

Uldaho Law

## Digital Commons @ Uldaho Law

---

Articles

Faculty Works

---

2017

### The Immigrant Right to Work

Geoffrey Heeren

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/faculty\\_scholarship](https://digitalcommons.law.uidaho.edu/faculty_scholarship)



Part of the Immigration Law Commons

---

## THE IMMIGRANT RIGHT TO WORK

GEOFFREY HEEREN\*

*Federal and state policies that make immigrant work putatively illegal are in tension with a constitutional right to work that is deeply rooted in United States history and jurisprudence. The Department of Homeland Security (“DHS”) regulates immigrant work through a system of employment authorization and sanctions on employers who hire unauthorized immigrant workers. This system has become such a central feature of immigration law that few recognize it is a relatively recent innovation. While the United States has always regulated its domestic labor market by modulating immigration, regulation of work as a mechanism of immigration enforcement has only existed since the 1980s. In order for that system to come into being, a radical shift needed to occur: immigrants’ right to work had to be forgotten.*

*From the late nineteenth through the early twentieth centuries, courts accepted that immigrants had a right to work based on substantive due process and natural law. This article contends that there are strong constitutional reasons to return to that principle, which has lapsed but has never been overruled. The right of immigrants to work is “objectively, deeply rooted this Nation’s history and tradition,” which is sufficient to trigger a rigorous form of substantive due process review. No statute has ever been passed that revokes immigrants’ right to work; the laws that exist today do not ban unauthorized immigrants from working but instead utilize employer sanctions to relegate them to various forms of contingent work. In these positions, immigrant workers are denied the bundle of rights and protections that go along with the traditional employment relationship. They face exploitation, lower wages, unsafe conditions, and retaliatory discharge or reporting to DHS.*

*This system of subordination arose during the late 1970s after a dramatic curtailment in legal Western Hemisphere immigration virtually assured a constant campaign of deportation against millions of predominately Latin American unauthorized immigrants. Policymakers discouraged unauthorized immigrant employment as a strategy to reduce the wave of illegal*

---

\* Associate Professor, Valparaiso University School of Law. I would like to thank Rosalie Berger Levinson, David Herzig, Marty Lederman, Jennifer J. Lee, Stephen Legomsky, Peter Markowitz, Jason Parkin, Barry Sullivan, Mary Szto, D.A. Jeremy Telman, Bernard Trujillo, and the participants at work-in-progress sessions at the Emerging Immigration Scholars’ Conference, the AALS Clinical Conference, the Seventh Annual Constitutional Law Colloquium at Loyola University, Chicago, and faculty workshops at Arkansas, South Carolina, and Valparaiso. © 2017, Geoffrey Heeren.

*immigration they had created—a goal that has so far not been met. This history shows that the ineffective policies of the present day raise significant constitutional concerns, and it is time to reconsider them. One way to do so is by taking a second look at the right to work that was well established during an earlier era of United States history.*

## I. INTRODUCTION

For much of United States history, immigrants had a right to work.<sup>1</sup> Nineteenth and early twentieth century courts viewed work as a natural right, and a central aspect of the liberty and property protected by the Fourteenth Amendment Due Process clause.<sup>2</sup> When states tried to keep out or drive out immigrants by restricting their job opportunities through licensing, permitting, or zoning laws, federal courts routinely struck down these efforts.<sup>3</sup> It was not until the late 1970s that the Immigration and Naturalization Service (“INS”) began to limit immigrants’ right to work by developing a comprehensive system for authorizing immigrant employment.<sup>4</sup> Congress followed up with the Immigration Reform and Control Act (“IRCA”) of 1986, which for the first time imposed sanctions on employers who hired unauthorized immigrant workers.<sup>5</sup> This was a paradigm shift: while immigration was once a means for regulating the supply of labor in the country, employment regulation since the 1980s has become a mechanism of immigration enforcement.<sup>6</sup>

However, neither IRCA nor any other federal statute has ever prohibited unauthorized immigrants from working, as long as they do not use false documents to do so.<sup>7</sup> When an unauthorized immigrant worker works for an employer, it is the employer who violates the law by hiring an unauthorized immigrant, not the worker.

Unauthorized immigrant workers continue to work despite employer sanctions, not only because it is lawful, but also because they have to in order to feed themselves and their families.<sup>8</sup> Work is one of the most basic human

---

1. *See infra* Part I.

2. *See, e.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

3. *See infra* Part II.

4. *See infra* Part II.

5. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 115, 274A, 100 Stat. 3359, 3360, 3384 (making employment of unauthorized immigrants unlawful and increasing enforcement of existing immigration laws).

6. See Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 137 (2002) (noting that IRCA “effectively makes employers parties to enforcement of the immigration laws affecting the labor market.”).

7. 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, 140 (2009) [hereinafter Griffith, *Migrant Worker Law*] (“IRCA [the Immigration Reform and Control Act of 1986] did not explicitly make it illegal for an undocumented employee to simply seek or accept employment in the United States.”).

8. See Jeffrey S. Passel & D’Vera Cohn, *Share of Unauthorized Immigrant Workers in Production, Construction Jobs Falls Since 2007*, PEW RESEARCH CENTER 5 (2015), <http://www.pewhispanic.org/2>

activities and the source of not only physical sustenance, but also societal respect and emotional fulfillment.<sup>9</sup> Courts once agreed that immigrants had a constitutional right to work, based on natural law principles set out in fundamental constitutive documents of the United States, like the Declaration of Independence.<sup>10</sup> In sharp contrast, unauthorized immigrant work today is putatively illegal—discouraged (but not actually banned) through a work permit system and employer sanctions.<sup>11</sup>

The putative illegality of unauthorized work puts unauthorized workers in a uniquely poor bargaining position in the economy. Employers who know of their workers' unauthorized status can use that knowledge as leverage to blackmail them into accepting conditions that do not comply with federal and state employment laws.<sup>12</sup> Many large and well-established employers, of course, do not wish the exposure that comes with openly hiring unauthorized workers. Yet they can still secure the economic benefit of hiring unauthorized immigrant workers by participating in the “fissured workplace”: a growing network of non-traditional work relationships, such as independent contracting, subcontracting, and franchising.<sup>13</sup> According to one estimate, about 13% of the labor force is composed of independent contractors: workers who theoretically control the terms and conditions of their work.<sup>14</sup> If self-employed workers, agency temps, on-call workers, and contract company workers are added in, the number rises to nearly a quarter of the United States workforce.<sup>15</sup>

Companies or individuals do not for the most part face sanctions under IRCA if they hire unauthorized immigrant workers who are independent contractors.<sup>16</sup> The independent contractor exception opens a vast swath of

---

015/03/26/share-of-unauthorized-immigrant-workers-in-production-construction-jobs-falls-since-2007/ (the number of unauthorized immigrants in the United States labor force has ranged from 8.1 million to 8.3 million since 2007).

9. See STUDES TERKEL, *WORKING: PEOPLE TALK ABOUT WHAT THEY DO ALL DAY AND HOW THEY FEEL ABOUT WHAT THEY DO* xiii (1974).

10. See *infra* Part I.

11. See *infra* Part III.

12. See Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1091 (2011) (“growing evidence suggests that unauthorized workers are more likely than their authorized counterparts to experience labor violations.”); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007). For a discussion of the workplace rights that arguably do apply to unauthorized migrants, see Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1367-71 (2009); D. Carolina Núñez, *Fractured Membership: Deconstructing Territoriality to Secure Rights and Remedies for the Undocumented Worker*, 2010 WIS. L. REV. 817, 849-60 (2010).

13. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 11-13 (2014).

14. GOVERNMENT ACCOUNTABILITY OFFICE, *CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS*, LETTER TO THE HONORABLE PATTY MURRAY, RANKING MEMBER, COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS, UNITED STATES SENATE 16 (APRIL 20, 2015).

15. *Id.* at 15-16.

16. Independent contractors are excluded from the definition of “employee” under IRCA and persons or entities therefore have no obligation to check the citizenship status or employment authorization of independent contractors. 8 C.F.R. § 274a.1(f). However, a person or entity who knowingly contracts with an unauthorized worker knowing that he or she is unauthorized can be

occupations for unauthorized immigrant workers; landscapers, general contractors, barbers, and home health care workers are all examples of occupations commonly structured as independent contractors. With the spread of the fissured workplace, large employers can subcontract out corporate functions to entities that might be more willing to directly hire unauthorized workers, or to hire independent contractors who are unauthorized to work.

In addition to the independent contractor exception, there are two other significant gaps in IRCA. The employment of one's self does not violate IRCA, and many unauthorized workers are self-employed entrepreneurs.<sup>17</sup> Last, persons can hire irregular domestic workers, such as housecleaners or part-time nannies, without violating IRCA.<sup>18</sup>

What all these positions have in common is that they do not come with the bundle of rights that typically accompanies a formal employment relationship: minimum wage and overtime, Social Security and other retirement benefits, unemployment insurance, workers' compensation, collective bargaining rights, and the protection of federal antidiscrimination laws.<sup>19</sup> Thus, the primary impact of employer sanctions is not to ban unauthorized workers from working, but to relegate them to contingent positions where they do not receive the rights and protections that traditional employees take for granted.

Therefore, unauthorized immigrant workers are literally subordinate in the workplace; IRCA does not bar them from working, just from accessing the rights that other workers have. They typically receive less pay than authorized workers do in exchange for largely manual labor jobs that come with a risk of poisoning by pesticides and industrial chemicals, debilitating workplace accidents, retaliatory discharge, and other labor law violations.<sup>20</sup> All

---

subject to liability under IRCA even if the worker is an independent contractor. 8 U.S. Code § 1324a(a)(4); 8 C.F.R. § 274a.5. Thus, an individual or entity might face sanctions if the individual or entity has independent knowledge that an independent contractor is not authorized to work.

17. See Cindy Carcamo, *Immigrants Lacking Papers Work Legally—As Their Own Bosses*, L.A. TIMES, Sept. 14, 2013; Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners "Employees" Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 252 (2008) (analyzing IRCA's employer sanctions provisions and determining that they do not prevent unauthorized immigrants from owning businesses). One study using data from the 1990 Census and the Legalized Population Survey (LPS) found that the rate of self-employment among undocumented male (female) immigrants was 4.6 percent (3.6 percent) in 1989 and 8.3 percent (5.1 percent) in 1992 after legalization through the Immigration Reform and Control Act. Robert W. Fairlie & Christopher Woodruff, *Mexican Entrepreneurship: A Comparison of Self-Employment in Mexico and the United States*, in GEORGE J. BORJAS, MEXICAN IMMIGRATION TO THE UNITED STATES 154 (2007). If this rate of self-employment among undocumented immigrants has remained constant, about 450,000 of the estimated eleven million undocumented immigrants would be self-employed.

18. 8 C.F.R. § 274a.1(h) (excluding "domestic service in a private home that is sporadic, irregular, or intermittent" from the definition of employment under IRCA).

19. WEIL, *supra* note 13, at 17-18. For a discussion concerning whether undocumented immigrants who are not working as independent contractors receive these protections, see Cunningham-Parmenter and Núñez, *supra* note 12.

20. See ANNETTE BERNHARDT, ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* (2008) (finding high incidence of labor law violations for unauthorized immigrant workers), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>; FARMWORKER JUSTICE, *EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION'S FARMWORKERS* (2013) (documenting the health impact of pesticide

the while, deportation hangs over their heads as a cudgel for unscrupulous employers to use against them—a stick that would not exist if employers were not required by law to inquire into immigration status.<sup>21</sup>

Certain aspects of this situation could be remedied if courts recognized what once was a truism: immigrants have a right to work. Given the historical protection of the immigrant right to work, it seems to satisfy the *Washington v. Glucksberg* standard for assessing whether a right is fundamental enough to deserve protection under the Fourteenth Amendment as a matter of substantive due process: whether it is “objectively, deeply rooted in United States history.”<sup>22</sup>

Admittedly, recognizing an immigrant right to work would be in tension with courts’ longstanding reluctance to apply heightened review to economic legislation since the rejection of this approach in *Lochner v. New York*.<sup>23</sup> Expansion of judicial protection for economic rights could be a Pandora’s box, possibly resulting in the invalidation of modern labor law. However, there are principled ways to expand select economic rights without holding all progressive economic legislation unconstitutional.<sup>24</sup> One possible limiting principle comes from the Court’s recent decision in *Obergefell v. Hodges*.<sup>25</sup> In that case, the Court found the history of subordination against LGBT persons supported the invocation of a substantive due process right to marry, even though LGBT persons had not historically enjoyed protection of that right.<sup>26</sup> Much like same-sex couples, immigrants have also experienced subordination; the workplace subordination of unauthorized immigrant workers is part and parcel of a larger history of discrimination, violence, and exploitation of immigrants in the United States. Thus, it is possible to legally distinguish between the workplace rights of subordinated immigrants and those of, for example, an employee who does not wish to pay union fees. Accordingly, there is a sound basis for treating them differently.<sup>27</sup>

---

exposure to farmworkers), <http://www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20singles%20compressed.pdf>; Passel & Cohn, *supra* note 11, at 8-9 (unauthorized immigrants hold jobs in agriculture, service, and construction at a disproportionately high rate); Jayesh M. Rathod, *Beyond the “Chilling Effect”: Immigrant Worker Behavior and the Regulation of Occupational Safety & Health*, 14 EMP. RTS. & EMP. POL’Y J. 267, 275-76 (2010) (noting a rise in workplace accidents among the foreign-born population in the United States).

21. See Wishnie, *supra* note 12, at 215.

22. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

23. For a discussion of *Lochner v. New York*, 198 U.S. 45 (1905), and its demise, see Richard E. Levy, *Escaping Lochner’s Shadow: Toward A Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 344 (1995).

24. As an example of one such argument, see *id.* at 413-42.

25. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

26. See Laurence H. Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. F. 16 (2015); Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015).

27. For a discussion of the role that the anti-subordination principle has played in legal analysis, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1048 (1986); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428-33 (1994).

