such as origin of birth. At that point, concerns over sovereignty began to tamper with principles of equality. That is not to say sovereignty inherently conflicts with equality, rather it impinges on the notion of equality when it is unchecked and absolute, defined solely in terms of geographic borders rather than one’s participation and involvement in the community.

56 Id.
57 Id. at 18.
58 See Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).
59 Id.
60 NGAI, supra note 14, at 11 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893)).
61 See Cassel, supra note 34, at 488.
62 See NGAI, supra note 14, at 12.
63 See id.; see also Wani, supra note 9, at 59-69 (arguing that immigration law misinterprets the principle of sovereignty to mean absolute sovereignty when absolute sovereignty is a legal fiction that no longer exists). However, by promulgating this fiction as “immutable” and absolute, immigration law ends up foreclosing the true definition of sovereignty alongside “certain fundamental values of human dignity.” Id. at 70. For further analysis of the evolving interpretation of U.S. sovereignty in the context of immigration policy, see Ernesto Hernandez-Lopez, Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention, 40 VAND. J. TRANSNAT’L L. 1345 (2007).
The most notable shift was the transfer of enforcement power from the former Immigration and Nationality Service (hereinafter "INS") to Immigration and Customs Enforcement (hereinafter "ICE"), housed in the Department of Homeland Security (hereinafter "DHS").

The security concerns regarding dangerous and undocumented individuals were extended to employers and workers. Some scholars argue that immigration law's notion of sovereignty went too far after September 11, 2001, even though it was understandably based on a fear of terrorists. "ICE, [in effect,] was able to use the [same] justifications [against dangerous individuals] ... and intrinsically relate that fear into a holistic policy against all cases of undocumented immigrants." The approach to compliance and enforcement became one-dimensional and an extreme version of absolute sovereignty.

This version of sovereignty is also illustrated when immigration law criminalizes the hiring of undocumented workers by creating a labor certification system that attempts to protect the U.S. worker. Facing much critique, these employer

---

66 Id. at 297.
68 Johnson & Hing, supra note 20, at 1357.
69 Merritt, supra note 65, at 297.
70 See Wani, supra note 9, at 59-69.
72 See 8 U.S.C. § 1182(a)(5)(A)(i) (2006) (stating that any "alien" who desires to perform "skilled or unskilled labor is inadmissible" unless he or she goes through the labor certification program).
73 See, e.g., Problems in the Current Employment Verification and Worksite
sanctions were eventually revised, yet the focus on limiting foreign workers continued to reflect an extreme notion of sovereignty.\textsuperscript{74}

The rationale seems sound for limiting incoming low-skill workers who may pose a threat against the current labor force. Allowing too many to stay for too long would drain scarce resources reserved for U.S. citizens and legal residents. At the same time, an unchecked principle of sovereignty, which otherwise becomes an extreme form of nationalism, would end up not only threatening the notion of equality, but would also defeat its own purpose of curbing illegal immigration. What follows is an analysis of how an over-reaching principle of sovereignty ends up clashing with the notion of equality, and the resulting effect of creating a subclass of people that warrants the protection of international human rights and labor law.

\textit{C. The Clash Between Immigration and Employment/Labor Law}\textsuperscript{75}

"America’s immigration system is . . . unsuited to the needs of our economy and to the values of our country. We should not be content with laws that punish hardworking people who want only to provide for their families, and deny businesses willing workers."\textsuperscript{76}

In this section, we will examine how IRCA contributed to creating a subclass of workers, how the Supreme Court perpetuated this subclass with their decision in \textit{Hoffman Plastic Compounds, Inc. v. NLRB},\textsuperscript{77} and how that decision resulted in mass confusion in the lower courts. The uneasy reality is that


\textit{See Merritt, supra note 65, at 294 (citing the IIRIRA in its address of these sanctions).}\textsuperscript{74}

\textit{See generally Griffith, supra note 2 (discussing this topic in depth).}\textsuperscript{75}


\textit{535 U.S. 137 (2002) (5-4 decision).}\textsuperscript{77}
Americans desire cheap labor but are unwilling to provide laborers equal protection of basic civil and human rights such as the right to fair wages or safe working conditions. Denying civil and human rights to people U.S. companies and industries recruit by demanding cheap labor essentially makes the United States no different from the Chinese government and its treatment of its rural migrant workers.

1. The Immigration Reform and Control Act

In theory, all workers have equal access to employment and labor rights. Before IRCA, immigration law stayed out of the workplace. Though it was illegal to enter the country without proper authorization, once the undocumented immigrant was employed, his or her rights were protected by employment and labor law. Immigration law simply did not comment on the "terms and conditions of an immigrant’s employment."  

The introduction of IRCA shifted the immigration policy focus from regulating admission and determining the current legal status of immigrants in the border to enforcing immigration laws at the workplace. Its primary goal is to combat employment of "illegal aliens" by imposing sanctions upon employers who violate the law. Though its stated intent is not to erode principles of employment/labor laws, IRCA has ended up doing so. The

78 See Griffith, supra note 2, at 128.

79 See Cunningham-Parmeter, supra note 29, at 1362.

80 Id. at 1366 (showing that the 1974 amendment to the Farm Labor Contractor Registration Act [hereinafter FLCRA] which prohibits farm labor contractors from employing undocumented workers was an exception); see also Stumpf, supra note 28, at 1583.

81 See Griffith, supra note 2, at 138 (citing Affordable Hous. Found., Inc. v. Silva, 469 F.3d 219, 231 (2d Cir. 2006) which noted that the court followed Congress’ interpretation on the rationale of IRCA: “[e]mployment is the magnet that attracts aliens here illegally” (internal citation omitted)).

82 Griffith, supra note 2, at 139.

practicality of the law resulted in an administrative burden on employers;\(^\text{85}\) and the lack of funding resulted in weak enforcement of employer sanctions.\(^\text{86}\) As a result, immigration officers narrowed their enforcement to deporting workers reported by employers "in retaliation for protected organizing activities or 'that kind of stuff.'"\(^\text{87}\)

Further, enforcement strategy shifted from punishing employers to punishing workers by endorsing employer cooperation, implementing a "series of cooperative industry-wide approaches."\(^\text{88}\) One example of this approach was when the INS targeted all meatpacking plants for a review of employers' employment records of immigration status.\(^\text{89}\) If the employer agreed to fire any unauthorized worker, the INS would take no further action against the employer.\(^\text{90}\) In essence, "border law became labor law."\(^\text{91}\) This threat of deportation led undocumented

---

powers of . . . labor standards agencies . . . to remedy unfair practices committed against undocumented employees. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment. 

Id.; Elizabeth M. Dunne, Comment, The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers, 49 EMOY L.J. 623, 637 (2000) (discussing the erosion of employment and labor law as a result of the adverse effect of immigration policies toward undocumented workers); see also Griffith, supra note 2, at 141; Merritt, supra note 62, at 291; .

\(^\text{84}\) See Dunne, supra note 83, at 637.

\(^\text{85}\) See Griffith, supra note 2, at 136; see also Glen M. Krebs, H-2B or Not to Be, 56 Fed. Law. 62 (2009) (arguing that the H-2B temporary nonimmigrant visa, under which most undocumented workers would enter, is both administratively burdensome on the employer and impractical).

\(^\text{86}\) See Nessel, supra note 83, at 360.

\(^\text{87}\) Id. at 361 (citing Louis Uchitelle, I.N.S. Is Looking the Other Way as Illegal Immigrants Fill Jobs, N.Y. Times, Mar. 9, 2000, at C1).