There are four parts to this argument. Part One provides a historical overview of immigrants' jurisprudential right to work and the relative absence of federal regulation of immigrant labor during the same time period. This history shows that immigrants' right to work is deeply rooted in United States history. Part Two describes how federal regulation of immigrant labor began to take place as courts simultaneously shifted away from recognizing immigrants' constitutional right to work. This shift accelerated in the 1970s as policymakers dramatically curtailed legal Western Hemisphere immigration and became concerned about the increase in illegal immigration that occurred as a result.<sup>28</sup> Believing that jobs were a magnet for illegal immigration, Congress restricted immigrant employment and made work authorization central to the overall immigration enforcement strategy.<sup>29</sup> Part Three contends that laws that evolved out of this era concerning noncitizens' work made unauthorized work only *putatively* illegal and subordinated unauthorized immigrant workers without significantly reducing illegal immigration. Finally, Part Four argues that immigrants' right to work ought to be revived because it is deeply rooted in United States history and because immigrant workers have experienced subordination.

This article argues that noncitizens have a right to work whether they have a formal immigration status or not. That does not mean the right to work can never be restricted. The exact contours of the right to work and the standard for evaluating restrictions on it are beyond the scope of this article. Nevertheless, if a constitutional right to work does exist for immigrants, then two significant conclusions follow. First, a President may expand immigrant work authorization without specific congressional approval. Second, government actions that significantly burden the immigrant right to work—like provisions criminalizing unauthorized work or taking work authorization away from classes of noncitizens who currently have it—should trigger judicial review.

## II. THE ORIGINS OF IMMIGRANTS' RIGHT TO WORK

Immigration has always been closely connected to labor in this country.<sup>30</sup> Throughout United States history, immigration controls have operated as a means to meet labor needs during times of economic prosperity or to protect jobs held by American citizens during times of economic malaise.<sup>31</sup> It is only in the last few decades that another system has arisen, under which labor regulation has come to serve as a means of immigration enforcement.

---

28. See *infra* Part II.

29. *Id.*

30. E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1789–1965 492 (1981).

31. JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Thomson/West 3d ed. 2007).

Previously, the federal government did not regulate immigrant work. When states did, courts struck down their efforts as a violation of immigrant rights.

A. *The Absence of Federal Regulation of Immigrant Work Prior to the 1940s*

In the nineteenth century, the Industrial Revolution created a seemingly endless need for labor. The United States met this need in part through policies encouraging immigration. Early federal immigration laws, such as the Contract Labor Law of 1864, were intended to increase, rather than reduce, immigration.<sup>32</sup> The Burlingame Treaty of 1868 encouraged Chinese immigration in particular—a key source of labor to build the infrastructure necessary for an expanding nation.<sup>33</sup> However, states like California reacted with hostility to the entry of large numbers of Chinese immigrants.<sup>34</sup> Organized labor objected to the use of contract immigrant laborers to break strikes and depress wages.<sup>35</sup>

As a result, Congress passed a series of laws that, for the first time, restricted immigration. The Page Act of 1875 prohibited immigration of Asian forced laborers and prostitutes.<sup>36</sup> The Chinese Exclusion Act of 1882 prohibited all Chinese immigration.<sup>37</sup> The 1885 Contract Labor Law banned American employers from entering into labor contracts with individuals prior to their immigration to the United States, and forbade ship captains from transporting immigrants under labor contracts.<sup>38</sup> There were, however, a variety of exceptions to the new Contract Labor Law, such as for “foreigners temporarily residing in the United States, skilled workmen for any new industry not established in the United States and artists, lecturers, and servants.”<sup>39</sup> In 1903, Congress banned advertising intended to encourage immigration of noncitizen laborers.<sup>40</sup>

This early round of immigration regulation may have been a response to declining wages for unskilled labor.<sup>41</sup> It aimed to fortify wages by restricting the supply of new laborers. Immigration and labor were so strongly linked in the views of policymakers that, shortly after the Department of Commerce and Labor was formed in 1903, the Bureau of Immigration was transferred

---

32. An Act to Encourage Immigration, 13 Stat. 385 (1864).

33. See Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 616 (2007).

34. *Id.*

35. ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT* 246 (1998).

36. The Page Act of 1875, 18 Stat. 477, 477–78 (1875).

37. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58–59 (1882).

38. Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (1885).

39. H. Rep. No. 1365, at 1662 (1952).

40. Act of March 3, 1903, ch. 1012, 32 Stat. 1213 (1903).

41. Ashley S. Timmer & Jeffrey G. Williams, *Immigration Policy Prior to the 1930s: Labor Markets, Policy Interactions, and Globalization Backlash*, 24 POPULATION & DEV. REV., 739, 759 (1998).



from the Treasury Department to the newly created department.<sup>42</sup> When Commerce and Labor broke off into separate departments, immigration remained with the Department of Labor.<sup>43</sup>

Though immigration restrictions ostensibly protected the domestic labor market, they often reflected the nation's racial biases. For example, the 1907 Immigration Act gave the president authority "to refuse immigration to certain persons when he was satisfied that such immigration was detrimental to labor conditions here."<sup>44</sup> In response to continuing public opposition to Asian immigration, President Theodore Roosevelt used this authority in 1907 to exclude Japanese and Korean laborers entering the United States from Mexico, Canada, or Hawaii.<sup>45</sup> Because immigration laws functioned as a means for regulating the labor supply in the United States, immigrants who were already in the United States faced no federal regulation of their right to work.

In 1924, Congress passed the first truly comprehensive immigration law, the Johnson-Reed Immigration Act.<sup>46</sup> The law did not restrict the right of immigrants to work; even students, under the Act's regulations, had a right to work to support themselves.<sup>47</sup> The Johnson-Reed Act regulated immigration through a series of national origin quotas that were intentionally designed to maintain a predominately white, Western European immigrant pool.<sup>48</sup> Asian immigration was barred entirely.<sup>49</sup> However, the quotas did not apply to the Western Hemisphere, largely because policymakers believed that Mexican migrant workers were essential to meeting the country's labor needs and that Mexican migrants would not remain or the flow of Mexican immigration could easily be controlled.<sup>50</sup>

While quotas did not apply to the Western Hemisphere, immigration authorities used their discretionary powers to prevent Mexican nationals from obtaining immigrant visas to reside permanently in the United States.<sup>51</sup> Many Mexicans therefore chose to enter as nonimmigrants, but eventually lost lawful status after overstaying their visas.<sup>52</sup> This unlawful status made it easier to deport them when the labor market changed during the Great Depression.<sup>53</sup> In the early 1930s, for example, over 400,000 Mexican nationals and United States citizens of Mexican descent were deported or

---

42. Act of February 14, 1903, ch. 552 (1903).

43. An Act to Create a Department of Labor, Pub. L. No. 426-62 (1913).

44. H. Rep. No. 1365 at 1669 (1952).

45. *Id.*

46. Immigration Act of 1924, Pub. L. No. 139, ch. 190, 43 Stat. 153 (1924).

47. 8 C.F.R. § 10.1 (1938).

48. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21-37 (2003) [hereinafter NGAI, IMPOSSIBLE SUBJECTS].

49. *Id.* at 37.

50. *Id.* at 50.

51. *Id.* at 55.

52. *Id.* at 70.

53. *Id.* at 129-35.

repatriated under the aegis of Secretary of Labor William Doak, who “believed that deportation enforcement was a good way to create jobs for unemployed Americans during the Depression.”<sup>54</sup> During this period of minimal due process protection for immigrants, immigration enforcement was another way that government officials sought to regulate the domestic labor market. Able to engage in massive deportation round-ups with apparently minimal judicial oversight, there was little need for policymakers to try to limit the right of immigrants in the United States to work.

### B. *Early Right to Work Jurisprudence*

In the absence of federal statutory limitations on immigrant labor, states sometimes tried to step in to regulate immigrant work. The federal courts and some state courts generally struck down these efforts. In doing so, they relied on a constitutional right to work that was often grounded in the Due Process Clause of the Fourteenth Amendment.

Initially, the Supreme Court rejected the position that the Due Process Clause protected a right to work in the *Slaughterhouse Cases*.<sup>55</sup> However, Justices Field and Bradley strongly dissented from this position, and their view soon prevailed.<sup>56</sup> In a series of decisions throughout the late nineteenth and early twentieth centuries, the Supreme Court recognized that the Fourteenth Amendment Due Process Clause protected a right to work.<sup>57</sup> The Court often used the language of natural law to infer a right to work from the Due Process Clause, which protected against state deprivations of “life, liberty, or property.”<sup>58</sup> For example, in *Allgeyer v. Louisiana*, the Court stated that the protection of “liberty” in the Due Process Clause embraced:

... [T]he right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>59</sup>

54. *Id.* at 71–75; DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 215 (2010).

55. *See* *Butchers’ Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 759 (1884) (rejecting various constitutional challenges to the grant of a monopoly to a slaughterhouse company, including one based in substantive due process).

56. *See id.* at 762 (Bradley, J., concurring) (“the right to follow any of the common occupations of life is an inalienable right”).

57. *See* *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Powell v. Pennsylvania*, 127 U. S. 678, 684 (1888) (“enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the fourteenth amendment”).

58. U.S. CONST., amend. XIV, § 1.

59. *Allgeyer*, 165 U.S. at 589.

*Allgeyer* is now considered the beginning of the 1897-1937 “*Lochner* era,” named after *Lochner v. New York*, which invalidated state legislation limiting weekly work hours.<sup>60</sup> The Court’s tendency during that era to strike down progressive legislation as violating a substantive due process right to contract has come to be viewed as a form of dubious judicial activism.<sup>61</sup> However, as further discussed in Part IV, revisionist scholarship has considerably qualified that critique.<sup>62</sup>

Although *Allgeyer* spoke of the right of “citizens” to labor, noncitizens were among the earliest beneficiaries of the Court’s right to work. *Lochner* itself addressed a New York law that may have been drafted to disadvantage immigrant bakers who were willing to work longer hours.<sup>63</sup> In fact, courts began to invalidate legislation limiting immigrants’ right to work about twenty years before the official start of the *Lochner* era.<sup>64</sup> The Supreme Court’s seminal immigrant right to work case, *Yick Wo v. Hopkins*, came ten years before *Allgeyer*.<sup>65</sup> This has led some commentators to label *Yick Wo* as a *Lochner* precursor.<sup>66</sup> However, *Yick Wo* did not exist in a vacuum; it was part of a sizeable body of contemporary case law concerning immigrants’ right to work that both preceded and post-dated the official *Lochner* era.<sup>67</sup>

Nineteenth and early twentieth century cases relied on various textual sources for these decisions, but they all took as a given that immigrants generally had a “right to work.”<sup>68</sup> Commentators from the time period also

---

60. Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism,”* 123 HARV. L. REV. F. 55, 56 (2010).

61. *Id.*

62. See *infra* Part IV.B.

63. David Bernstein, *The Supreme Court and “Civil Rights,” 1886–1908*, 100 YALE L.J. 725, 734–36 (1990).

64. *Baker v. Portland*, 5 Sawy. 566 (1879).

65. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court struck down a San Francisco ordinance regulating laundries that had a disparate impact on Chinese-owned businesses.

66. Gabriel J. Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, 2008 U. ILL. L. REV. 1359, 1364, 1373 (2008); Thomas Wuil Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 356 (1995).

67. See *Toraio Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 422 (1948); *Truax v. Raich*, 239 U.S. 33, 35, 41 (1915); *Yick Wo*, 118 U.S. at 357–59, 369–70 (1886); *Fraser v. McConway & Torley Co.*, 82 F. 257 (C.C.D. Pa. 1897); *In re Yot Sang*, 75 F. 983 (1896); *In re Ah Chong*, 2 Fed. 733 (1880); *Baker v. Portland*, 5 Sawy. 566 (C.C.D. Or. 1879); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882); *Ex parte Case*, 116 P. 1037-38 (Idaho 1911); *State v. Montgomery*, 47 A. 165 (Me. 1900); *Templar v. Bd. of Exam’rs*, 90 N.W. 1058 (Mich 1902); *George v. Portland*, 235 P. 681 (Or. 1925); *Carvalho v. Cooper*, 239 N.Y.S. 436 (1930).

68. See *Takahashi v. Fish and Game Comm’n*, 334 U.S. 410, 422 (1948) (California statute barring issuance of commercial fishing licenses to persons ineligible for citizenship under federal law violated equal protection); *Asakura v. Seattle*, 265 U.S. 332 (1924) (statute denying pawnbrokers’ licenses to aliens violated treaty with Japan); *Truax v. Raich*, 239 U.S. 33, 35, 41 (1915) (using natural rights language and locating the right of noncitizens to work in the Fourteenth Amendment); *Yick Wo*, 118 U.S. at 357–59, 369–70 (1886) (discussing natural rights in the context of striking down a law regulating laundry businesses in San Francisco because unequal enforcement of the law violated equal protection); *Fraser*, 82 F. At 259 (C.C.D. Pa.1897) (Pennsylvania tax of male noncitizens over twenty-one of three cents per day for each day employed was evidently “intended to hinder the employment of foreign-born unnaturalized male persons over twenty-one years of age”

agreed that immigrants had a right to work, arguing at times for an even more robust version of the right than courts entertained.<sup>69</sup> Courts found exceptions for jobs involving public works,<sup>70</sup> public resources,<sup>71</sup> or the “police power,”<sup>72</sup> but, all in all, it is remarkable how far they went extending immigrants a right to work. Even when that right was based on Constitutional equal protection theories or international treaties, there was often an emphasis on substantive due process and the language of natural law.<sup>73</sup> Sometimes the right of immigrants to work seemed linked in the analysis of courts to the right of

and was therefore prohibited by [Fourteenth Amendment.]; *In re Tie Loy* (The Stockton Laundry Case), 26 F. 611, 613–15 (C.C.D. Cal. 1886) (city ordinance prohibiting the opening of laundries violates the Privileges or Immunities Clause of the Fourteenth Amendment, as well as due process and equal protection); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882) (using natural law language to hold that a San Francisco ordinance requiring consent of Board of Supervisors to operate a laundry violated treaty with China); *In re Ah Chong*, 2 F. 733 (C.C.D. Ca. 1880) (striking down a CA law that denied fishing rights to all who were ineligible to become electors, meaning Chinese persons, as a violation of Equal Protection and the Treaty with China); *In re Tiburcio Parrot*, 1 F. 481, 510 (C.C.D. Ca. 1880) (Sawyer, J., concurring) (“to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the [F]ourteenth [A]mendment and the act of congress.”); *Baker v. Portland*, 5 Sawy. 566 (C.C.D. Or. 1879) (Oregon statute barring holders of contracts for public work within the state from employing Chinese persons violated Treaty with China); *Ex parte Case*, 116 P. 1037, 1038 (Idaho 1911) (Idaho statute prohibiting employment of noncitizens violated equal protection and the right to contract); *Chicago v. Hulbert*, 68 N.E. 786 (Ill. 1903) (state law requiring bidders for state public work contracts to work personnel only eight hours per day and use only citizen labor violated the right to contract); *State v. Montgomery*, 47 A. 165, 169 (Me. 1900) (state legislation barring aliens from obtaining hawker’s or peddler’s licenses denied equal protection, broadly defined to embrace the right of all persons to pursue business and property on an even footing); *Templar v. Bd. of Exam’rs*, 90 N.W. 1058 (Mich. 1902) (ordinance denying barbers’ licenses to noncitizens violated Fourteenth Amendment.); *Ex parte Sing Lee*, 31 P. 245, 246 (Cal. 1892) (ordinance requiring a permit to open a laundry violated “the inalienable right of such person to engage in a lawful occupation,” and “the right of the owner of property to devote it to a lawful purpose”).