\(^\text{88}\) Nessel, supra note 83, at 359.

\(^\text{89}\) See id. at 360; see also Spencer S. Hsu, Immigration Raid Jars a Small Town, WASH. POST (May 18, 2008) http://www.washingtonpost.com/wp-dyn/content/article/2008/05/17/AR2008051702474.html. Hsu discusses the "disruptive impact on the nation's largest supplier of kosher beef and on the surrounding community has provoked renewed criticism that the administration is disproportionately targeting workers instead of employers, and that the resulting turmoil is worse than the underlying crimes." Id.

\(^\text{90}\) See Nessel, supra note 83, at 360.

\(^\text{91}\) Id.
workers to keep silent in reporting workplace violations and they were less likely to pursue remedies or assert their rights for fear of exposure of their immigration status. Thus, undocumented workers end up as a vulnerable group.

If immigration law is less likely to enforce sanctions against employers but more likely to deport undocumented workers upon apprehending them, employers are at an advantage. They can take advantage of workers’ fears of reporting workplace violations by hiring them at lower wages and not facing consequences for wrongful termination. These egregious actions have been supported by subsequent interpretations of IRCA’s policy. IRCA preempts employment/labor law, excluding substantial benefits and remedies normally available to workers, such as Social Security disability, unemployment benefits, and worker’s compensation. Inadvertently, IRCA created an “underground economy.”

One can argue that the current immigration law marginalizes one group of workers to the point of creating a “caste” system, “unambiguously situat[ing undocumented workers] outside the

---

92 Griffith, supra note 2, at 140; see also 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, 41-51 (2005) (citing examples of undocumented workers who face “abusive or exploitative working conditions,” as often receiving lower wages and sweatshop-like work conditions).

93 The Supreme Court’s decision upholding Arizona’s law on sanctioning employers who knowingly hire unauthorized workers faced similar critiques. See Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (Breyer, J., dissenting) (noting that the state law would motivate employers to avoid hiring unauthorized workers “without counterbalancing protection against unlawful discrimination”).


95 See id. at 186-88. Congress attempted to address the weakness in employer sanctions with IIRIRA by creating a new verification program. Yet IIRIRA placed more restrictions on rights such as terminating welfare benefits for legal immigrants and putting legal permanent residents on “permanent probation.” NGAI, supra note 14, at 268.

96 Griffith, supra note 2, at 140.

boundaries of formal membership and social legitimacy."98 Hence, the statutory framework of IRCA translates the principle of sovereignty into protectionist attitudes and exclusive membership99 at the expense of rights and remedies afforded to all workers under employment/labor law.100 In doing so, immigration law has betrayed the American ideal. This betrayal poses the "most difficult problems for a Nation that prides itself on adherence to principles of equality under the law."101

2. Hoffman Plastic Compounds, Inc. v. NLRB102

Before IRCA, courts did not consider weighing interests between immigration law and employment/labor law.103 They assumed all workers, regardless of legal immigration status, had equal rights.104 This assumption was based on IRCA’s predecessor, the Immigration and Nationality Act (hereinafter “INA”).105 The Court noted INA’s silence on unauthorized

---

98 NGAI, supra note 14, at 2; see also Catherine L. Merino, Note, Compromising Immigration Reform: The Creation of a Vulnerable Subclass, 98 YALE L.J. 409 (1988) (discussing the adverse unintentional effect of creating a subclass group of workers from IRCA).

99 See PARK, supra note 9, at 44; see also Wani, supra note 8 (noting that the United States does not adhere to the true principle of sovereignty, but a false version of this principle).

100 See Wani, supra note 9, at 96.

101 Phyler, 457 U.S. at 219; see also Harold Meyerson, Worker Loopholes, L.A. TIMES, June 24, 2011, at A17 (“[E]mployers know they can violate [wage, hour and unionization] ... laws with impunity when their workers have no union contract and are undocumented. The odds are overwhelming that the outcome of such conflicts is worker deportation, not management fines.”).


103 Cunningham-Parmeter, supra note 29, at 1366-1367.

104 See id. at n. 30-32 and accompanying text (citing EEOC v. Hacienda Hotel, 881 F.2d 1504, 1517 (9th Cir. 1989) (holding Title VII covers undocumented immigrants for sex discrimination); Rios v. Enter. Ass’n Steamfitters Local Union 638, 860 F.2d 1168, 1172 (2d Cir. 1988) (holding Title VII applies to undocumented workers for race and national origin discrimination); In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987) (holding FLSA applies to undocumented workers by applying pre-IRCA law); Donovan v. Burgett Greenhouses, Inc., 759 F.2d 1483, 1485 (10th Cir. 1985) (holding undocumented workers may recover unpaid wages under FLSA); NLRB v. Apollo Tire Co., 604 F.2d 1180, 1181 (9th Cir. 1979) (holding the definition of “employees” under NLRA cover undocumented workers)). Id.

105 See Cunningham-Parmeter, supra note 29, at 1366-37.
employment and consequent lack of conflict with labor law, such as the NLRA.\textsuperscript{106} Most notably, in 1984, the Court in \textit{Sure-Tan v. NLRB}\textsuperscript{107} held that the NLRA protections applied to undocumented workers because labor law principles actually "advance" immigration policies as well.\textsuperscript{108} If the employer treated both undocumented and documented workers equally in terms of hiring and firing practices, there would be no advantage to hiring undocumented workers.\textsuperscript{109} This would lessen the demand for undocumented workers and deter illegal immigration.\textsuperscript{110}

However, IRCA reversed this reasoning. In \textit{Hoffman} the Supreme Court interpreted the central policy of immigration law to be the prohibition of hiring of undocumented workers.\textsuperscript{111} The rationale was that awarding backpay to a wrongfully terminated but undocumented worker would "violate the core of immigration law."\textsuperscript{112} Rather than seeing labor law protections as partnering with immigration law, the Court saw that the NLRB had no authority to interfere with IRCA’s policies by awarding backpay to a worker who committed what IRCA deemed a "criminal fraud."\textsuperscript{113} By entering into the workplace and making employment of undocumented workers illegal, IRCA preempted the employment and labor law protections previously in place.\textsuperscript{114} Though the Court noted other sanctions were available and that their decision should be construed narrowly, scholars believed that the \textit{Hoffman} decision was still significant: backpay was "the only

\textsuperscript{106} See id. at 1368 (citing \textit{Apollo Tire Co.}, 604 F.2d at 1184, noting INA’s silence as to employment issues).


\textsuperscript{109} See \textit{Sure-Tan}, 467 U.S. at 884

\textsuperscript{110} See id. at 893-94.

\textsuperscript{111} \textit{Hoffman}, 535 U.S. at 147 (citing INS v. Nat’l Ctr. for Immigrants’ Rights, Inc., 502 U.S. 183, 194 and n. 8 (1991)).


\textsuperscript{113} \textit{Hoffman}, 535 U.S. at 149.

\textsuperscript{114} See id. Granting backpay “not only trivializes immigration law, [but would also] . . . encourage successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.” \textit{Id.} at 151.
monetary remedy available to victims of discrimination under the NLRA.\textsuperscript{115} Consequently, backpay’s singular ability to “protect[] and compensat[e] . . . employees”\textsuperscript{116} was undermined by the Hoffman decision.