69. NORMAN ALEXANDER, *RIGHTS OF ALIENS UNDER THE FEDERAL CONSTITUTION* (1931); WILLIAM MARION GIBSON, *ALIENS AND THE LAW: SOME LEGAL ASPECTS OF THE NATIONAL TREATMENT OF ALIENS IN THE UNITED STATES* (1940); Note, *Constitutionality of Legislative Discrimination Against the Alien in His Right to Work*, 83 U. PA. L. REV. 74 (1934–35).

70. Early cases sometimes found that states had authority to deny various sorts of occupational licenses to noncitizens as an exercise of their “police power,” based on the dubious theory that noncitizens were less likely to uphold the public order in certain supposedly sensitive types of work. See *Clarke v. Deckebach*, 274 U.S. 392 (1927) (upholding Cincinnati ordinance denying licenses to operate pool rooms to aliens); *Anton v. Van Winkle*, 297 F. 340 (D. Or. 1924) (same); *Commonwealth v. Hana*, 81 N.E. 149 (Mass. 1907) (upholding ban of issuance of hawkers’ licenses to noncitizens); *Trageser v. Gray*, 20 A. 905 (Md. 1890) (upholding ban on issuing retail liquor licenses to noncitizens).

71. Other cases upheld discrimination in employment in public works on the theory that when a state acted as employer it was as free to discriminate against noncitizens as a private employer at that time would have been. See *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915); *Lee v. City of Lynn*, 111 N.E. 700 (Mass. 1916); *People v. I.M. Ludington’s Sons, Inc.*, 131 N.Y.S. 550 (Orleans Cty. Ct. 1911).

72. Another line of cases held that state resources were collective property, owned by state citizens, meaning that the state could deny noncitizens licenses related to the use of public resources, such as fishing licenses. See *McCready v. Virginia*, 94 U.S. 391 (1876) (oyster fishing); *Tokai Maru*, 190 F. 450 (9th Cir. 1911) (commercial fishing); *People v. Naglee*, 1 Cal. 232 (1850) (gold mines); *Ex parte Gilletti*, 70 So. 446 (Fla. 1915) (commercial oyster fishing); *State v. Kofines*, 80 A. 432 (R.I. 1911) (fishing licenses).

73. See *infra* note 84.

businesses to exploit them,<sup>74</sup> but most of the decisions redounded to immigrants' benefit during an era of government-supported xenophobia, discrimination, and anti-immigrant violence.<sup>75</sup>

Though the *Lochner* era ended around 1937, the Court has continued to strike down state efforts to regulate labor by lawful immigrants (except for jobs with a "governmental function," i.e. those related to self-government and the democratic process).<sup>76</sup> However, decisions in immigrant work cases have moved away from the language of natural rights, due process, and the right to contract, and have coalesced around a theory that state efforts to deny employment to lawful immigrants implicate equal protection and fail to satisfy the requirements of strict scrutiny unless they fall within the "governmental function" exception.<sup>77</sup> This remains an undisputed point of law today, although the current Court may be inclined to strike down state regulation of immigrant employment on preemption grounds rather than equal protection.<sup>78</sup>

Two characteristics distinguished the earlier cases from the current equal protection jurisprudence concerning alienage-based restrictions. First, the current case law seems almost entirely limited to discrimination against immigrants with lawful status, typically lawful permanent residency. The earlier line of cases, however, recognized a right to work even for immigrants who were the closest thing the nineteenth and early twentieth century had to unpopular "illegal aliens": Chinese nationals. There was no such thing as a "lawful permanent resident" until 1952,<sup>79</sup> and most immigrants of the time were recognized as being on a potential pathway to citizenship, except Asian immigrants, who were ineligible for naturalization.<sup>80</sup> In addition, Chinese nationals were excluded from admission to the United States in 1882 (and in 1924, all Asian immigrants were excluded).<sup>81</sup> Those who could prove they had resided in the United States prior to a certain date and who could meet the

---

74. For example, in *Glover v. People*, 66 N.E. 820 (Ill. 1903), the court upheld a taxpayer suit challenging a state law requiring bidders for state public work contracts to work personnel only eight hours per day and use only citizen labor. In upholding the challenge, the court found, essentially, that it was public policy to get the work done as cheaply as possible. *Id.* at 822.

75. Bernstein, *Chinese Laundry Cases*, *infra* note 244, at 217–69 (1999).

76. See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a citizenship requirement for probation officers); *Ambach v. Norwick*, 441 U.S. 68, 73–75 (1979) (rejecting an equal protection challenge to New York's refusal to employ elementary and secondary school teachers who are eligible for citizenship but who refuse to seek naturalization); *Foley v. Connelie*, 435 U.S. 291 (1978) (upholding a New York requirement that police officers be citizens).

77. See *Bernal v. Fainter*, 467 U.S. 216, 219–27 (1984); *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601–02 (1976); *In re Griffiths*, 413 U.S. 717, 722 (1973); *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973); *Gebin v. Mineta*, 231 F.Supp. 2d 971, 976 (C.D. Cal. 2002); *Szeto v. Louisiana State Bd. of Dentistry*, 508 F.Supp. 268, 272 (E.D. La. 1981); *Younus v. Shabat*, 336 F.Supp. 1137, 1139 (N.D. Ill. 1971) *aff'd*, (7th Cir. Jan. 3, 1973); *Sundram v. City of Niagara Falls*, 357 N.Y.S.2d 943 (N.Y. Sup. Ct. 1973), *aff'd*, 44 A.D.2d 906 (1974).

78. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (striking down Arizona's effort to make unauthorized work a criminal offense as being preempted by federal immigration law).

79. 8 U.S.C. § 1101(a)(20) (1952).

80. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 115–25 (2006).

81. KANSTROOM, *supra* note 54, at 109–21; NGAI, *IMPOSSIBLE SUBJECTS*, *supra* note 48, at 37–50.

onerous registration requirements of the Geary Act of 1892 could in theory remain; all others were subject to summary deportation.<sup>82</sup> Yet even as the legislation of the period spelled out the deportability of most Chinese nationals, it implicitly recognized their employability—referring explicitly to them in the statutory text as “Chinese laborers.”<sup>83</sup>

The second characteristic distinguishing the early right-to-work cases from the more recent line of cases is an understanding of work as a substantive due process or a natural right.<sup>84</sup> Contemporary cases view discrimination as the problem meriting judicial intervention, but earlier cases saw the right to work as a universal aspect of liberty or autonomy. For example, in *In re Quong Woo*, Supreme Court Justice Stephen Field, sitting as a circuit judge, held that the right to pursue an occupation free from unreasonable government regulation was a liberty interest protected by the Due Process Clause.<sup>85</sup> Even when striking down state legislation as a violation of equal protection, courts used due process-like language to do so, defining equal protection as embracing a right of all persons to pursue business and property on equal terms.<sup>86</sup> Although ostensibly based on equal protection, *Yick Wo v. Hopkins* relied on substantive due process and natural rights language to strike down San Francisco’s licensing provisions for laundries, which had a disparate impact on Chinese persons:

For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.<sup>87</sup>

---

82. *Fong Yue Ting v. United States*, 149 U.S. 698, 728 (1893).

83. Geary Act, ch. 60, § 6, 27 Stat. 25, 25 (1892) (“any Chinese laborer, within the limits of the United States, who shall neglect, fail, or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested, by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States . . .”).

84. *See, e.g., Anton v. Van Winkle*, 297 Fed. 340 (1924) (“Plaintiff, [a non-citizen] along with citizens of the United States, has the right to work and so employ himself as to gain a livelihood. Primarily, he has the same right and privilege as citizens under similar conditions to engage in useful gainful employment and occupations, unless they pertain to the regulation or distribution of the public domain, or to the common property or resources of the people of the State . . . or pertain to public works or benefits to be received from public moneys.”).

85. *See In re Quong Woo*, 13 F. 229, 233 (Field, Circuit Justice, C.C.D. Cal. 1882).

86. *See, e.g., State v. Montgomery*, 47 A. 165, 169 (Me. 1900) (a licensing requirement for a noncitizen to engage in peddling “absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen.”) According to Professor Gabriel Chin, late nineteenth century courts held that all due process violations concerning work and property were automatically equal protection violations “because others were allowed to pursue their occupations and retain their property.” Chin, *supra* note 66, at 1364, 1375.

87. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The right that emerged from these cases cannot be entirely dismissed as a species of deference to business interests. Taken in its entirety, this jurisprudence offered the outlines of an individual right based in notions of autonomy and individual liberty, which was especially protective of immigrants in part because they were the subjects of societal discrimination.<sup>88</sup>

### III. THE END OF IMMIGRANTS' RIGHT TO WORK

After the Court repudiated *Lochner* in *West Coast Hotel* in 1937,<sup>89</sup> courts eventually stopped using the sweeping language contained in earlier right-to-work cases. Instead, courts assessed immigrant work cases using preemption analysis or the growing body of modern equal protection law, which was doctrinally skewed to defer to the federal government in cases of federal discrimination against noncitizens.<sup>90</sup> At the same time, the Immigration and Naturalization Service ("INS") began incrementally regulating immigrant labor.<sup>91</sup> However, the first comprehensive employment authorization regulations was not proposed until the late 1970s, after Congress had extended the country quotas to the Western Hemisphere, virtually assuring the presence of a massive population of unauthorized Mexican immigrants in the country.<sup>92</sup> In response to this self-created immigration crisis, policymakers chose the Sisyphean task of restricting immigrant work rather than fixing the irrationally low immigration quota for Mexico. In a relatively short timeframe, immigrant work shifted from a national asset to presumptively illegal, and work authorization became an element of the overall immigration enforcement strategy. The imposition of employer sanctions with passage of the Immigration Reform and Control Act ("IRCA") of 1986 and the development of E-Verify in the 1990s-2000s fortified this sea change.<sup>93</sup>

#### A. *The 1940s-1960s: Incremental Agency Regulation*

The first significant federal restriction on noncitizens' legal right to work came with the "Bracero" program.<sup>94</sup> The program began in 1942 with the negotiation of an agreement between the executive branch and Mexico to import a large, temporary workforce of Mexican laborers into the United

---

88. See MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S* (2001) (early *Lochner* Court decisions laid foundation for constitutional right to privacy).

89. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876 (1987) (stating that the downfall of *Lochner* is associated with the decision of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)).

90. See *supra* notes 77-78.

91. See *infra* Part II.A.

92. *Id.*

93. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

94. For a general discussion of the Bracero Program, see KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992).

States.<sup>95</sup> The Bracero program was widely criticized for leading to violations of the Braceros' workplace rights, and was both preceded and followed by massive deportation campaigns that specifically targeted Mexican nationals.<sup>96</sup>

In general, the Bracero program followed the preexisting pattern of immigration regulation as a means of controlling the domestic labor supply. Braceros were imported to meet labor needs, and the number of Braceros could be increased or decreased depending on economic interests. However, there was one significant difference between Braceros and earlier immigrants who had entered to meet the country's labor needs. The five million temporary workers who were imported into the United States over the twenty-two years of the Bracero program were contractually bound to their employers and therefore restricted from pursuing other employment.<sup>97</sup> This limitation on the mobility of immigrant workers represented one of the first instances of federal regulation of immigrants' right to work.

In 1947, the INS also promulgated regulations barring students from working without a showing of financial necessity and special permission from the INS District Director.<sup>98</sup> The following year, it promulgated regulations similarly barring visitors from working without permission.<sup>99</sup>

In 1952, Congress passed the Immigration and Nationality Act (INA), which included various new "nonimmigrant" visa categories for noncitizens coming to the United States for a temporary period of time to engage in a specific activity.<sup>100</sup> Among these were a new H visa for temporary guest workers, which, like the Bracero program, limited the visa holders to working for particular employers.<sup>101</sup> In addition, the 1952 Act revised the contract laborer ground of exclusion, which, since 1885, had prohibited the admission of contract laborers but allowed the importation of "skilled labor," provided that it could not be obtained in the United States.<sup>102</sup> According to the House Report accompanying the bill, the Contract Labor provision was being replaced in order to better protect American labor with a new, more robust provision.<sup>103</sup> In particular, the new provision excluded:

---

95. See Juan Carlos Linares, *Hired Hands Needed: The Impact of Globalization and Human Rights Law on Migrant Workers in the United States*, 34 DENV. J. INT'L L. & POL'Y 321, 330 (2006).

96. *Id.* at 331; NGAI, *supra* note 48 at 71–75; KANSTROOM, *supra* note 54 at 215.

97. See Linares, *supra* note 95 at 330–31.

98. INS Rule for Nonquota Immigrant Students, 12 Fed. Reg. 5355, 5357 (Aug. 7, 1947) (to be codified at 8 C.F.R. pt. 125).

99. INS Rule for Aliens Coming to the United States as Visitors, 13 Fed. Reg. 2643, 2644 (Feb. 26, 1948) (to be codified at 8 C.F.R. pt. 119).

100. See Immigration and Nationality Act, Pub. L. No 82-414, 66 Stat. 163, § 101(a)(15) (1952) (defining "immigrant" as "every alien except an alien who is within . . . [various enumerated] classes of nonimmigrant aliens").

101. See Griffith, *Migrant Worker Law*, *supra* note 7, at 131–38.

102. See, e.g., 8 U.S.C. § 136(h) (1946) (allowing for the importation of skilled labor upon application to the Attorney General and after a hearing on the question of whether labor "of like kind unemployed cannot be found in this country").

103. H.R. REP. NO. 82-1365, at 50-51 (1952).



Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.<sup>104</sup>

However, the provision only applied to two categories: (1) immigrants who were subject to annual per-country quotas who were not part of several priority categories, such as those with extraordinary ability or close family relationships to citizens and Lawful Permanent Residents (“LPRs”); or (2) certain specified classes of immigrants who were exempt from annual quotas, including, most relevantly, nationals of the Western Hemisphere “other than parents, spouses, or children of the United States citizens or LPRs.”<sup>105</sup> Moreover, the provision included a potential waiver, by which the Attorney General could waive application of the provision if the Attorney General determined that their services were “needed urgently in the United States because of the high education technical training, specialized experience, or exceptional ability of such immigrants” and it would “be substantially beneficial prospectively to the national economy, cultural interest, or welfare of the United States” to admit them.<sup>106</sup>

The most significant result of this provision was that Western Hemisphere nationals (including Mexican citizens) could be barred under the 1952 INA from entering the United States to work if the Secretary of Labor certified that there was not a need for their labor, unless they had an immediate family member who was a United States citizen or LPR.<sup>107</sup> Thus, the 1952 INA, like earlier immigration reforms, continued to regulate the supply of domestic labor through immigration; immigrant laborers could be excluded in order to protect the domestic labor market. Yet the 1952 Act did nothing to prevent immigrants from working once they were inside the United States.

The 1952 INA, however, also authorized the Attorney General to promulgate regulations as necessary to implement the INA.<sup>108</sup> The INS afterward

---

104. 8 U.S.C. § 1182(a)(14) (1952).

105. 8 U.S.C. § 212(a)(14) (1952); 8 U.S.C. § 203(a)(4) (1952); 8 U.S.C. § 101(a)(27)(C), (D), and (E) (1952).

106. 8 U.S.C. § 212(a)(14)(1952). *See also* 8 C.F.R. § 212(a)(1952) (setting out procedures for seeking the waiver).

107. If a noncitizen entered for a bona fide purpose other than to work and then later began working, the INS did not take enforcement action against the noncitizen. *See* Sam Bernsen, *Leave to Labor*, 52 INTERP. REL. 291, 299 (1975).

108. Immigration and Nationality Act, Pub. L. No. 414, 66 Stat. 163, §§ 101(a)(15) and 103 (1952) (§ 101 defines new nonimmigrant categories and § 103 authorizes the AG to promulgate regulations as necessary to implement the Act).

used this authority to promulgate regulations that restricted employment for any nonimmigrant that was “inconsistent with and not essential to the status under which he is in the United States unless such activity has first been authorized by the district director or the officer in charge having administrative jurisdiction over the alien’s place of temporary residence in the United States.”<sup>109</sup>

The new regulation on nonimmigrant work expanded upon the INS’s earlier regulation of work by tourists and students, and solidified the legal authority for doing so by relying on the INA provision authorizing the Attorney General to promulgate regulations to implement the INA.<sup>110</sup> The new regulations did not square well with the Court’s earlier immigrant right-to-work jurisprudence. However, the regulations were not legally challenged, perhaps because they were rarely enforced and, when they were, the temporary visa holders to whom they applied lacked the resources or ability to contest them. In addition, the 1950s were a period of low immigration and reduced societal support for immigrants.<sup>111</sup> Finally, the end of the *Lochner* era also ushered in a growing legal consensus in favor of an empowered administrative state.<sup>112</sup>

By the late 1950s, the INS had begun to deport a modest number of nonimmigrants who had worked without permission.<sup>113</sup> It distributed a form to entering nonimmigrants stating that they could not work without permission, but the INS did not have a formal process for granting work permits.<sup>114</sup> In the absence of any official work permit, the INS marked some noncitizens’ I-94 Arrival/Departure Records with a statement that the noncitizens were eligible to seek employment.<sup>115</sup>

The INS developed more policies concerning nonimmigrant employment over the course of the 1960s and 1970s. For example, it took the position that noncitizens with student visas were not banned by statute from working, but

---

109. 8 C.F.R. § 214.2(c) (1952).

110. Another authority for at least regulating the work of tourists and temporary business visitors was the new definition of those categories contained in the INA, which specified that they did not include “an alien . . . coming for the purpose of study or of performing skilled or unskilled labor. . . .” 8 U.S.C. § 1101(a)(15)(B) (1952).

111. Douglas S. Massey, *The New Immigration and Ethnicity in the United States*, 21 POP. & DEV. REV. 631, 635 (1995).

112. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1266-67 (1986).

113. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION 7 (1959) (reporting that 39,016 nonimmigrants violated the terms of their admission—most “by engaging in unauthorized employment or . . . remaining beyond the period of authorized stay”); Matter of S-, 8 I. & N. Dec. 574, 575 (B.I.A. 1960).

114. In 1960, the INS informed entering nonimmigrants that they could not work using Form I-358. Matter of S-, 8 I. & N. Dec. 574, 575 (B.I.A. 1960).

115. See IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, ANNUAL REPORT OF THE COMMISSIONER OF IMMIGRATION AND NATURALIZATION 7 (1959) (reporting that 39,016 nonimmigrants violated the terms of their admission—most “by engaging in unauthorized employment or . . . remaining beyond the period of authorized stay”); Matter of S-, 8 I. & N. Dec. 574, 575 (B.I.A. 1960).

restricted student work based on labor market conditions.<sup>116</sup> It allowed on-campus work without restrictions, and from the 1950s through 1974 allowed off-campus summer work on an annual basis after consulting with the Labor Department.<sup>117</sup> After 1974, it allowed off-campus work only on a case-by-case basis following a showing of economic necessity or a need for practical training.<sup>118</sup> Furthermore, INS District Directors varied considerably in how they handled students' applications for work permission during this time period.<sup>119</sup>

In addition to nonimmigrants and immigrants (green card holders), there were a number of other categories of noncitizens during this time period, such as unauthorized immigrants and those paroled into the country as the contemporary equivalent of refugees.<sup>120</sup> These noncitizens certainly worked, and there was no legal authority making it illegal for them to do so.<sup>121</sup> Although unauthorized immigrants could be deported for entering without inspection, working without permission did not create any additional penalty for them.<sup>122</sup> Moreover, the INS gave I-94s stamped to show work authorization to some undocumented immigrants in the 1970s, such as those who were waiting for their applications or petitions for lawful status to be granted.<sup>123</sup>

In 1965, Congress substantially amended the INA.<sup>124</sup> The most significant change was to eliminate the former system of national origin quotas that had been intentionally designed in 1924 to maintain a predominately white, Western European immigrant pool.<sup>125</sup> In place of the national origin quotas, Congress created new quotas of 20,000 visas per country per year that were the same for every country in the Eastern Hemisphere.<sup>126</sup> For the Western Hemisphere, Congress imposed a cap of 120,000 visas to be divided by demand.<sup>127</sup>

One other significant change that Congress made in 1965 was to tighten the grounds for excluding noncitizens seeking admission to perform labor. Its 1952 act had allowed the exclusion of noncitizens seeking admission to perform work if the Secretary of Labor certified that there were sufficient workers in the United States to perform the job at issue or that the

---

116. Bernsen, *supra* note 107, at 292–94.

117. *Id.* at 292–93.

118. *Id.* at 293–94.

119. *Id.* at 300.

120. The Refugee Act was not passed until 1980, but the United States paroled in thousands of persons for humanitarian reasons from the 1950s up until 1980. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 25 (2014).

121. See Wishnie, *supra* note 12, at 198–99 (explaining that prior to IRCA's passage, there were no criminal penalties for employers who hired unauthorized workers and no additional penalties for unauthorized workers who worked).

122. 8 U.S.C. § 1251 (1958).

123. Bernsen, *supra* note 107, at 294–95.

124. The Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911 (1965).

125. NGAI, *supra* note 48, at 227.

126. *Id.* at 258.

127. *Id.*

employment of the noncitizen would adversely affect wages or working conditions in the United States.<sup>128</sup> The amended provision allowed admission only if the Secretary of Labor certified that there were *not* sufficient laborers in the United States to perform the work at issue or that the employment of the noncitizen would *not* adversely affect wages or working conditions.<sup>129</sup> Thus, the 1965 amendments, like earlier reforms, focused on using immigration laws to control the domestic labor supply. They did not contain any limitations on immigrants' ability to work once in the country.

B. *The 1970s-1990s: The Illusion of a Comprehensive System*

Although Congress and the Agency tinkered around the edges of immigrant work regulations from the 1940s through the 1960s, there was no comprehensive system until the late 1970s. The creation of such a system coincided with Congress' and the public's growing obsession with the phenomenon of so-called "illegal aliens." As Professor Mae Ngai has persuasively shown, the legal and cultural category of "illegal alien" as it currently exists was partly created by public policies during this time period that dramatically curtailed legal Mexican immigration.<sup>130</sup>

In 1964, Congress repealed the Bracero program, which had been admitting about 200,000 Mexican Braceros per year.<sup>131</sup> Although the H2A guest worker visa program remained, the number of H2A workers was never sufficient to meet the labor needs of the United States economy.<sup>132</sup> Exacerbating the sudden disjuncture between the needs of the labor market and the amount of legal Mexican immigration, in 1968 Congress imposed a numerical quota for the first time on Western Hemisphere immigration.<sup>133</sup> The total number of Western Hemisphere immigrants permitted was 120,000—considerably less than the annual number of Mexican Braceros entering just a few years earlier.<sup>134</sup> In 1976, Congress further restricted Mexican immigration by imposing an annual quota of 20,000 on each Western Hemisphere country, including Mexico.<sup>135</sup>

The United States economy, however, had not substantially reduced its need for labor. As a result, illegal immigration from Mexico surged. The number of deportations of undocumented Mexicans increased by forty percent in 1968 (the year the 120,000 quota for the Western Hemisphere was implemented) to 151,000.<sup>136</sup> In 1976, the year the 20,000 country quota for

---

128. See *Pesikoff v. Sec'y of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974).

129. *Id.*

130. NGAI, IMPOSSIBLE SUBJECTS, *supra* note 48, at 261.

131. Linares, *supra* note 95, at 333.

132. For a discussion of the H visa and other temporary work visa programs, see Griffith, *Migrant Worker Law*, *supra* note 7, at 130–38.

133. NGAI, IMPOSSIBLE SUBJECTS, *supra* note 48, at 258.

134. *Id.*

135. *Id.* at 261.

136. *Id.*

Mexico was implemented, the INS expelled 781,000 Mexicans from the United States.<sup>137</sup> Meanwhile, the total number of apprehensions for all other nationals in the world combined remained below 100,000 per year.<sup>138</sup>

One obvious policy solution to this problem would have been to revise the immigration quota for Mexico and other countries with historically high emigration to the United States so that they better reflected the country's need for foreign labor. Instead, a consensus view emerged among policymakers that illegal immigration should be combatted by restricting unauthorized migrants' access to work.<sup>139</sup> Bills were unsuccessfully introduced throughout the 1970s to penalize employers who hired unauthorized immigrant workers.<sup>140</sup> This legislation incorrectly presumed that there was a comprehensive system in place for limiting or authorizing immigrant work.<sup>141</sup> For example, in 1971, the Nixon administration introduced legislation prohibiting the employment of noncitizens "who are illegally in the United States or are in an immigration status in which such employment is not authorized."<sup>142</sup> The bill did not pass,<sup>143</sup> but if it had, it would have left the agency scrambling to develop a more comprehensive employment authorization system.

In 1972, Congress amended the Social Security Act to require certain measures concerning social security numbers for noncitizens.<sup>144</sup> It was driven by a concern that unauthorized immigrants were seeking to obtain social security numbers, which was lawful at the time.<sup>145</sup> In 1974, the Social Security Administration ("SSA") promulgated new regulations implementing the recent amendments to the Social Security Act.<sup>146</sup> Under the new regulations, the SSA was authorized to issue numbers to citizens, LPRs, or persons "under other authority of law permitting them to engage in employment in the United States."<sup>147</sup> Again, policymakers wrongly assumed that there already existed some legal framework comprehensively addressing employment authorization for noncitizens.

---

137. *Id.*

138. *Id.*

139. *See, e.g.*, Final Report of the Select Commission on Immigration and Refugee Policy: Joint Hearings, Open. Statement of Hon. Alan K. Simpson, Chairman, Subcommittee on Immigration and Refugee Policy 8 (1981) (identifying the United States labor market as the primary pull factor for illegal immigration and calling for "sanctions against employers who hire and exploit illegal aliens, plus some new method to verify work authorization.").

140. Wishnie, *supra* note 12, at 199–202.

141. *See DeCanas v. Bica*, 424 U.S. 351, 360–61 (1976) (noting, in striking down California's effort to criminally punish employers who hired undocumented workers, that the INA did not concern itself with regulating the hiring of immigrant workers).

142. H.R. 2328 § 26 (1971).

143. JEFFREY TOGMAN, *THE RAMPARTS OF NATIONS: INSTITUTIONS AND IMMIGRATION POLICIES IN FRANCE AND THE UNITED STATES*, 52-53 (2002).

144. Social Security Amendments of 1972, Pub. L. No. 92-603, 64 Stat. 518, § 137 (1972).

145. *See* Sen. Rep. No. 92-1230, Social Security Amendments Act of 1972, Report of the Committee on Finance, United States Senate, to Accompany H.R. 1, 92nd Cong. 2d Session, Sept. 26, 1972, 160.

146. 20 C.F.R. § 422.104 (1974).

147. *Id.* Those not authorized to work could be issued cards "only for a non-work purpose."

Also in 1974 Congress passed the Farm Labor Contractor Registration Amendments Act, which prohibited farm labor contractors from facilitating the hiring of any noncitizen “not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment.”<sup>148</sup> Two years later, Congress not only imposed the 20,000 quota on Mexican immigration, but also barred noncitizens who “continue[d] in or accept[ed] unauthorized employment” from obtaining lawful permanent residence in the United States.<sup>149</sup> Yet Congress did not specify in the Immigration and Nationality Act Amendments of 1976 who could legally work in the United States, nor had the INS yet done so through regulations.