Furthermore, such a decision ignores the underlying principle of fair competition, requiring uniform treatment of all workers.\textsuperscript{117} Surprisingly, this was noted by some businesses which joined with unions and immigrant rights organizations in support of the NLRB in Hoffman.\textsuperscript{118} They argued that allowing employers to get away with violating labor laws without backpay liability would create unfair competition for law-abiding employers and undermine labor law principles.\textsuperscript{119}

3. Hoffman’s Effect

There is continued debate regarding the “ripple effect” of basic protections to workers.\textsuperscript{120} This debate reflects the confusion in the lower courts, since the Hoffman decision left no conclusion on how to handle the interaction between immigration policies and employment/labor policies.\textsuperscript{121}

On one hand, some state courts have directly interpreted Hoffman as preempting worker protections, such as recovery of lost wages\textsuperscript{122} or used Hoffman as persuasive authority.\textsuperscript{123} The

\textsuperscript{115} Cunningham-Parmeter, supra note 29, at 1380 (emphasis in original).
\textsuperscript{116} Id. (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-11 (1940)).
\textsuperscript{117} See Wishnie, supra note 43, at 507-08.
\textsuperscript{118} Id. at 499 (citing Brief Amici Curiae of Employers and Employer Organizations in Support of the NLRB, No. 00-1595, 2001 WL 161729).
\textsuperscript{119} Id.
\textsuperscript{120} Lyon, supra note 7, at 189. Compare Cunningham-Parmeter, supra note 29, at 1385-86 (noting that limiting backpay would cut off remedies for Title VII claims from undocumented workers), with Wishnie, supra note 42, at 509-10 (observing that benefits and remedies such as federal minimum wage, overtime premiums, punitive or compensatory damages under anti-discrimination statutes, and additional remedies other than backpay are still available to undocumented workers).
\textsuperscript{121} See Merritt, supra note 65, at 311-12; see also Cunningham-Parmeter, supra note 29, at 1372 (“courts have failed to establish clear criteria for resolving conflicts between employment laws and immigration laws”).
\textsuperscript{122} See Jobs and Borders, supra note 112, at 2230-32 (citing Veliz v. Rental Serv. Corp. USA, 313 F. Supp. 2d 1317, 1320-21, 1334-37 (M.D. Fla. 2003) (holding an undocumented worker is limited to recovery in a products liability action under Hoffman); Hernandez-Cortez v. Hernandez, No. 01-1241-JTM, 2003 U.S. Dist. LEXIS
result is that these cases discourage undocumented workers from filing claims, especially if the chance of recovery is unknown and the risk of exposing their illegal status great. For instance, workers filing a Title VII claim withdrew their claims when they were unable to prove work authorization in Rivera v. NIBCO, Inc. In Lopez v. Superflex, Ltd., workers withdrew their disability discrimination claim “in light of the Supreme Court’s decision in Hoffman.” These cases demonstrate how lower courts, and, thus, employers following these courts, have expanded Hoffman’s holding to Title VII, FLSA, and other workplace protections, further eroding labor law’s protection of equality.

On the other hand, some lower courts narrowly construed and distinguished from the Hoffman holding. In Agri Processor Co. v. NLRB, the NLRB ordered the employer to recognize a union elected mostly by undocumented workers, broadly interpreting the term “employee” to include undocumented workers. The circuit court agreed, relying on Congress’ expressed intent in IRCA and the Supreme Court’s holding in Sure-Tan. Reaffirming that the IRCA was not intended to limit or repeal labor law principles. Rather, the Court reasoned that the IRCA was irrelevant when analyzing the rights and interests of workers because workers,

---


124 See Cunningham-Parmeter, supra note 29, at 1370.


126 No. 01 CIV. 10010, 2002 WL 1941484, at *1 (S.D.N.Y. Aug. 21, 2002).

127 Id.


129 See id.

130 514 F.3d 1 (D.C. Cir. 2008).

131 Id. at 3.

132 Id. at 4-6.

133 Id.
both legal and undocumented, share a "community of interest."134 This was the NLRB-deemed standard for recognizing a "bargaining unit" for collective bargaining purposes.135 The circuit court noted that an undocumented worker could be in violation of immigration law but still be afforded the same rights and protections of legal workers because the focus of labor law was on the employee’s interests and not a person’s interests generally.136

The rationale is that there is a practicality to having undocumented workers covered under labor law protections. *Agri Processor* repeats the same rationale stated in *Sure-Tan*,137 the *Hoffman* dissent,138 Congress’ statement on IRCA’s intent,139 the employers and businesses who filed an amici curiae brief in support of the NLRB,140 and the NLRB’s intent.141 The effect is to not only protect legal workers and their employment but to disincentivize employers from choosing undocumented workers over legal workers.142 Other circuit courts have followed this reasoning as well.143

134 Id.
136 See *Agri Processor Co.*, 514 F.3d at 9 (citation omitted).
137 See *id.* at 4-6.
139 See discussion supra note 83. When IRCA was enacted, Congress also simultaneously appropriated additional funds to the Department of Labor’s Wage and Hour division [hereinafter DOL] “in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.” *Id.; see also Cunningham-Parmeter, supra* note 29, at 1374 (citing IRCA, Pub. L. No. 99-603, § 111(d), 100 Stat. 3359, 3381). “Both [IRCA and additional funds to DOL] . . . serve the same goal: to raise the price of hiring [undocumented workers] . . . . Employers pay the price either through IRCA penalties or wage enforcement actions brought on behalf of unauthorized immigrants.” *Id.* at 1374-75.
140 See supra note 118 and accompanying text.
141 *Agri Processor*, 514 F.3d at 8 (quoting *Sure-Tan*, 467 U.S. at 891, which found that excluding undocumented workers from the NLRA’s protections would “erod[e] the unity of all the employees and impede[e] effective collective bargaining”).
142 See Motomura, supra note 135, at 1753.
143 See, e.g., NLRB v. Concrete Form Walls, Inc., 225 Fed. App’x 837 (11th Cir. 2007); NLRB v. Kolkka, 170 F.3d 937, 941 (9th Cir. 1999); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1121 (7th Cir. 1992).
Hoffman’s continuing impact remains unknown. There is debate as to how far courts will extend backpay limitations to other employment/labor law protections. So far, courts have refused to extend Hoffman to minimum wage and overtime protections. Yet granting remedies for Title VII claims is confusing. The Rivera v. NIBCO, Inc. court allowed full remedies for Title VII, yet the Escobar v. Spartan Security Service court rejected backpay remedies for a Title VII claim.

Further, the EEOC, while still asserting that discrimination against undocumented workers will not be tolerated, rescinded the extension of backpay to undocumented workers as a result of the Hoffman decision. Yet the FLSA and Migrant and Seasonal Agricultural Worker Protection Act (hereinafter “MSPA”) are still enforced by the U.S. Department of Labor’s Wage and Hour Division.

In conclusion, IRCA’s ineffective, unenforced employer sanctions and intrusion into workers’ rights, as well as the Supreme Court’s lack of clear guidance on the interaction between immigration law and employment/labor law, opened the door to a

---

145 364 F.3d 1057 (9th Cir. 2004).
146 See id. at 1067.
148 See id. at 896-98.
land of legal ambiguity. Until Congress deliberates on the next proposal for a comprehensive immigration reform, of which there have been successive failed proposals after IIRIRA,\textsuperscript{153} the impact of IRCA and the court decisions will affect undocumented workers by putting the interest of all workers at a disadvantage while giving employers a greater advantage.\textsuperscript{154}

III. China and Their Treatment of the Migrant Peasants

Ironically, China is similar to the United States in its treatment of undocumented workers through its house registration system, *hukou*, and its marginalization of rural peasants. Though Chinese rural peasants were recruited as labor into the urban areas, similar to undocumented workers being recruited by U.S. employers, the rural peasants in China who migrate to the urban areas have been denied safe working conditions, fair wages, and even basic living conditions for the duration of their work period.