In response to the 1976 Act, and in an environment of rapidly escalating immigration enforcement against Mexican nationals, the Agency began to try to systematically regulate noncitizen employment. It published notice of a draft regulation concerning work authorization, stating that Congress had recognized its authority to do so by banning noncitizens who were unauthorized to work from adjusting status.<sup>150</sup> The proposed regulation was relatively simple; it authorized noncitizens to file an employment authorization application in three circumstances: if the noncitizen (1) held valid nonimmigrant status and was otherwise authorized by the regulations to seek work; (2) had “a prima facie claim of entitlement to a benefit—which, if granted, would make him eligible to remain permanently or indefinitely in the United States”; or (3) had “been granted permission to remain in the United States for an indefinite or extended period of time by the Immigration and Naturalization Service.”<sup>151</sup>

After President Reagan took office in 1980, the INS issued another proposed regulation, eschewing the simple approach in the earlier regulation for a cumbersome list of categories of noncitizens eligible to work.<sup>152</sup> With some modifications, the regulation was finalized in 1981.<sup>153</sup> After forty years of incrementally chipping away at the immigrant right to work, the INS now explicitly repudiated it in the new regulatory language. In the new regulation’s preamble, the INS stated that “[e]mployment in the United States is not an inherent right” but, rather, “a matter of administrative discretion . . . .”<sup>154</sup>

---

148. 5 Farm Labor Contractor Registration Amendments Act, Pub. L. No. 93-518 § 11, 88 Stat. 1652, 1655 (1974).

149. Immigration and Nationality Act Amendments of 1976, Pub. L. No. 94-571 § 6, 90 Stat. 2703, 2706 (codified as amended at 8 U.S.C. § 1255(c)); 44 Fed. Reg. 43,480 (Jul. 25, 1979).

150. INS, Proposed Rules for Employment Authorization for Certain Aliens, 44 Fed. Reg. 43,480 (July 25, 1979) (Reserved 8 CFR Part 109).

151. *Id.*

152. INS, Employment Authorization, 45 Fed. Reg. 19,563 (Mar. 26, 1980) (Reserved 8 CFR 109).

153. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,080–81 (May 5, 1981) (codified at 8 C.F.R. pt. 109) (distinguishing classes of aliens who receive work authorization as a condition of their admission from others who must apply for work authorization separately).

154. *Id.* at 25,080.

There was no statutory authority for this language, which was directly contrary to the holding of the earlier right-to-work cases, like *Yick Wo*. As statutory authority for the regulation, the INS cited only the general provision of the INA authorizing the Attorney General to engage in rulemaking “as he deems necessary for carrying out his authority under the provisions of this chapter.”<sup>155</sup>

Still, the new work permission regulation authorized a grant of work permission even for many noncitizens who lacked formal legal status, but whose presence in the United States was allowed as a matter of administrative discretion.<sup>156</sup> Moreover, the regulation said nothing about what would happen to noncitizens who did work without permission, or to employers who hired them.<sup>157</sup>

The same year that the INS published this employment authorization regulation, Congress’s Select Commission on Immigration and Refugee Policy released a report summarizing its multi-year study of immigration.<sup>158</sup> The report focused heavily on the issue of illegal immigration.<sup>159</sup> It recommended a multi-prong strategy to combat illegal immigration, including increased enforcement, employer sanctions, a legalization program for unauthorized migrants in the United States, and a temporary guest worker program.<sup>160</sup>

Congress eventually acted on these recommendations when it passed the Immigration Reform and Control Act (“IRCA”), in 1986.<sup>161</sup> “IRCA contained a new provision specifying that an ‘unauthorized alien’ for purposes of work was a noncitizen who is neither an LPR nor ‘authorized to be . . . employed by this chapter or by the Attorney General.’”<sup>162</sup> The provision thus ratified the INS’s pre-existing practice of administratively deciding which categories of noncitizens could lawfully work.<sup>163</sup> In this regulatory Möbius strip, a noncitizen authorized to work was essentially anyone whom the INS said was authorized to work.

---

155. 8 U.S.C. § 1103(a) (1982).

156. See 8 C.F.R. § 109.1(b)(4)–(6) (1982) (allowing work authorization for noncitizens with “voluntary departure,” “deferred action,” and “parole”).

157. See *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 893 (1984).

158. U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Comm’n on Immigration and Refugee Policy with Supplemental Views by Commissioners, 97th Cong., 1st Sess. (Mar 1, 1981) (“Select Commission Report”).

159. *Id.* at 35.

160. *Id.* at 11–13.

161. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 115, 274A, 100 Stat. 3359, 3360, 3384 (making employment of unauthorized immigrants unlawful and increasing enforcement of existing immigration laws).

162. 8 U.S.C. § 1324a(1324(a)(h)(3) (1988).

163. See Employment Authorization; Classes of Aliens Eligible, 52 Fed. Reg. 46,092, 46,093 (Dec. 4, 1987) (to be codified 8 C.F.R. pt. 109) (rejecting a petition asking the INS to rescind its employment authorization regulation and rejecting an argument that “the phrase ‘authorized to be so employed by this Act or the Attorney General’ does not recognize the Attorney General’s authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act”).

IRCA also included new employer sanctions provisions. Until IRCA, it had not been illegal for employers to hire immigrants without work authorization; Congress had issued the so-called “Texas Proviso” to clarify that hiring an undocumented immigrant did not violate the federal harboring statute.<sup>164</sup> Under IRCA, prospective employees were required to complete a “Form I-9, Employment Eligibility Verification,” attesting to their work eligibility.<sup>165</sup> Employers were required to verify eligibility by consulting certain documents, and certifying that the documents reasonably appeared to be genuine and to relate to the individual.<sup>166</sup>

The purpose of the new employer sanctions provision was twofold: to reduce illegal immigration and to protect the domestic labor market from competition by unauthorized migrants.<sup>167</sup> However, enforcement of employer sanctions was spotty and seemed to grow even weaker over the course of the first couple decades after IRCA’s passage.<sup>168</sup> Rather than reducing illegal immigration, the number of unauthorized migrants in the United States tripled after IRCA.<sup>169</sup>

Moreover, instead of protecting United States citizen-workers from unfair competition, this legislation merely “granted to employers an enormous, coercive power over their noncitizen workers and over low-wage U.S. workers who compete with them.”<sup>170</sup> The IRCA sanctions have been an insufficient deterrent for many employers who have an economic incentive to hire unauthorized workers due to their inability to demand higher wages or better workplace conditions without risking deportation. This incentive has been enhanced by the Supreme Court’s finding that unauthorized workers could not recover backpay for employers’ labor law violations,<sup>171</sup> which further limited unauthorized workers’ recourse against employers’ unfair labor practices.<sup>172</sup>

Despite the failure of IRCA to achieve its twin purposes, policymakers did not abandon the course Congress had embarked on with IRCA. Instead, Congress doubled down by attempting to develop better methods for employers to verify employment eligibility. In 1996, Congress ordered the INS to conduct three pilot programs to determine the best method of verifying an employee’s employment authorization.<sup>173</sup> One of these programs was the “Basic Pilot Program,” under which voluntarily participating employers

---

164. 8 U.S.C. § 1324(a)(4) (1982).

165. Griffith, *Migrant Worker Law*, *supra* note 7 at 139.

166. *Id.*

167. Wishnie, *supra* note 12, at 202.

168. *Id.* at 209 (noting a decline in IRCA enforcement throughout the 1990s, and through 2005).

169. *Id.* at 206.

170. *Id.* at 205.

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

172. Wishnie, *supra* note 12, at 213–14.

173. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104–208, Div. C, 110 Stat. 3009–546 (amended 1996).



called the SSA to check information from a form that the employee is required to fill out concerning her immigration status, called an “I-9 form,” against SSA records.<sup>174</sup> Once the SSA information was confirmed by phone, the employer entered I-9 data into a computer program that was sent to the INS by modem.<sup>175</sup>

Eighteen years later, the program has outlasted its generic name, bureaucratic implementation, and opposition from both industry and civil liberty organizations. It is now called “E-Verify” and boasts over 600,000 participating employers.<sup>176</sup> Proposed immigration reforms frequently include mandatory participation in the program for all employers, so something like E-Verify could come to dominate the future of immigrant labor. This would mark a 180-degree turn from the *Yick Wo* era. Contradicting the Supreme Court’s earlier recognition that work is a fundamental right, E-Verify heralds a future of technocratic policing of work in service of a Sisyphean project of immigration enforcement.

#### IV. THE PUTATIVE ILLEGALITY OF UNAUTHORIZED IMMIGRANT WORK

Immigration laws today primarily address the issue of immigrant labor through statutory provisions that aim to limit the admission of immigrant workers in order to protect the jobs or wages of domestic workers.<sup>177</sup> Compared to this system for regulating the *admission* of noncitizen workers, the laws that address the ability of noncitizens *already residing* in the United States to work are sparse and equivocal.<sup>178</sup> On the whole, they do not prohibit unauthorized work, but restrict it by limiting unauthorized workers’ access to jobs and labor rights.<sup>179</sup> As a result, most people assume that unauthorized work is illegal—not because it is, but because unauthorized workers are treated as if they had done something illegal.<sup>180</sup> The putative illegality of

---

174. For a copy of the form, see *Employment Eligibility Verification*, USCIS, <https://www.uscis.gov/i-9> (last visited Apr 9, 2017).

175. *United States Citizenship and Immigration Services, E-Verify: History and Milestones*, USCIS, <http://www.uscis.gov/e-verify/about-program/history-and-milestones> (last visited Apr 9, 2017).

176. *Id.* For a discussion of E-Verify, see Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. IRVINE L. REV. 381, 382 (2012).

177. See 8 U.S.C. §§ 1101(a)(15)(H)(i)(b) (allowing for the admission of temporary workers engaged in specialty occupations); 1101(a)(15)(I) (admission of journalists); 1101(a)(15)(J) (exchange visitors, including workers); 1101(a)(15)(L) (executive transferees); 1101(a)(15)(O) (aliens of extraordinary ability); 1101(a)(15)(P) (artists and entertainers); 1101(a)(15)(R) (religious workers); 1182(a)(5) (describing the “labor certification” process), 1182(n)(2)(G) (authorization investigations of employers in violation of the H visa requirements); 1188 (labor certification process for the admission of H-2A agricultural workers).

178. See *infra* Part III.B.

179. *Id.*

180. For a discussion of the criminalization of immigrants, see Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 7 (2003).

immigrant work has allowed a system that was designed to regulate employers to become a means for exploiting immigrant workers.

#### A. *Immigration Regulation to Control the Labor Market*

United States immigration law sets out the grounds for admitting noncitizens into the United States.<sup>181</sup> There are a variety of temporary visa categories, including several that are specifically for temporary workers.<sup>182</sup> Some of these categories are subject to a “labor certification” process.<sup>183</sup>

The antecedents to this process date to 1885, when the United States barred the admission of “contract labor” and only allowed the importation of immigrant laborers if there were not enough native workers to fill the job.<sup>184</sup> The 1952 and 1965 amendments to this law establish the essential structure of the current labor certification process.<sup>185</sup> According to this system, employers may not petition for the admission of most skilled and unskilled workers unless the Department of Labor has certified that there are not enough workers in the United States to do the work and that their admission will not adversely affect the wages of American workers.<sup>186</sup> The labor certification process serves a longstanding goal of United States immigration policy: assuring the existence of sufficient workers to meet economic needs while also protecting the jobs of domestic workers.<sup>187</sup>

#### B. *Immigration Law Creates Some Qualified Penalties for Unauthorized Work but Does Not Explicitly Prohibit It*

The above system for deciding who gets into the United States in the first place must be distinguished from the question of what rights noncitizens have who are present in the country. When it comes to work, the INA defines an “unauthorized alien” as “(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.”<sup>188</sup> The second half of the above definition is implemented through regulations enumerating the categories of noncitizens authorized to work or to seek work permission.<sup>189</sup> However, neither the statute nor

---

181. 8 U.S.C. §§ 1101(a)(15) (setting out various visa categories); 1182 (setting out categories of inadmissible noncitizens).

182. *See supra* note 177.

183. 8 U.S.C. § 1182(a)(5).

184. Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (amended 1887).

185. For the text of these provisions and a discussion of them, see *Pesikoff v. Sec’y of Labor*, 501 F.2d 757, 761 (D.C. Cir. 1974).

186. 8 U.S.C. § 1182(a)(5). The labor certification process applies to second preference (Professionals Holding Advanced Degrees and Persons of Exceptional Ability) and third preference (Skilled Workers, Professionals, and Unskilled Workers) categories of employment-based admissions, meaning that priority workers, “special immigrants” and immigrant investors are exempt. For the labor certification requirements, see 20 C.F.R. § 656.24.

187. *See Digilab, Inc. v. Sec’y of Labor*, 495 F.2d 323 (1st Cir. 1974).

188. 8 U.S.C. § 1324a(h)(3) (1952).

189. 8 C.F.R. § 274a.12 (2017).

regulations set out a clear penalty for “unauthorized aliens” who work.<sup>190</sup>

In the instances where the INA addresses immigrant work, it does so in a qualified manner. First, the INA is explicit that nonimmigrant “B visas” for tourism or business are unavailable to persons “coming for the purpose of . . . performing skilled or unskilled labor” and these visa holders can be deported for working.<sup>191</sup> However, Department of Homeland Security (“DHS”) regulations do actually authorize B visa holders to work in some situations.<sup>192</sup>

Second, noncitizens who work without authorization may in some situations be ineligible for other benefits under the INA.<sup>193</sup> For asylum seekers, unauthorized work is considered tantamount to “unlawful presence” and can lead to a bar on future admission to the United States, although this bar only becomes effective if the asylum seeker loses or abandons her asylum application, leaves, and later attempts to return.<sup>194</sup>

Perhaps the most significant immigration complication arising from unauthorized work is that noncitizens who work without authorization are ineligible for adjustment of status—a process for obtaining a green card from within the United States.<sup>195</sup> However, there is an exception to this principle for “immediate relatives” (spouses, parents, and children) of United States citizens and certain “special immigrants.”<sup>196</sup> Moreover, this penalty for unauthorized work is often beside the point, because noncitizens who entered without inspection are already ineligible for adjustment of status and generally must return to their country of origin to “consular process” in order to obtain a green card.<sup>197</sup>

Thus, the legally mandated penalties specifically for unauthorized work are limited. Unauthorized workers who are unlawfully present in the United States do face a significant immigration consequence as a result of that unlawful presence: they can be deported. However, that consequence is collateral to working, not because of it.