A. Background

In order to understand why this treatment of the Chinese peasants exists, we must understand that the roots of Chinese peasant marginality run deep and are complex. Further, a direct comparison between the United States and China can only be valid when we consider the context in which standards are measured. For example, the United States, from birth, has espoused equal treatment of each individual and prohibits discrimination based on arbitrary distinctions or characteristics. However, China has never endorsed this ideal and presumes that each person exists for the sole purpose of furthering the nation's interests—an idealized

\textsuperscript{153} See \textsc{Bill Ong Hing}, DEPARTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 29-46 (2006).

\textsuperscript{154} See Cunningham-Parmeter, supra note 29, at 1371; Martinez, supra note 128, at 665 (citing ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 325 (1994); Motomura, supra note 135, at 1753; Billie Pierce, Recent Case, Are They or Aren't They? Agri Processor Revisits Undocumented Workers' Employee Status Under the NLRA, 29 BERKELEY J. EMP. & LAB. L. 495, 501 (2008). The court in *ABF Freight Sys.* noted that inquiry into immigration status "might force the [NLRB] to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility." *ABF Freight Sys.*, 510 U.S. at 325.
economic model.\textsuperscript{155}

China’s constitution specifies an economic model reflective of a socialist ideology, potentially capable of granting freedom and rights to all people.\textsuperscript{156} Though none of these freedoms have yet been realized, the approach to this model was through a one-party authoritarian state, one “unified...for most of the last two thousand years.”\textsuperscript{157} During the 1950s, after a period of civil war and foreign occupation, China adopted a “command model” in an attempt to stabilize its fragile economy.\textsuperscript{158} All private ownership of property was transferred to the government.\textsuperscript{159} During this time, Mao Zedong, the First Chairman of the Communist Party, created a plan known as The Great Leap Forward, lasting from 1958 through 1961.\textsuperscript{160} The plan was an attempt to fast-track the industrialization of China, redirecting all resources, including agricultural production and rural labor, to industrial production.\textsuperscript{161} This period was indicative of China’s great effort to industrialize the entire country. As a result, migration was also strictly dictated by this hyper-focus on industrialization.

\textbf{B. The Hukou System}

In order to further this industrialization initiative, a residential permit system was set up to ensure that peasants would remain in the countryside in order to produce food for the cities.\textsuperscript{162} At the same time, this system attempted to address urban unemployment.\textsuperscript{163} As the government took on the responsibility to “feed the urban unemployed,” they also urged hundreds of thousands of wartime refugees and unemployed urban residents to


\textsuperscript{156} See id.


\textsuperscript{158} Id.

\textsuperscript{159} Id.

\textsuperscript{160} Finch, supra note 155, at 87.

\textsuperscript{161} Id.


\textsuperscript{163} Id.
move to the countryside. What enticed many of these people to migrate to the countryside was an offer of reserved land and housing for some, a land grant credit for others, and most notably, a gift of a seven-month grain and vegetable allowance to each migrant.

It was not until after the rural resettlement initiative, with which many migrants voluntarily complied because of the economic incentives formerly mentioned, when the government began to restrict migration with the hukou registration system. This household registration system aimed to “fix people permanently on the basis of their birth place or their husband’s residence.” It was designed so that access to resources was dependent on where one’s place of residence was located. People living in urban areas were “entitled to work and [had] access to subsidized food, housing, education, and other social services,” whereas urban-bound migrant peasants who moved to the cities in search of work would not be entitled to these social services.

This was the state’s method of rationing urban services, as well as “calibrat[ing] the number of legal urban residents with the amount of grain and the number of jobs available in the cities.”

Because of this system, the state was able to create a “migrant labor regime conducive to industrial and urban development at a low cost with far-reaching social consequences.” As the rural peasants were denied basic social services such as food, housing, bathing, transportation, and child education based on their rural registration status, they were unable to stay there long term. They were given temporary jobs, and ended up becoming a potentially permanent underclass, “ready to be exploited to fulfill the... state’s cherished project of industrialization.”

---


165 See id. at 648-49.

166 SOLINGER, supra note 162, at 35.

167 Cheng & Selden, supra note 164, at 644.

168 FAN, supra note 4, at 4.

169 SOLINGER, supra note 162, at 37.

170 FAN, supra note 4, at 4.

171 See Jing, supra note 6, at 1087.

172 SOLINGER, supra note 162, at 27.
they were discouraged from moving to the urban cities for employment under the *hukou* system, they were also recruited into the cities as a “cheaper and more expendable labor force.”73 It was cheaper for the government to hire temporary laborers rather than permanent ones, and the trend increased during the economic development surge in the 1970s.174 At the same time, the status quo of the rural peasants remained the same: “The unspoken message was that the peasants were embraced just so long as they remained ‘peasants’ and did the work in the cities that only peasants would do, and so long as they refrained from expecting the treatment in the cities that ‘belonged’ only to full-fledged urbanites.”175

Unfortunately, this treatment of the rural peasants is similar to the treatment of undocumented workers in the United States. The most common complaint for the undocumented workers in the United States is delayed payment of wages, unpaid overtime, and non-payment of social insurance premiums.176 For the Chinese rural peasants, exploitative work conditions are similar: long work hours with wages and bonuses deducted.177

Further, the debate surrounding these two groups of workers is similar. It is well recognized that they are needed to do jobs that no one else would do. For the Chinese migrant peasants, they are crucial for “simulating urban economy and facilitating the expansion of industries and services.”178 Undocumented workers in the United States constitute a significant percentage of the unskilled occupations.179 Local communities recognize that they are needed.180 At the same time, both groups, the Chinese migrant peasants and the undocumented workers in the United States, are regarded as threats to wage suppression as well as burdens to “urban infrastructure such as transportation and housing,” and are

173 *Id.* at 41.
174 See *id.* at 37.
175 *Id.* at 50-51.
176 See Lyon, *supra* note 8, at 186.
177 See FAN, *supra* note 4, at 108-09.
178 *Id.* at 112.
179 See *supra* note 10 and accompanying text.
180 See *Brother Towns/Pueblos Hermanos*, *supra* note 16.
“blamed for exacerbating... unemployment.” Despite overwhelming studies of both Chinese migrant peasants and undocumented workers in the United States concluding that they actually complement, rather than compete against, the local labor force, the marginalization continues.

C. China’s Labor Laws

In the 1970s, China began to realize the adverse effects of a centralized economy: “slow growth and the strangling of entrepreneurial initiative.” It is within this context that the country significantly changed its economic approach. China went from a command model to a “socialist market economy,” loosening the state’s grip on businesses and allowing private enterprising, as well as non-industrial and service-oriented sectors to flourish. The hukou system became more flexible to accommodate this new model, along with China’s first Labor Law in 1994 requiring employment contracts for all workers regardless of their household registration status.

At the same time, there were stricter regulations on migrant laborers, requiring them to obtain numerous separate permits (such as a migration certificate, work permit, employment certificate, temporary residency certificate, etc.) in order to be able to enter into an employment contract. These regulations were imposed in order to protect laid-off urban workers, thereby giving them easier access to available jobs. Therefore, the Labor Law was ineffective for migrant workers, as its administratively burdensome barriers prevented their access to protection.