### C. *State Policies Limiting Immigrant Work*

Although unauthorized work is not per se illegal as a matter of federal law, some states have created an environment hostile to immigrant work. Many

---

190. *Id.*

191. *See* 8 U.S.C. §§ 1101(a)(15)(B); 1227(a)(1)(C)(i).

192. *See* 8 C.F.R. § 274a.12(c)(17) (authorizing work for B visa holders who are domestic servants of certain nonimmigrants or US citizens with a permanent home in another country, and for certain employees of foreign airlines).

193. *See* U.S.C. § 112(a)(9)(B)(iii)(II) (treating work as unlawful presence for asylum seekers); U.S.C. § 1255(c) (making noncitizens who work without authorization ineligible in many cases for adjustment of status).

194. 8 U.S.C. § 1182(a)(9)(B)(iii)(II) (2012).

195. 8 U.S.C. § 1255(c) (2012).

196. *Id.*

197. 8 U.S.C. § 1255(a) (2012) (providing for adjustment of status for an “alien who was inspected and admitted or paroled into the United States.”).

states have licensing standards that restrict noncitizens' ability to pursue certain occupations.<sup>198</sup> About half the states in the country sued the Obama administration over its effort to authorize the work of some immigrants who otherwise lacked legal immigration status.<sup>199</sup> As set out in Part II, the phenomenon of states attempting to limit immigrant work has a long tradition. In the late nineteenth and early twentieth centuries, courts mostly struck down those laws as violating a substantive immigrant right to work.<sup>200</sup> Later, courts became more likely to invalidate them as violating equal protection; today, preemption is often the analysis of choice.<sup>201</sup> For example, Arizona and Alabama have attempted in recent years to make unauthorized work a criminal offense, but courts have found that such efforts are preempted by IRCA.<sup>202</sup>

#### D. *Unauthorized Workers Are Relegated to Precarious Work*

In the end, the most serious impediments to immigrant work come from laws that limit unauthorized immigrant workers' employment opportunities rather than prohibiting them.<sup>203</sup> IRCA employer sanctions provisions and E-Verify are the most notable of these. E-Verify continues to gain steam and although participation is voluntary at the federal level, a number of states have mandated its use by at least some employers.<sup>204</sup>

Employers who do not participate in E-Verify must still confirm that a worker is not an "unauthorized alien" by checking certain documents before hiring the employee, such as a Social Security Card.<sup>205</sup> Unless noncitizens use a false Social Security Card or other false documents to obtain work, they do not face a penalty under IRCA if an employer hires them.<sup>206</sup> Nonetheless, it is the unauthorized worker who often bears the brunt of the violation.

---

198. For a discussion of state occupational licensing requirements on noncitizens, see Michael A. Olivas, *How Did We Get Here? Undocumented and DACAmented Lawyers and Occupational Licensing*, 52 VALPARAISO L. REV. (2017, forthcoming).

199. *Texas v. United States*, 809 F.3d 134, 179–86 (5th Cir. 2015), *aff'd*, 579 U.S. \_\_\_\_ (2016).

200. See note 84, *supra*.

201. See note 78, *supra*. Preemption is a doctrine based on the Supremacy Clause to the United States Constitution, providing that state regulation of a subject can be preempted when there is a conflicting federal statute or a comprehensive regulatory scheme. See *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

202. See *Arizona*, 132 S. Ct. at 2505 (finding a provision making it unlawful for an unauthorized migrant to knowingly apply for or perform work in Arizona to be preempted by federal law); *United States v. Alabama*, 691 F.3d 1269, 1283 (11th Cir. 2012) (same).

203. Once in removal proceedings, unauthorized employment can be banned as a condition of release on bond. See *I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991) (rejecting facial statutory challenge to INS regulation allowing for a ban on acceptance of unauthorized employment as a condition of bond).

204. See Kati L. Griffith, *Discovering "Immemployment" Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 390. (2011).

205. See note 176, *supra*.

206. 8 U.S.C. § 1324c(a), (f).

Employers who violate IRCA face civil fines as low as \$100.<sup>207</sup> By contrast, an unauthorized migrant risks deportation and possibly permanent separation from her family, home, and life in the United States—not because he or she worked but because he or she drew attention to his or her unauthorized presence by working. These disparate stakes contribute to the putative illegality of unauthorized immigrant work. Because unauthorized immigrants bear the steeper penalty, they are perceived as the more culpable party—as the ones who have “stolen” the jobs of citizens.<sup>208</sup>

Noncitizens who are unauthorized to work cannot legally obtain a Social Security Card that satisfies IRCA requirements for an employer to hire them.<sup>209</sup> However, it is possible to work and pay taxes without a Social Security Number.<sup>210</sup> Thus, unauthorized workers can be self-employed, and many are.<sup>211</sup> In addition, employers can hire “sporadic, irregular, or intermittent” domestic workers without checking their immigration status.<sup>212</sup> Most significantly, employers need not check the immigration status of independent contractors they retain to perform work for them.<sup>213</sup>

These categories of contingent work comprise a large, and growing share of the overall United States economy.<sup>214</sup> In many sectors of the economy, such as landscaping and construction, it is common to characterize (or mischaracterize) workers as independent contractors. This means that employers need not check immigration status, pay minimum wage, overtime, social security, Medicaid, or unemployment insurance taxes.<sup>215</sup> Independent contractors are unable to access the protections of most labor and employment law, such as the Fair Labor Standards Act, National Labor Relations Act, Occupational Safety and Health Act, Family Medical Leave Act, or Title VII.<sup>216</sup> Such incentives to hire independent contractors lead to the fissuring of the workplace and the degradation of employment security for all

---

207. Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 789 (2008). An employer who engages in a pattern and practice of violations can be subject to the criminal penalty of six months' incarceration. 8 U.S.C. § 1324a(f)(1).

208. Daniel Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 65 (2009) (“Apart from reiterating the established link between Mexicans and the criminal, employer sanctions also turned the workplace (which had formerly been the location where immigrants, through sweat and toil ‘earned’ their social right to remain present in the United States) into the locus of criminal endeavor and fraud. Work went from a marker of belonging to a species of theft.”).

209. 42 U.S.C. 405(c)(2)(B)(i)(I) (2012).

210. Most persons have a Social Security number in order to report their taxes, because the Internal Revenue Service requires that employers obtain an identification number from employees, which is typically a Social Security Number. However, federal law allows employers to use Taxpayer Identification Numbers (“TIN”) if employees are ineligible for a Social Security number. *See* 26 U.S.C. § 6109 (2012); 26 CFR 301.6109–1(a). Because unauthorized migrants can obtain TIN numbers, they technically do not need a Social Security Number to legally work.

211. *See* Mastman, *supra* note 17 at 257.

212. 8 C.F.R. § 274a.1(h) (2009).

213. 8 C.F.R. § 274a.1(f) (2009).

214. *See supra* note 13-15.

215. *See* WEIL, *supra* note 13 at 17-18.

216. *Id.*

employees in the affected industries.<sup>217</sup>

Thus, the primary impact of IRCA employer sanctions is not to make it illegal for immigrants without work authorization to work, but to limit unauthorized workers' employment opportunities and access to legal protections and benefits. They are restricted to self-employment, independent contractor status, or the underground economy, where they earn less money, are less likely to have work-provided benefits, and are more likely to live in poverty.<sup>218</sup>

In 2002 the Supreme Court announced, "Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies."<sup>219</sup> Yet, unauthorized immigrant workers can legally be self-employed or work as irregular domestic workers or independent contractors. A 2016 challenge filed by many states to a federal expansion of work authorization, *United States v. Texas*, similarly reveals that this point is rarely understood. No party in that case pointed out that unauthorized migrants could legally work without being granted work authorization through the controversial new federal program.<sup>220</sup> The Court, states, and federal government all seem to believe that there is a comprehensive statutory scheme in place to prohibit and punish employment by unauthorized immigrant workers, rather than just a set of measures to discourage employers from hiring them.

Perhaps part of the reason why there is no comprehensive statutory scheme for regulating immigrant work is that at one time this country encouraged and protected all immigrant work.<sup>221</sup> The current system is a messy palimpsest written over that earlier history. It is time to reconsider this system, which has disrupted the labor market, caused hardship on immigrant families, and led to arbitrary immigration enforcement without solving the underlying problem of illegal immigration.<sup>222</sup> The policy arguments for doing so have been ably made by other commentators.<sup>223</sup> Thus, the following section looks instead at constitutional arguments for restoring the once widely accepted right of immigrants to work to support themselves and their families.

## V. RESUSCITATING IMMIGRANTS' RIGHT TO WORK?

In a country that accepts E-Verify, it may seem quixotic to attempt to resurrect the right to work for noncitizens. The view that that the ability to

---

217. *Id.*

218. Government Accountability Office, *supra* note 15 at 5-6.

219. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 148 (2002).

220. See Brief for the Petitioners, *United States v. Texas*, (March 1, 2016) (No. 15-674); Brief for the Respondents, *United States v. Texas*, (March 2, 2016) (No. 15-674); Reply Brief of Petitioners, *United States v. Texas*, (April 11, 2016) (No. 15-674).

221. See Part I, *supra*.

222. See Wishnie, *supra* note 12.

223. See *id.*; Griffith, *Migrant Worker Law*, *supra* note 7, at 140; Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1119 (2009); Pham, *supra* note 207.

work is a privilege to be granted by Congress or the Executive has become thoroughly entrenched. Yet the hegemony of this principle does not mean that it is legitimate or wise. We have seen that the current system arose largely through incremental regulation and became entrenched in the wake of 1970s reforms that virtually assured a perpetual campaign of deportation against Latin American migrants. With IRCA, Congress finally lent its stamp of approval to a system of work authorization it believed to be comprehensive, but which in fact was far from it.

The current views concerning immigrant work are myopic. Looking back, the right of immigrants to work is “objectively, deeply rooted in this Nation’s history and tradition.”<sup>224</sup> As a result, restrictions of the right should trigger robust review under the Due Process Clause.<sup>225</sup> The precise standard of review is beyond the scope of this Article, as is an analysis of the complete ramifications of resuscitating immigrants’ right to work. The point here is to discuss whether the right still exists.

The constitutional argument for a right to work faces formidable hurdles, such as the post-*West Coast Hotel* reluctance of the Court to apply more than cursory review to economic regulation and the extraordinary deference the Court grants Congress and the executive branch in immigration matters.<sup>226</sup> Yet once these problematic doctrines are overcome, there are strong theoretical reasons for restoring the constitutional right to work. This discussion aims to renew debate on this neglected topic.

#### A. *Interpretative Methodology*

There are a host of schools of constitutional interpretation. Some commentators and judges advocate a “Living Constitution” that changes with the times.<sup>227</sup> Others urge an “originalist” approach that looks either to the intentions of the founders or the public understanding of the text at the time of ratification.<sup>228</sup> As a general matter, originalists are suspicious of substantive due process.<sup>229</sup> Yet the search for historicity that is the hallmark of originalism has had an impact on the Court’s substantive due process jurisprudence. In *Washington v. Glucksberg*, the Court articulated a test for expanding the rights protected by substantive due process that examines

---

224. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

225. There is also a right to work under the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. See Jonathan Varat, *State “Citizenship” and Interstate Equality*, 48 U. Chi. L. Rev. 487, 491 (1981). However, that clause is limited to citizens and only protects against state discrimination. See *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 216 (1984).

226. See Part IV.B and C, *infra*.

227. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

228. D.A. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N. L. REV. 529 (2016); Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 9 (2006).

229. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 389 (2012).

whether the right is “objectively, deeply rooted in this Nation’s history and tradition.”<sup>230</sup>

In its most recent substantive due process decision, *Obergefell v. Hodges*, the Court continued its reliance on historical inquiry, citing de Toqueville and nineteenth century case law for the proposition that marriage is a fundamental right.<sup>231</sup> However, it also cautioned that “[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”<sup>232</sup> As a result, *Obergefell* rejected the second element of the *Glucksberg* test—that there be “a ‘careful description’ of the asserted fundamental liberty interest.”<sup>233</sup> The justices thus did not require that a right to *same-sex* marriage be deeply rooted in United States history and tradition, only that marriage itself be a fundamental right.<sup>234</sup> In considering whether that right could be used to strike down restrictions on same-sex marriage, they focused on considerations that had previously been confined to equal protection cases. Because LGBT persons had suffered historical discrimination, a majority concluded that there could be no deeply rooted right to same-sex marriage.<sup>235</sup> The Court thus blended an examination of the historical pedigree of the right to marriage with a focus on whether LGBT persons had experienced disrespect and subordination that prevented them from accessing that right.<sup>236</sup>

Consistent with *Glucksberg* and *Obergefell*, this Part inspects whether an immigrant right to work is deeply rooted in United States tradition and whether noncitizens have experienced subordination. It draws upon the substantial historical support for the right to work for immigrants set out in Part II, and the reasons for its lapse, including animus against immigrants, which are set out in Part III. Thus, the two aspects of the *Glucksberg/Obergefell* analysis—historicity and subordination—support renewal of immigrants’ right to work.

As a preliminary matter, two theoretical obstacles to this analysis must be addressed: Lochnerism and the Plenary Power doctrine. Lochnerism refers to the judicial consensus that arose in the wake of *Lochner* that any form of strong judicial review of economic regulation amounts to judicial activism. The Plenary Power doctrine refers to the judicial doctrine that federal regulation of immigration should be given great deference. Although the two

---

230. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

231. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

232. *Id.* at 2598.

233. *Id.* at 2602.

234. *Id.*

235. *Id.* at 2602–05.

236. *Id.* at 2604.



together seem to present an insurmountable barrier to immigrants' right to work, each gives way under closer scrutiny.

### B. *Lochnerism*

Since *West Coast Hotel*, the Court has applied such a deferential form of rational basis review to economic regulations that it has only rarely struck down any legislation in the economic arena as a violation of due process.<sup>237</sup> This reluctance stems largely from the widespread view that the era's decisions amounted to judicial activism—an invention of economic rights that were not in the Constitution, in order to support “an economic theory which a large part of the country does not entertain.”<sup>238</sup> According to both the traditional and progressive views of *Lochner*, Supreme Court Justices “steeped in laissez-faire economic theory” struck down “legislation that threatened to burden corporations or disturb the existing economic hierarchy.”<sup>239</sup>

There are several reasons why the charge of *Lochnerism* should not undermine an argument for a right to work. First, recent scholarship has questioned the traditional critique of *Lochner*.<sup>240</sup> Revisionists have “traced the main strands of *Lochner*-era police powers jurisprudence back to the Jacksonian aversion to ‘class’ legislation, to the anti-slavery movement’s adulation of individual economic liberty as a constitutive element of human freedom, and to the nation’s traditional social contract vision of political membership.”<sup>241</sup> One strand of *Lochner* revisionism holds that the Court was engaged in a sincere, if at times anachronistic, effort to uphold core constitutional values.<sup>242</sup> It is likely no coincidence that the Court’s search for historicity frequently served the nation’s increasingly voracious appetite for labor—and often in a way that privileged capitalist interests over workers. Yet the right to work, with its Lockean pedigree,<sup>243</sup> was authentically tied to the country’s intellectual tradition.<sup>244</sup>

237. Levy, *supra* note 23.

238. *Lochner*, 198 U.S. at 75 (Holmes, J. dissenting). See generally Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221, 223 (1999).

239. Lindsay, *supra* note 61 at 56.

240. Paul Kens, *Lochner v. New York, Tradition or Change in Constitutional Law*, 1 N.Y.U. J.L. & LIBERTY 404 (2005).

241. Lindsay, *supra* note 61, at 56.

242. David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12 (2003) (the *Lochner* Court “had a generally historicist outlook, seeking to discover the content of fundamental rights through an understanding of which rights had created and advanced liberty among the Anglo-American people.”).

243. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT.

244. David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 282–83 (1999) [hereinafter Bernstein, *Chinese Laundry Cases*] (“*Lochnerian* judges relied on two long-standing American intellectual traditions that heavily influenced American conceptions of liberty and the proper role of government in the post-bellum era: the tradition that valued ‘natural rights’ and ‘free labor,’ and the tradition that opposed ‘class legislation’—legislation that benefits politically powerful interest groups at the expense of other citizens.”); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 799 (1985).

Thus, revisionist scholarship suggests that the Court's doctrinal aversion to applying substantive due process analysis in the economic arena is not based on a coherent set of principles.<sup>245</sup> If the Court were to apply substantive due process to laws that severely restrict work, the floodgates would not burst open. In fact, the Court has been willing to enforce substantive due process in recent years—both in the economic and private domains. One area in which the Court has struck down economic regulation as violating substantive due process is when it comes to excessive punitive damages awards.<sup>246</sup> The Court has also continued to regularly apply substantive due process analysis in analogous areas outside economic regulation, such as restrictions on the fundamental right of marriage.<sup>247</sup>

Both marriage and work involve a “personal choice [that] . . . is inherent in the concept of individual autonomy.”<sup>248</sup> Other than the choice of a life partner, the choice of how to work is one of the most basic and personal decisions in life. The fact that work is economic activity does not seem to be a sufficient basis to distinguish it from the Court's recognition of other analogous rights, like marriage, as fundamental for due process purposes.

Modern courts seem concerned that if they recognize economic rights as being fundamental as a matter of substantive due process, it will reopen a Pandora's box with no logical stopping point. However, there are principles that could allow a court to strike down some restrictions on immigrant work without logically requiring the invalidation of all labor law. The Court's recent *Obergefell* decision provides a framework for doing so.

In *Obergefell*, the Court blended equal protection and due process review, and looked to the historical subordination of LGBT persons as a basis for recognizing a substantive due process right to gay marriage even in the absence of any historical tradition of respecting such a right.<sup>249</sup> As Professor Kenji Yoshino points out, this “analysis of substantive due process inflected with equality concerns . . . constrains as well as expands the field of possible liberties.”<sup>250</sup> In other words, a linkage between equality principles and substantive due process can act as a check on Lochnerism. Unlike workers who may not wish to pay union dues or fees, immigrants have been subject to a history of subordination both inside and outside the workforce. A denial of their right to work does not just represent a minor economic hardship; it typically results in greatly diminished or eviscerated employment options

---

245. Levy, *supra* note 23 at 331.

246. See *Philip Morris U.S.A. v. Williams*, 549 U.S. 346 (2007) (striking down a punitive damages limit as in violation of the Due Process Clause); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (same); *BMW of North Am., Inc. v. Gore*, 517 U.S. 599 (1996) (same).

247. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

248. *Obergefell*, 135 S. Ct. at 2599.

249. *Id.*

250. Yoshino, *supra* note 26 at 175.

and furthers immigrant subordination.<sup>251</sup>

Another reason to reject the charge of Lochnerism in this context is international law. Justice Kennedy has been particularly willing to consult international law in order to confirm “the centrality of those same rights within our own heritage of freedom.”<sup>252</sup> International law has historically provided support for a right to work: Justice Field, for example, quoted the 1776 edict of Louis XVI giving freedom to trades and professions to buttress a finding that the right to work is rooted in natural law.<sup>253</sup> Many of the early immigrant right-to-work cases relied on treaties between the United States and China and Japan.<sup>254</sup>

International law today continues to support a right to work, even if that right is not robustly enforced in practice.<sup>255</sup> The International Covenant on Civil and Political Rights (“ICCPR”) includes a right to life, which impliedly comes with a right to seek out the basic necessities of life, meaning, for most persons, work.<sup>256</sup> The Universal Declaration of Human Rights (“UDHR”), which is a fundamental constitutive document of the United Nations, sets out “a right to work.”<sup>257</sup> The International Covenant on Economic, Social and Cultural Rights (“ICESR”), which the United States has signed but not ratified, also contains a right to work.<sup>258</sup> The right to work set out in these provisions has been interpreted to mean a right to a job, not to nondiscriminatory access to work. However, the UDHR and ICESR also provide that all persons must be afforded equal protection with respect to their right to work.<sup>259</sup>

These international authorities have generally been met with ambivalence in the United States, because they could imply increased government interference with the labor market.<sup>260</sup> Internationally, the right to work is often not enforced, but that does not mean that it does not exist, or that it will not eventually be vindicated over time.<sup>261</sup> There is widespread recognition in international law that nondiscriminatory access to employment is a human right.<sup>262</sup> This global consensus concerning the right to work shows that the

---

251. See Part IV.D, *infra*.

252. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

253. *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 757 (1884) (Field, J., concurring).

254. Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 618 (2007).

255. See generally Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 371 (2002).

256. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, Art. 6.

257. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 23, U.N. Doc. A/810 (Dec. 10, 1948).

258. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, art. 6, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, reprinted in 6 I.L.M. (1967) (*entered into force* Jan. 3, 1976).

259. Harvey, *supra* note 255 at 380.

260. *Id.* at 383-84.

261. *Id.* at 382.

262. *Id.*

core critique of *Lochner*—that judges struck down legislation based mostly on their personal views of political economy—does not hold in this context. Thus, international law, revisionist scholarship, and recent substantive due process jurisprudence all refute the argument that an immigrant right to work is mere *Lochnerism*.

### C. *The Plenary Power Doctrine*

The Court has frequently adhered to a “plenary power” doctrine under which it exercises extraordinary deference towards congressional or executive decisions over “immigration law,” or decisions concerning the admission or deportation of noncitizens.<sup>263</sup> This doctrine first arose in 1889 in *Chae Chan Ping*, or the *Chinese Exclusion* case, in which the Supreme Court affirmed Congress’s shameful exclusion of Chinese immigration into the United States.<sup>264</sup> The primary justification for the doctrine is the greater competence of the political branches over questions of foreign affairs,<sup>265</sup> and it has been limited, for the most part, to cases involving federal decisions about whom to admit or deport.<sup>266</sup> In cases, on the other hand, involving the rights of noncitizens in the United States, the Court has generally not applied the plenary power doctrine.<sup>267</sup> This is especially true in cases involving *state* discrimination against noncitizens, particularly lawful residents, which have even sometimes triggered strict scrutiny equal protection review.<sup>268</sup> When the *federal government* discriminates with respect to different types of noncitizens, the Court has been much more likely to apply the plenary power doctrine. It has even done so in at least one major case, *Mathews v. Diaz*, which involved the allocation of benefits rather than decisions about admission and deportation.<sup>269</sup>

Therefore, a court is more likely to apply the plenary power doctrine to federal discrimination concerning the right to work rather than state restrictions on the right. Moreover, whether the plenary power doctrine should insulate federal work restrictions from review depends on whether those rules are construed as “immigration law” or pertaining to the “more general law of aliens’ rights and obligations.”<sup>270</sup> In other words, if work restrictions are connected closely enough to decisions concerning admission and depor-

---

263. For a discussion of the plenary power doctrine and its scope, see Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 379 (2004); Hiroshi Motomura, *Immigration Law After A Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256 (1984).

264. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

265. *Id.*

266. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN* 54 (2006).

267. *Id.*

268. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971).

269. *Mathews*, 426 U.S. at 81 (1976) (applying rational basis review to evaluate federal discrimination concerning the award of Medicare benefits to different categories of noncitizens).

270. Legomsky, *supra* note 263 at 256.

tation, they are likely to fall under the plenary power doctrine. If they are viewed as imposing on civil rights that transcend the limited context of immigration decisions, they should fall outside the scope of plenary power.

Given the increasingly close connection between employment regulation and immigration enforcement, an argument could be made for the application of the plenary power doctrine in the area of employment regulation. The argument would be that limitations on immigrants' right to work in the United States are necessary to deter unauthorized immigration. In addition, enlisting employers in checking work authorization aids the federal government in deporting unauthorized immigrants. Limitation of immigrants' right to work may not be, strictly speaking, in the area of admissions and deportation, but it does have a close connection to admissions and removal.

One of the strongest reasons to reject such an argument is that the Supreme Court did not apply the plenary power doctrine to cases involving immigrant work during the era when it invented the doctrine. Justice Field was the author of the *Chinese Exclusion* case, in which he used remarkably racist language to affirm federal plenary power to exclude Chinese individuals.<sup>271</sup> Yet, he repeatedly affirmed in other cases that immigrants—even Chinese ones—had a right to work.<sup>272</sup>

Moreover, applying the plenary power doctrine in this context would be an unwarranted extension of it. Accepting the historical right of immigrants to work in the United States does not restrict the authority of the federal government to limit admissions in order to regulate the labor market. Immigrant rights doctrine traditionally distinguishes between “alienage” cases involving the rights of noncitizens present in the United States, where plenary power is at its weakest, and “immigration cases” involving admissions and removal decisions, where the plenary power doctrine is at its peak.<sup>273</sup> There is no question that Congress has plenary power to require noncitizens seeking to enter the country in order to work to comply with the labor certification process described in Part IV. However, the current use of employment authorization restrictions as a tool of immigration enforcement is a distinct and more novel development, which conflicts with a long history of accepting the right of all persons already present in the United States to earn a livelihood.<sup>274</sup>

Ultimately, the primary rationale for the plenary power doctrine—the greater competence of the political branches over foreign affairs—does not

---

271. See *Chae Chan Ping*, 130 U.S. at 595 (“It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration.”).

272. See *In re Quong Woo*, 13 F. 229 (Field, Circuit Justice, C.C.D. Cal. 1882).

273. Legomsky, *supra* note 263.

274. See Part I, *supra*.

apply to questions about who can work in the United States. The plenary power doctrine should not limit judicial review of restrictions on immigrant work.

#### D. *Historicity and Subordination*

In *Washington v. Glucksberg*, the Court articulated a two-part test for assessing whether a right is protected by substantive due process. First, the test examines whether the right is “objectively, ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>275</sup> Second, it requires “a ‘careful description’ of the asserted fundamental liberty interest,” meaning that there must be a history of recognizing the specific right at issue, not some more general form of it.<sup>276</sup> However, the Court appeared to move away from the second requirement in *Obergefell* as it found a right to gay marriage based on historical recognition of a general right to marriage, not a specific right to gay marriage.<sup>277</sup>

There is ample support for finding a right to work that is deeply rooted in this nation’s history and tradition and “implicit in the concept of ordered liberty.” This support can be found in the nation’s intellectual, cultural, and legal history. The founders drew much of their political theory from the work of John Locke.<sup>278</sup> In particular, much of the Declaration of Independence was based upon Locke’s *Treatise on Government*.<sup>279</sup> In the *Second Treatise on Government*, Locke defended a natural right to property and defined property by reference to labor.<sup>280</sup> Work, according to Locke, is the basis for property, and the justification for protecting a right to property.<sup>281</sup>

American intellectual history has also been heavily influenced by the work of Adam Smith, and the founders in particular may have been influenced his views.<sup>282</sup> James Madison, for example, was persuaded by Adam Smith’s

---

275. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

276. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

277. *Obergefell*, 135 S. Ct. at 2599.

278. See DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 143 (LSU Press) (1988).

279. Letter from Thomas Jefferson to James Madison (August 30, 1823), 15 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 462 (Andrew A. Lipscomb et al. eds., The Thomas Jefferson Memorial Association 1904).

280. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, ch. 5, § 27 (C.B. Macpherson ed., Hackett Publishing Inc. 1980) (1690).

281. For an argument that the Constitution should be interpreted as consistent with the Declaration of Independence, see Harry V. Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 SEATTLE U. L. REV. 351, 365–66 (1987) (arguing that the right to property “is the antecedent natural right grounded in natural equality that every person possesses in himself. This right is a fortiori—a right of each person to possess the fruit of his labor.”).