It was not until 2000 that China began to focus on protections

---

181 FAN, supra note 4, at 112-13.
182 See id. at 113; see also supra Part I.B.
183 Josephs, supra note 157, at 375.
184 See id. at 375-76.
185 Id. at 375.
186 See id. at 375-76.
187 See Jing, supra note 6, at 1089.
188 See id.
189 Id.
190 See id. at 1096-98 (noting the ineffectiveness of China’s 2006 Labor Law on covering rural workers).
for rural workers, adopting this priority as one of its national policies.\textsuperscript{191} In early April of 2008, Premier Wen Jiabao declared in his inaugural address to the First Session of the 11th National People’s Congress that the top priority of the new cabinet was to “lessen[] the financial hardships of ‘under-classes’ such as peasants and migrant workers.”\textsuperscript{192} There was no doubt that the government took on the responsibility of improving work conditions of rural workers, recognizing that “poor treatment of rural workers poses a serious threat to China’s social stability.”\textsuperscript{193} Premier Wen appeared to be sincere, as China began to spread economic growth to the poorer underclass by establishing a social security system, repealing the agricultural tax in 2006, and “increas[ing] spending in the countryside.”\textsuperscript{194} As a result of these initiatives, as well as many “rural-worker-friendly policies,”\textsuperscript{195} the Chinese population viewed the government as a \textit{qinmin} government, “a government that cares for the ordinary people.”\textsuperscript{196}

Most notably, China developed a comprehensive national policy document on rural workers in 2006.\textsuperscript{197} The policy seeks to solve problems facing the migrant population, such as low wages and lack of legal labor regulations, and aims to provide employment service, occupational training, social security, urban public services, and safeguard mechanisms for protecting rural workers’ rights.\textsuperscript{198} At the same time, with a number of initiatives already in place, compliance and enforcement remain virtually

\footnotesize
\textsuperscript{191} \textit{Id.} at 1090.


\textsuperscript{194} Jing, \textit{supra} note 6, at 1092.

\textsuperscript{195} \textit{Id.} at 1093.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.} at 1090; \textit{see also} Several Opinions of the State Council on Resolving the Problems of Rural Workers (issued by the State Council) (Mar. 27, 2006), available at http://www.gov.cn/jrzg/2006-03/27/content_237644.htm (China).

\textsuperscript{198} Jing, \textit{supra} note 6, at 1090-91.
non-existent.\textsuperscript{199} This is due to discriminatory practices based on the household registration system, in which urban citizens continue to enjoy benefits afforded to them based on their registration permit,\textsuperscript{200} as well as a status quo of discriminatory treatment of rural workers,\textsuperscript{201} and local governments unwilling to follow the national government's interpretation of the Labor Law as applicable to migrant workers.\textsuperscript{202} Rather than recognizing equal employment rights, local municipalities end up developing regulations that continue to restrict employment of rural workers.\textsuperscript{203} Additionally, regulations themselves often do not provide sufficient remedies for violations of labor rights or incentives to enforce these rights.\textsuperscript{204} Further, scholars note that the image of the \textit{qinmin} government itself is not enough, and the government needs to recognize the peasant workers' "demand[s] for political participation and consultation within the mainstream political institution."\textsuperscript{205}

In 2007, China enacted its first Labor Contract Law,\textsuperscript{206} which "openly and unmistakably emphasize[d] the protection of the rights of laborers."\textsuperscript{207} Two other labor laws were also enacted: the Law on the Mediation and Arbitration of Labor Disputes (hereinafter Labor Arbitration Law), and the Employment Promotion Law.\textsuperscript{208} The underlying rationale for new labor laws was to improve the contracting system, define the rights and obligations of the parties to a labor contract, protect laborers'
interests, "and develop stable and harmonious labor relations." Essentially, employers were required to treat migrant workers the same way they would treat other employees. Migrant workers had the right to employment contracts and the right to bargain using "state-run union and other employee representative groups."

The Labor Contract Law attempts to address some of the gaps from the Labor Law of 1994. One provision is to impose harsh sanctions on employers who avoid labor contracts. The previous Labor Law did not provide enough deterrence for employers, and the Labor Contract Law recognizes that the employer has more bargaining power in refusing to execute a labor contract than intimidated, vulnerable workers who would likely not demand one. Another provision encourages long-term employment contracts, addressing the exploitative potential for employers to hire only temporary employees. These provisions are representative of the provisions that address the weaknesses of the Labor Law, especially for the protection of rural workers. Though the effectiveness of these provisions is unknown, China at least has something on the books that specifically addresses the inequality between the rural and urban workers and the exploitation of the rural peasants.

Furthermore, even though employment and labor law are traditionally domestic issues, China has garnered international attention, especially amongst international labor advocates, human rights watch organizations, and the international business community. This is because these labor laws may have positive and negative impacts on the treatment of workers as well as

---

209 Jing, *supra* note 6, at 1107 (citing the stated legislative purpose of the Labor Contract Law).


211 *Id.*

212 Jing, *supra* note 6, at 1112.

213 *Id.*

214 *Id.* at 1114.

215 See *id.* at 1110-1127 (discussing what Labor Contract Law provisions address the weaknesses of the Labor Law of 1994).

216 See *id.* at 1112, 1120.

affecting the cost-benefit analysis of implementing these new labor provisions.  

Like the United States, China’s employment and labor laws are on the books, technically protecting the rights of all workers, including undocumented workers. Yet compliance and enforcement remain a critical weakness to these laws. Where China faces international pressure from labor advocates and human rights organizations for its treatment of its rural peasants, while the United States’ treatment of undocumented workers mostly goes unnoticed. This lack of notice will soon change. The U.N. Human Rights Council just completed its first universal periodic review on the United States, of which one of the issues addressed was the United States’ treatment of undocumented workers. This U.N. review signifies a new concern from the international community on the United States’ treatment on undocumented workers.

IV. International Law’s Influence

In order to address underlying factors causing the disparity of treatment between undocumented workers and documented workers, the United States must recognize the international forces at play. Migration is not a domestic issue. In fact, immigration law was originally considered a foreign policy issue that was shifted to the domestic forum. It is now time to bring it back to a foreign policy issue, as “workers compete globally with other labor markets, and employers can easily outsource service-based jobs.”

The issue of recognizing international law in the labor and employment arena for China is not new, as China has been

---

218 See id. at 38-39.
219 Id. at 38.
220 Id.
222 Stumpf, supra note 28, at 1565, 1583.
critiqued by the international community on its human rights violations, including the exploitation of rural migrant peasants.\textsuperscript{224} International forces and international legal analysis are now an assumption when it comes to analyzing China’s policies in labor law, especially when China, as the fastest growing market economy, desires to attract foreign business investments with its cheap labor.\textsuperscript{225}

Comparing China to the United States through international legal analysis highlights the deficiencies of the United States perspective on immigration law and shows that consideration of international forces should be incorporated more into its policy-making decisions towards undocumented workers.

\textit{A. The Effect of International Forces and Agreements}

The world has become increasingly viewed as an “economic unit,”\textsuperscript{226} and “market forces” must be considered in making policy decisions.\textsuperscript{227} If the United States continues to try to address its “illegal immigration” problem by only looking at its domestic issues, not only will it continue to fail to curb illegal immigration, but it will also continue to threaten the “overall condition of workers” in the country.\textsuperscript{228}

The United States must recognize actors involved in influencing migration, such as multinational corporations, governments in their military activities, the International Monetary Fund (hereinafter IMF)\textsuperscript{229} free-trade agreements that open borders for trade, capital, and services,\textsuperscript{230} and the improvement of living standards in the home country.\textsuperscript{231} The country should consider

\footnotesize{\textsuperscript{224} Ho, supra note 208, at 38.  
\textsuperscript{225} SOLINGER, supra note 162, at 47.  
\textsuperscript{226} HUNTINGTON, supra note 20, at 267.  
\textsuperscript{227} See Bill Ong Hing, Immigration Policy: Thinking Outside the (Big) Box, 39 CONN. L. REV. 1401, 1401 (2007) (outlining his view on immigration reform).  
\textsuperscript{228} Beaseley, supra note 223, at 39.  
\textsuperscript{229} Sassen argues that the IMF’s “austerity measures” involved “mobilizing the poor into a desperate search for survival strategies that include migration, whether domestic or international, as one option.” Sassen, supra note 8, at 67.  
\textsuperscript{230} Id. at 67.  
“push-and-pull dynamics of migration from the developing world
to the United States.” Globalization and its effects can greatly
influence immigration.