282. Samuel Fleischacker, *Adam Smith’s Reception among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 905 (2002) (“There is good evidence that Jefferson, Hamilton, Wilson, Adams, Webster, Morris, and the two James Madisons were some of his Smith’s earliest readers and among the first to take him seriously in their own political lives.”).

view of labor as being the foundation for all property.<sup>283</sup> Like Locke, Smith believed in a close connection between labor, property, and liberty:

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.<sup>284</sup>

This view was also highly influential with the nineteenth century jurists who upheld the right to work for immigrants—Justice Field quoted the above passage in his dissent in the 1884 *Slaughterhouse Case*.<sup>285</sup>

The centrality of the right to work in American culture has been recognized by commentators from Benjamin Franklin to Max Weber.<sup>286</sup> In the United States, work seems to carry a unique moral and social force.<sup>287</sup> Those who do not work are viewed as immoral—lazy and shiftless—or as dependent, lacking in autonomy.<sup>288</sup> Jefferson and Madison believed that one's character was influenced by the type of work one did, and that democracy depended on the responsible judgment of economically independent yeoman farmers.<sup>289</sup> There is perhaps no other aspect of human activity that is more “deeply rooted in this Nation's history and tradition” than work.<sup>290</sup>

Throughout most of United States history, it has been assumed that immigrants would be workers, and the value of their work to the growth and success of the country has been widely recognized, even by those with nativist or racist views.<sup>291</sup> As detailed in Part I, United States courts recognized a constitutional and natural law right to work for immigrants from

---

283. *Id.* at 906.

284. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, b. 1, ch. 10, part 2 (London: Methuen, 1904), [http://oll.libertyfund.org/titles/237#Smith\\_0206-01\\_516](http://oll.libertyfund.org/titles/237#Smith_0206-01_516).

285. *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 757 (1884).

286. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 13-19 (Routledge 2001) (discussing Benjamin Franklin and the view of work as a moral “calling”).

287. *See* TERKEL, *supra* note 9.

288. MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 17-19 (New York: Basic Books 10th ed. 1996).

289. *See* JAMES MADISON, JAMES MADISON: WRITINGS 512 (Jack N. Rakove ed. 1999).

290. *Glucksberg*, 521 U.S. at 721.

291. *See* Leticia M. Saucedo, *Mexicans, Immigrants, Cultural Narratives, and National Origin*, 44 ARIZ. ST. L.J. 305, 316 (2012) (describing historical preferences of many employers for Mexican laborers). *See also* *Chae Chan Ping v. United States*, 130 U.S. 581, 594 (1889) (“These [Chinese] laborers readily secured employment, and, as domestic servants, and in various kinds of outdoor work, proved to be exceedingly useful.”).

the 1870s through the early twentieth century.<sup>292</sup> Since then, federal courts have continued to strike down state restrictions on immigrant labor as a violation of the Equal Protection Clause—showing a persistent regard for immigrant work, although without recognizing a right to such.<sup>293</sup>

There is also a strong moral and philosophical argument that an immigrant right to work is implicit in the concept of ordered liberty. As discussed above, the liberal political theory on which the United States was founded clearly upheld a universal right to work. The principle philosophical counterpoint to liberalism comes from communitarianism.<sup>294</sup> A communitarian critique of an immigrant right to work might be that work is a privilege of formal membership in the United States, not a universal right. Relegating the right to members, this argument posits, is necessary to preserve the integrity of the community by discouraging illegal immigration. That argument relies on an empirical assumption that has proven false—that illegal immigration will be discouraged by limiting access to work.<sup>295</sup> In addition, Part IV clarifies that unauthorized immigrants are able to legally work, but in jobs where their access to legal protections are limited, such as independent contractor positions or self-employment. Communitarians recognize that denying rights to non-members undermines community by encouraging exploitation that harms the community as a whole.<sup>296</sup> One of the foremost communitarian thinkers, Michael Walzer, argues for rigid border control but liberal rights recognition in the interior, and recognizes that the subordination of noncitizens is a form of tyranny.<sup>297</sup>

There is therefore a very strong argument that immigrants' right to work meets all elements of the *Washington v. Glucksberg* test. It is deeply rooted in United States history, implicit in the concept of ordered liberty, and also "carefully described" in the sense that American history not only reflects a general right to work, but that immigrants themselves have been the beneficiaries of that right. It is only in relatively recent history that the paradigm concerning immigrant work has shifted. The conception of immigrant work as putatively illegal and linked to immigration enforcement coincided with the decision of policymakers in the 1960s and 1970s to dramatically curtail legal Western Hemisphere immigration by initiating a massive campaign of deportation against Latin American nationals in the United States and a

---

292. Part I.B, *supra*.

293. See MICHAEL J. SANDEL, Introduction to LIBERALISM AND ITS CRITICS 1, 5 (Michael J. Sandel ed., 1984).

294. *Id.*

295. Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1046–55, 1057, 1060 (1990); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2051 (2008) [hereinafter Motomura, *Outside the Law*]; Pham, *supra* note 207, at 803–10.

296. Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 1004 (1988).

297. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 62 (New York: Basic Books 1983).



conflation in the popular imagination of so-called “illegal aliens” with Mexican nationals.<sup>298</sup>

This recent history offers a strong reason for the Supreme Court to invoke an immigrant right to work. According to Professor Cass Sunstein:

From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.<sup>299</sup>

The current hostility to immigrant work is a recent phenomenon and the traditional view of substantive due process should protect against it. Yet, labor and employment laws in general are a “recent phenomenon” when viewed against the full scope of United States history.<sup>300</sup> The concern then is that a substantive due process right to work might be used to undermine labor and employment laws in general, not just those that limit immigrant work. This is where the *Obergefell* focus on anti-subordination as a constraining principle for substantive due process is relevant.<sup>301</sup>

In *Obergefell*, Justice Kennedy looked to whether LGBT persons had experienced subordination that explained their exclusion from the right of marriage. Like LGBT persons, immigrants—especially Asian and Latino ones—have experienced subordination in countless ways throughout American history: restrictions on immigrants’ rights and privileges, selective enforcement of criminal laws against them, mass internment, draconian deportation campaigns, hostile public rhetoric, and attacks on their physical safety.<sup>302</sup> The Supreme Court has even recognized that “Aliens as a class are a prime example of a ‘discrete and insular’ minority” requiring special judicial protection, because majoritarian politics cannot be relied upon to do so.<sup>303</sup>

The subordination of unauthorized immigrants has often been effectuated by policies that limit their rights while simultaneously encouraging or at least tolerating their availability as low-cost labor. Justice Brennan described this

298. Kevin R. Johnson, “Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 282 (1997).

299. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

300. See Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 354 (2002).

301. See Yoshino, *supra* note 26 at 175.

302. See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 450–54 (2002); See also Kevin R. Johnson, *Fear of an “Alien Nation”*: *Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111 (1996).

303. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

reality in *Plyler v. Doe*, in which the Court struck down Texas's effort to deny public education to undocumented immigrant children:

This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.<sup>304</sup>

As a general matter, there can be little doubt that immigrants—especially unauthorized ones—have experienced subordination.<sup>305</sup> This is particularly true in the workplace, where they are forced to work in the underground economy or be independent contractors or self-employed.<sup>306</sup> They accept exploitative conditions and risk deportation for just trying to feed themselves and their families.

Given the historical foundations for an immigrant right to work and the subordination that noncitizens have experienced, they should have a right to work regardless of whether they have a formal immigration status. That is not to say that every restriction on immigrant work will violate the right. There is a fundamental right to marriage, but the right to marry is not infringed by every burden on it; for example, the government can impose a special tax on married couples without violating the right itself.<sup>307</sup> In deciding whether there has been a violation of a right, the Court considers “[t]he directness and substantiality of the interference,”<sup>308</sup> meaning that a court may well conclude that some reasonable restrictions on immigrant work do not infringe upon the right. Even when rights are infringed, courts may allow the violation to occur if there is a sufficiently important state interest in doing so and the restriction is carefully tailored.<sup>309</sup>

The extent to which the right to work can be abridged as a constitutional matter and the policy rationales for regulating immigrant work are beyond

---

304. *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982).

305. Anthony O'Rourke, *Substantive Due Process for Noncitizens: Lessons from Obergefell*, 114 MICH. L. REV. FIRST IMPRESSIONS 9, 17 (2015).

306. Part IV.D, *supra*.

307. *See, e.g., Druker v. C.I.R.*, 697 F.2d 46, 50 (2d Cir. 1982).

308. *Zablocki v. Redhail*, 434 U.S. 374, 387 n.12 (1978).

309. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283–97 (2007) (describing the evolution of “strict scrutiny” in various contexts, including substantive due process). For an argument that a lesser standard of review applied to rights violations at the time of the *Lochner* Court, which was focused on analysis of the government’s “police power,” *see* Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 752 (2009). Generally, if a right is “deeply rooted in this Nation’s history and tradition,” the Court considers it to be fundamental and applies strict scrutiny, although that standard is of relatively recent origin and could be modified going forward. *See* Fallon, 54 UCLA L. REV. at 1281-85. The question of what level of judicial scrutiny is appropriate for addressing violations of the immigrant right to work is an important one, but is beyond the scope of this article.

the scope of this Article. However, even without addressing these doctrinal questions, it is possible to draw two basic conclusions that follow from the existence of a right to work.

First, if there is a right to work, that means that the starting point for any conversation about immigrants working should not be whether Congress has specifically authorized it, but whether Congress has prohibited it. There should be no impediment, for example, to the president offering work authorization to unauthorized immigrants without specific congressional approval, as President Obama attempted with his Deferred Action for Parental Accountability (“DAPA”) program.<sup>310</sup>

Second, direct and substantial interference with the right to work ought to trigger some level of judicial review. The criminalization of unauthorized work, for example, would seem to be such a direct and substantial interference. When Arizona and Alabama attempted to criminalize unauthorized work, their laws were struck down as being preempted by federal law.<sup>311</sup> However, if Congress were to criminalize unauthorized work, the preemption doctrine would not apply, and one of the few constitutional checks on such an action might be the constitutional right to work. Similarly, if Congress were to attempt to withdraw work authorization from a category of noncitizens that currently has it, like asylees and refugees, a constitutional right-to-work claim also might be one of the only bases for legally challenging such action.

## VI. CONCLUSION

Immigrants’ right to work is not officially dead, just dying. No court has ever overruled *Yick Wo*, and no statute has been passed saying “unauthorized aliens” cannot work. But any reasonable bystander looking at the condition of immigrants’ right to work would say that it needs resuscitation. So many statutory and regulatory impediments to immigrant work have been created that it has come to be putatively illegal. Moreover, no court has enforced a substantive due process right to work since the *Lochner* era.

Restrictions on immigrant work may ultimately serve a symbolic function more than they advance any legitimate policy goal.<sup>312</sup> To some citizens who have lost economic status in the global economy, they may reflect a commitment to preserving American jobs for American citizens. Yet, in practice, they diminish workplace protections and civil liberties for citizens

---

310. See DEPT. OF HOMELAND SECURITY, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS (2014). The Fifth Circuit upheld an injunction against the DAPA program and it never went into effect. *Texas v. United States*, 809 F.3d 134, 187–88 (5th Cir. 2015), *aff’d*, 136 S. Ct. 2271, 2272 (2016).

311. See *Arizona* and *Alabama*, *supra* note 202.

312. See *Pham*, *supra* note 207, at 817.

just as they subordinate unauthorized immigrant workers.<sup>313</sup>

The early immigrant right-to-work cases recognized a basic principle that is strangely missing from today's debate about unauthorized immigration: all humans have a right to work to support themselves.<sup>314</sup> This principle is not only codified in international law, but is also deeply rooted in United States history and in foundational documents like the Declaration of Independence.<sup>315</sup> The movement away from the never-overruled constitutional jurisprudence of immigrants' right to work was a radical shift that seems inevitable only because it occurred under the radar, mostly without congressional action, over years of bureaucratic half-measures.<sup>316</sup>

The anti-subordination logic of *Obergefell* offers a principled way to recognize immigrants' right to work without also resurrecting all the problems associated with *Lochner*. In order to assert a right to work, a claimant would need to be a member of a subordinated class. Employers would not generally have standing to enforce a right to work for their employees, and workers could not raise claims to defend exploitative work conditions that exacerbate rather than remedy subordination in the face of government health and safety regulations.

Restrictions that directly and substantially interfere with immigrant work would trigger judicial review. Moreover, the recognition of an immigrant right to work would shift the discussion in cases involving work authorization from whether Congress has specifically authorized work, to whether it has prohibited it. Thus, there should be no constitutional problem with the president authorizing a large class of unauthorized migrants to work, as President Obama attempted to do with his DAPA program.

Not all presidents want to broaden work authorization, so it is equally possible that in the future the federal government will act to restrict noncitizens' ability to work. In these cases, the right to work might provide the most potent, if not only, form of challenge. Immigrant rights advocates have successfully challenged state legislation as being preempted by federal law or as violating equal protection.<sup>317</sup> But preemption provides no check on federal limitations on immigrant work, and the Supreme Court has sometimes applied only rational basis review to federal action, despite the fact that the Court mostly applies strict scrutiny to state discrimination.<sup>318</sup>

---

313. See Wishnie, *supra* note 12; Griffith, *Migrant Worker Law*, *supra* note 7, at 140; Lee, *Private Immigration Screening*, *supra* note 223.

314. See Part II.B, *supra*.

315. See Part II.B, *supra*.

316. See Part III.A, *supra*.

317. See *Arizona* and *Alabama*, *supra* note 202.

318. Compare *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (rational basis review of federal discrimination concerning the allocation of Medicaid benefits), with *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (applying strict scrutiny to Arizona's durational residency requirement for noncitizen receipt of welfare benefits).

Both the proper standard of review and policy arguments for or against particular types of regulation are beyond the scope of the article. There are no doubt good economic arguments for preventing some immigrants from working, as well as arguments that society would be better off with no regulation.<sup>319</sup> Assessing those arguments requires rigorous empirical study. But, at a minimum, if Congress wishes to prohibit immigrant work it should have a legitimate reason for doing so. Anti-immigrant sentiment alone ought not to suffice. A constitutional right with a lengthy pedigree should not be abridged based on prejudice or unexamined assumptions.

---

319. See, e.g., Pia Orrenius & Madeline Zavodny, *Does Immigration Affect Wages? A Look at Occupation-Level Evidence*, 14 *LABOUR ECON.* 757 (2007) (finding that an increase in foreign-born workers tends to lower the wages of natives in blue collar occupations but does not have a statistically significant impact on the wages of natives in skilled occupations).