Part of the globalization influence is the existence of various
bilateral and multilateral trade agreements such as the North
American Free Trade Agreement (hereinafter “NAFTA”) and
the Central American Free Trade Agreement (hereinafter
“CAFTA”). Though the focus of these agreements was to free
up the border for trade, there were no written considerations
addressing the impact on labor migration.

The only consideration of labor migration was a labor side
agreement to NAFTA, called the North American Accord on
Labor Cooperation (hereinafter “NAALC”). In essence, the
agreement was to leave the issue of labor migration to each
country. However, there was no common minimum labor
standard or effort to harmonize labor legislation. Though there
was an emphasis on monitoring amongst the countries and
exchanging information, this emphasis was seen as the weakest
aspect of the agreement because of the lack of compliance and
enforcement. As a result, there were no legal channels for
facilitating movement of labor as the demand for it increased;
the “initiation of economic development under market
mechanisms cause[d] mass migration to occur, not [the

---

232 NGAI, supra note 14, at 269.
233 Sassen, supra note 8, at 65.
235 Central American Free Trade Agreement, Aug. 5, 2004, available at,
http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-
republic-central-america-fta/final-text.
236 See Hing, supra note 227, at 1431. Though there was a consideration for high-
skilled workers such as professionals in NAFTA, there was nothing for the low-wage
238 Id.
239 Id.
240 Id.
241 Hing, supra note 227, at 1431.
Debates about NAFTA now regularly include its impact on immigration, especially the migration flow from Mexico to the United States.

That is not to say that there were no prior bi-lateral agreements that focused on labor migration. Though most of these agreements are found between European countries and North African countries, one notable labor agreement to which the United States was a party was a series of agreements relating to temporary farm work, otherwise known as the Bracero program. It was a temporary program designed to recruit Mexican workers, and was meant to guarantee safe working conditions for the Mexican workers. However, while the program and agreements expired in 1964, no other agreement took its place to manage the continued flow of migration between Mexico and the United States. An unintended adverse effect of this program was that undocumented migration increased, partly because of active employer recruitment. It is now estimated that the rate of growth for the undocumented population is about 515,000 per year.

As for multilateral agreements, little is found on the subject of labor from 1947 to 1994, the period when the General Agreement on Tariffs and Trade (hereinafter “GATT”) was enacted to the time when the World Trade Organization (hereinafter “WTO”) was founded. Even when the General Agreement on Trade in Services (hereinafter “GATS”) provided as a legal framework for WTO members to use to liberalize trade on services such as water, health, and education, and included a provision for the

243 Sassen, supra note 8, at 69.
245 Id at 209.
246 Id. at 208.
247 Hing, supra note 227, at 1429.
248 Brother Towns/Pueblos Hermanos, supra note 16.
250 Trachtman, supra note 244, at 241.
251 General Agreement on Trade in Services, Apr. 5, 1994, 36 I.L.M. 354.
movement of persons in supplying these services, no labor issue related to the production of goods was covered. In other words, the "movement of persons" provision in GATS mainly covered "high-skill-based services" and persons associated in supplying these services.

B. Considering International Law

The regulation of migration or immigration is considered "the last major redoubt of unfettered national sovereignty." At the same time, equal workers' protections for undocumented workers is the "least controversial . . . norm" for international law. International human rights law establishes this norm as a foundation for equal treatment. Regardless of one's immigration status, a worker has certain fundamental rights. These are asserted by the International Labor Organization (hereinafter "ILO"), the United Nations, and the Inter-American Court of Human Rights (hereinafter "ICHR").

The use of international labor standards is increasingly popular, not just for institutional framework changes, but also as a guide and public policy consideration. One scholar notes that

---


253 TRACHTMAN, supra note 244, at 242.

254 Id. at 243.


257 Lyon, supra note 8, at 212.

258 Id.


260 Jobs and Borders, supra note 112, at 2202.

261 Id. The definition of labor standards are “norms and rules that govern working conditions and industrial relations . . . established either at the national level . . . or at the international level.” ORG. FOR ECON. CO-OPERATION AND DEV., TRADE, EMPLOYMENT AND LABOUR STANDARDS 25 (1996), available at http://www.oecd-ilibrary.org/trade/trade-employment-and-labour-standards_9789264104884-en.
U.S. courts have increased the number of citations to international agencies to support their decisions.\footnote{Lyon, supra note 8, at 172.} With the continued deprivation of employment/labor rights to undocumented workers as well as the rise of international human rights incorporated into the norms of international labor standards, it would serve the United States well to consider international law.\footnote{Id.}

One important legal framework is the ILO’s Multilateral Framework on Labour Migration (hereinafter “the Framework”) created in 2005.\footnote{The Hon. Justice Michael Kirby, Labour Migration: International Standards and National Progress, 2 J. MIGRATION & REFUGEE ISSUES 1, 4 (2006) (citing ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration (Geneva, 2006)).} The ILO, as the United Nations’ oldest agency, founded in 1919, does not traditionally have binding influence on nations.\footnote{See id., at 3-4.} Rather, its purpose is to “promote the global community’s acceptance of international labor standards through the adoption of conventions, guidelines, and recommendations after consultation with governments, labor unions, and employers.”\footnote{Jobs and Borders, supra note 112, at 2205.} The Framework promulgates four key themes as a guide to all relevant parties (governments, employers, unions, and others) in their labor policy-making.\footnote{Kirby, supra note 264, at 4.} These themes are “decent work for all; promotion and protection of migrant rights; management and governance of migration; and migration and development.”\footnote{Id.} The Framework implies that these themes are non-negotiable and universally applicable, regardless of one’s immigration status.\footnote{Jobs and Borders, supra note 112, at 2206.}

Yet the weakness in the ILO lies in its lack of enforcement power.\footnote{Id. at 2207.} It is up to each country to decide whether it will be a party to any of the conventions or frameworks the ILO puts out; for example, the United States has only ratified two of what are considered eight “core” ILO conventions: the abolishment of forced labor (Convention 105) and the prohibition of child labor.
(Convention 182).271

Yet, if the United States were encouraged to follow the themes of the Framework, they would likely be told to focus on its "fundamental principles."272 The ILO Committee on Freedom of Association (hereinafter "ILO-CFA") addressed the United States directly in regard to the Supreme Court's decision in Hoffman.273 The Committee protested that denying backpay to undocumented workers could "devastate worker safety and well-being."274 Though the United States asserted that it had no obligations to follow this opinion, the ILO-CFA went on to declare the Hoffman decision "so egregious as to violate the fundamental aims and principles behind the ILO Constitution."275 They considered this decision a violation of human rights.276

Further, ICHR, an "autonomous judicial institution of the Organization of American States,"277 condemned the Hoffman decision, declaring that the vulnerability of undocumented workers provides greater support for equal protection, and that the Hoffman decision effectuates discrimination against a specific group of persons, which ends up harming the employment relationship.278 This declaration "throws an even harsher international spotlight" on the United States' treatment of undocumented workers.279

271 Id.
272 Id.
273 See International Labour Organization, Comm. on Freedom of Ass’n [hereinafter ILO-CFA], 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), ILO Doc. 0320033322227 (Oct. 18, 2002), available at http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1300&chapter-3&query=%28United+States%29+0/o4Oref&highlight-&querytype=bool&context=0 (alleging a complaint against the U.S. Supreme Court decision in Hoffman).
275 Id.
276 See ILO-CFA, supra note 273, at ¶ 573.
278 Lyon, supra note 8, at 215-16.
279 Id. at 216.
The language is reminiscent of the language used in describing China's human rights violations. Arguments illustrating China's poor record of enforcing human rights standards—including workplace protections—should also apply to the United States' approach towards undocumented workers. The legal status of the rural peasants excludes membership from cities in China; while the legal status of the undocumented worker in the United States excludes membership from equal workers' rights. There is no difference between an exploited peasant worker in China and an exploited undocumented worker in the United States.

C. Critiques

Many object to the use or consideration of international policy with regard to migration issues, especially in terms of labor conditions. The first critique is that international law usually stays out of migration policies as it is mostly a national government matter. However, there is a distinction between labor policies and migration. Labor rights are a well-established international norm, starting first with the Treaty of Versailles and the ILO in 1919. Additionally, equal workplace treatment is the "least controversial norm." Equal rights protections at the workplace are categorically not based on immigration status in international

280 See, e.g., Solinger, supra note 162, at 50-51 (explaining that peasants in urban areas were tolerated only to the extent that they refrained from expecting the same treatment as "full-fledged urbanites").

281 See Lyon, supra note 8, at 186.

282 See A. LeRoy Bennett, International Organizations: Principles and Issues 358-362 (6th ed. 1995) (noting ILO's origin was based on the Treaty of Versailles of 1919 and developed a "movement to further world order through international cooperative institutions").

283 Lyon, supra note 8, at 210.

284 Id.

285 Fitzpatrick, supra note 256, at 180.
law.  

Though there may be a hierarchy of rights, such that substantive political rights may not be absolute, basic human rights treatment of workers is the norm.  

The second critique of using international law to regulate national issues is based on the idea of sovereignty; this is also China’s argument for being able to decide what is in the best interest of the country. Both countries are suspicious of “unelected world authority” dictating what standards to follow. Americans are as “stubbornly protectionist” as the Chinese are in regards to the treatment of its people.  

However, the United States has signed and ratified major treaties on human rights, and has been active in the drafting process in order to ensure that there is a balance of sovereignty interests and human rights (unlike China). Therefore, the United States has no reason to shy away from fundamental human rights concepts it had a hand in drafting. Further, there has been a decline in “unilateral state action;” sovereignty is no longer considered a rigid, absolute principle, but rather, a flexible concept. Other world regions such as Western Europe consider international migration as being handled de facto through bilateral and multilateral channels. Even China, as a member of ILO, allowed international pressure to influence its decision to revise its labor laws in 2008.


288 International Covenant on Civil and Political Rights, art. 25, opened for signature Dec. 16, 1966, 99 U.N.T.S. 171 (stating, for example, that voting is limited to citizens).


290 Id.

291 Id. at 329.

292 Ramji-Nogales, supra note 289, at 344.

293 Other world regions such as Western Europe consider international migration as being handled de facto through bilateral and multilateral channels. Even China, as a member of ILO, allowed international pressure to influence its decision to revise its labor laws in 2008.

294 Id. at 69-70.

295 See text accompanying supra note 215.
The third critique follows the logic that highlighting human rights for undocumented workers may dilute the issue of how immigrants can benefit society as a whole.\textsuperscript{296} It would dilute the uniqueness of the United States' immigration policy, as it is one of the few nations that provide a step-by-step transition to citizenship.\textsuperscript{297} If we apply international human rights law, this uniqueness and focus of immigration law would be diluted. However, the suggestion of using international law is not to change the institutional legal framework, but rather to guide what the minimum standard should be. It is not the ceiling but rather the floor to standards.\textsuperscript{298}

V. Towards a Solution

The center of controversy for immigration law is more than a clash with employment law—it is also about the definition of sovereignty and equality. This issue led the AFL-CIO to a drastic switch from an antiimmigrant to proimmigrant stance.\textsuperscript{299} The AFL-CIO recognized the necessity for all workers' rights to be recognized in order to preserve the current workforce, both legal and undocumented.\textsuperscript{300} All members benefit when the "entire workforce can assert these rights."\textsuperscript{301} An equalized workforce population would result in a disincentive for employers to hire undocumented workers at a cheaper price and would curb illegal

\textsuperscript{296} Ramji-Nogales, supra note 289, at 344.
\textsuperscript{297} Id.
\textsuperscript{298} Id.
\textsuperscript{301} Cunningham-Parmeter, supra note 29, at 1366.
immigration. Additionally, Congress' original focus of IRCA was targeting the employer, not the undocumented worker. Employer sanctions, coupled with work verification processes, must be strictly and accurately enforced. In other words, if immigration law focuses not only on border controls, but also on employer sanctions and allowing undocumented workers full access to employment and labor rights, curbing illegal immigration would be more effective.

Specific reform suggestions have ranged from enacting a transnational citizenship based on labor to a call for global employee benefits law, where a worker would take his or her benefits across nation-state lines. There is even a suggestion of incentivizing workers for reporting workplace violations by granting them a visa based on their ability to help enforce the law, similar to the current “S” and “T” visas. Most of the proposed comprehensive immigration reform bills include a legalized path for undocumented workers to gain legal status, especially if they have been in the United States for a long time. Other scholars look beyond immigration policies to foreign relations policy and suggest bilateral trade agreements and aid specific to regulating labor migration, such as country-specific investments and country-specific work visas.

302 Id., at 1390.
304 AFL-CIO AND CHANGE TO WIN, supra note 299, at 2.
305 See generally Gordon, supra note 8 (arguing that labor-based citizenship "would facilitate the enforcement of baseline labor rights and allow migrants to carry benefits and services with them as they move.").
308 See, e.g., Heydari supra note 307, at 1552 (recommending a model for immigration reform which allows victims of certain crimes permission to remain in the country with possibility of permanent residency); Nessel, supra note 81, at 351.
309 Cunningham-Parmerter, supra note 29, at 1411 (citing Cristina M. Rodriguez, Guest Workers and Integration: Toward a Theory of What Immigrants and Americans
The consideration of international law is simply one major factor in addressing these problems. In fact, it is a way the United States may be able to lead by example and effect change in the rest of the world.\textsuperscript{310} If the United States is serious in its critiques of other countries such as China on its human rights violations, then the United States would do well to follow suit in listening to its own voice in the international arena. This is especially relevant considering the U.N. Human Rights Commission’s universal periodic review on the United States, in fulfillment of the U.N. Charter and the Universal Declaration of Human Rights.\textsuperscript{311} While China may have serious concerns in terms of human rights violations, the parallel between its treatment of the rural peasants and the United States’ treatment of undocumented workers exists, and it is one of the concerns brought up in the U.N.’s compilation of issues to raise in its periodic review.\textsuperscript{312}

One recommendation is that the United States consider international law as a tool to integrate immigration policies with labor/employment laws by going beyond the institutional framework of these two legal regimes and viewing it as a public policy.\textsuperscript{313} Perhaps it is best viewed as a potential mediator for immigration law and employment/labor law.

An underlying assumption to these suggestions is based on a challenge to the traditional conceptualization of citizenship-based membership. This view is that membership based on citizenship includes protections and rights from the law. However, if a

\textit{Owe One Another}, 2007 U. CHI. LEGAL F. 219, 266-67 (2007)).

\textsuperscript{310} Gordon, supra note 8, at 586-87; Ramji-Nogales, supra note 281, at 350.


\textsuperscript{312} Report of the Working Group on Universal Periodic Review, supra note 217, at 18-19, ¶¶ 92.79, 92.81.

\textsuperscript{313} Lyon, supra note 8, at 220 (citing Vicki C. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience, 51 DUKE L.J. 223, 272-73 (2001)).
substantial group of workers, who are not born here or legally authorized to work here, contribute to the communities and workforce, should membership not also be based on the amount of contribution given to society? Are there not certain fundamental rights that should be accorded to all peoples, regardless of their immigration status?314

Perhaps the greatest chance for reform may be a "reconceptualization" of sovereignty and equality.315 Otherwise, immigration law’s current policy goals and employment/labor law policies will continue to be mutually exclusive.316 This reconceptualization includes acknowledging that there are greater forces causing illegal immigration than a lack of border control. Globalization forces, disparity between sending and receiving countries, and international agreements based on free trade continue to influence and impact migration.317 Current immigration policy does not recognize or address these greater forces.

Reconceptualizing sovereignty also means recognizing factors other than place of birth as criteria to membership to a country, or community. “[W]ork itself can serve as a crucial pathway to

314 Human Rights law affirms certain rights, such as the “right to life” or “right to integrity of the person and to human dignity.” Guy S. Goodwin-Gill, Migration: International Law and Human Rights, in MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 160 (Bimal Ghosh ed. 2000). Additionally, political theorists, international law scholars, and the U.S. Supreme Court have reasoned that the “right to emigrate” is also a fundamental, inalienable right. Joy M. Purcell, A Right to Leave, But Nowhere to Go: Reconciling an Emigrant’s Right to Leave with the Sovereign’s Right to Exclude, 39 U. MIAMI INTER-AM. L. REV. 177, 184 (2007). Though there is not a universal right to immigrate, the right to emigrate is characterized as a right to freedom of movement. See Organization of American States, American Convention on Human Rights, art. 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Charter of Fundamental Rights of the European Union, art. 45, Dec. 12, 2000 O.J. (C 364) 19.


316 Linda S. Bosniak, Opposing Prop. 187: Undocumented Immigrants and the National Imagination, 28 CONN. L. REV. 555, 593 (1996) (“The two commitments (against marginalization of persons and for borders around the community) are mutually incompatible, at least where the status of the undocumented immigrants are concerned”).

317 NGAI, supra note 14, at 10-11; see also de la Vega & Lozano-Batista, supra note 89, at 36.
citizenship... [as it is] one of the few remaining centers of integration... where people of different races, ethnicities, and statuses have the opportunity to engage in a shared experience.”

In fact, it would serve the principle of sovereignty even more to allow these undocumented workers to participate in the notion of equality, giving them an opportunity to invest and share in the community.

At this point, change or reform moves slowly. Immigration law is a polarizing issue for the American public and politicians highlight their position to pursue their own agenda. For Congress, multiple proposals have ended in gridlock. Courts also show resistance, relying more on “status-based membership” indicators to determine the rights afforded to workers. While we wait for the national government and the court system, it may be wiser to begin at a local level.

One tangible way of changing our notion of sovereignty is through local worker centers. These centers are geared towards day laborers and serve as a resource for guiding workers, legal or undocumented, through rights and protections accorded to them in employment and labor law. They are “community-based mediating institutions that provide support to low-wage workers.” They serve as a bridge between the local community and the workers, not only in the sense of advocacy of workers’

---

318 Cunningham-Partmert, supra note 29, at 1411-12.
319 Id. at 1412.
321 Nunez, supra note 315, at 848.
323 Id. at 2.
rights and protections, but also as a way to connect these workers to the local communities. They also are able to organize voices that can speak from their own experiences on the exploitative nature of their work conditions. In fact, “hearing directly from the workers themselves has moved local elected officials and community residents... to empathic positions as they have connected their own immigrant pasts to those of these newcomers.”

One example is the El Sol Community Center (hereinafter “El Sol”) in Jupiter, Florida. The center was a community-led effort, based mostly on volunteers and professionals willing to give some time to provide advice on legal and labor issues. Though some local residents viewed this center as an encouragement to immigrate without authorization, the center is mostly supported. In fact, local volunteers who were interviewed noted that these day laborers provided crucial services to the community. El Sol also opened contact and relations with a town in Guatemala, establishing a sort of “friendship” based relationship to help immigrants go through legal channels when immigrating and to address any potential workplace problems that may arise in Jupiter. This is a tangible example of recognition that the problems with undocumented workers are directly related to issues beyond our borders. El Sol’s efforts to work with a Guatemalan town demonstrates one way of acknowledging the international factors at play in regards to the undocumented workers in Jupiter.

Another example is the Farm Labor Organizing Committee, partnering with the North Carolina Growers Association, the

---

324 Id. at 14 (explaining that worker centers work closely with community organizations).
326 Id.
327 BROTHER TOWNS/PUEBLOS HERMANOS, supra note 16.
328 Id.
329 Id.
330 Id.
331 Id.
largest employer of guest workers in the United States.\textsuperscript{332} The partnership helps arrange wages and available jobs as well as provides a safe, protected, legal channel of work for day laborers.\textsuperscript{333} This partnership recognizes that immigration is not simply a domestic issue. They not only have an office in Raleigh, North Carolina, but also one in Monterrey, Mexico.\textsuperscript{334} It is a local, but transnational, approach to integrating immigration law with employment/labor law.

While Congress continues to deliberate on another comprehensive immigration reform bill,\textsuperscript{335} worker centers provide local-level support and legal counsel to undocumented workers. Their work can inform the controversy over immigration, providing human experiences and stories that dispel myths about the adverse effects of immigration and inform local communities of the benefits of encouraging workplace protections for all workers, regardless of their immigration legal status.

In conclusion, there are no simple remedies to addressing the clash between immigration law and employment/labor law. Historically, the United States was able to strike a balance between its core principle of equality and its notion of sovereignty. Currently, immigration law undermines employment/labor principles and upsets this balance. The inadvertent effect is the creation of a subclass that employers can exploit by hiring them at cheaper wages. This abuse of undocumented workers, in turn, threatens the fair competition among legal workers. We now face a reality where pursuit of sovereignty has undermined the value of equality. This is a situation that parallels China's current situation with its labor force. Ironically, because China is in a weaker position in the geopolitical struggle for power, China is more likely to heed the international community's exhortations and critiques, revamping its labor laws to address a historic problem of exploitation on its rural workers. However, the United States,

\textsuperscript{332} Gordon, \textit{supra} note 8, at 574.

\textsuperscript{333} \textit{Id.}

\textsuperscript{334} \textit{Id.} at 375.

\textsuperscript{335} See, \textit{e.g.}, Press Release, Robert Menendez, United States Senator for New Jersey, \textit{Colleagues Re-Introduce Comprehensive Immigration Reform}, (June 22, 2011), \textit{available at} http://menendez.senate.gov/newsroom/press/release/?id=0c6c73f2-5366-4fde-bd9d4e5d85c1b8f3 (last visited Oct. 23, 2011).
coming from a position of wealth, power, and strength, does not feel the need to listen to the international community. Yet this is to the detriment not only of the undocumented worker, but also to the rest of the native-born and documented populations. It is this author’s hope that the United States will start listening.