

Volume 18 | Issue 1

Winter 2014

A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State

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Recommended Citation

Raja Raghunath, *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*, 18 CUNY L. Rev. 47 (2014).

Available at: <https://academicworks.cuny.edu/clr/vol18/iss1/5>

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A FOUNDING FAILURE OF ENFORCEMENT: FREEDMEN, DAY LABORERS, AND THE PERILS OF AN INEFFECTUAL STATE

Raja Raghunath[†]

CONTENTS

INTRODUCTION	48
I.	50
A. The Persistent American Underclass	50
B. Exploitation as Feature, Not Bug	53
C. The Role of Labor Standards Enforcement	59
D. Sources of Resistance to Equal Treatment for the Unauthorized	63
II.	67
A. Workers' Rights as the Original Civil Rights	67
B. A Founding Failure of Enforcement	71
C. The Long Winter of the Lochner Era	75
III.	78
A. The Value of a Disposable Workforce	78
B. Otherness as Externality	82
CONCLUSION	90

ABSTRACT

As the descent from the heights of our most recent rights revolution continues apace, there is a cautionary lesson contained in the aftermath of the passage of the Thirteenth Amendment and the abolition of chattel slavery, 150 years ago this year. Reconstruction was the moment when the promise of universal liberty to work first became part of the American state's covenant with its people. But this promise was quickly lost, and the rights that the federal government had extended to the freed slaves – the freedmen – were contested and eventually nullified by vehement opposition in the working fields and cities of the South. In this sense, workers' rights were the original civil rights, and the Freedmen's Bureau, the original federal labor rights agency, was a founding failure of enforcement. This article argues that enforcement efforts today must take from this history an increased focus on the labor standards of low-

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wage workers, in particular the unauthorized immigrants among them. The presence of a largely unauthorized workforce in a labor market, such as in day labor and domestic work, is a reliable sign that the most vulnerable workers may be found there. By focusing on these most vulnerable workers, government enforcement efforts can help overcome the collective action problem that is created by any system of minimum labor standards. The exploitation of vulnerable workers is the common behavior that has persisted through the centuries, and while some of its premises may have shifted, it remains the very wrong that our equal rights at work were originally designed to combat.

INTRODUCTION

The origins of the rights enjoyed by today's workers lie nearly one hundred and fifty years ago, in Reconstruction, the war after the Civil War.¹ The United States passed the first laws requiring the equal treatment of black Americans during Reconstruction, laying the groundwork for the universal rights guarantees of the twentieth century.² But the federal government's failure to enforce these laws helped to nullify the promise of equality that was made by the abolition of slavery, and usher in a long dark period for workers' rights in the United States. Today, the descendants of these pioneering civil rights laws find their highest purpose when used to once again protect the workers most vulnerable to exploitation by modern economic actors: unauthorized immigrants, the laboring portion of the American shadow economy.³

This article argues that an important lesson of Reconstruction

¹ See, e.g., *Reconstruction: The Second Civil War*, (PBS television broadcast 2004).

² See KATE MASUR, *AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C.* 6 (2010) ("Even before the war, theories of individual rights and contract were replacing local traditions that stressed standing and collectivity. The rise of the Republican vision of free labor ideology, the Union victory, and the raft of federal legislation and constitutional amendments that followed the war all magnified this trend. Indeed, it is a commonplace that postwar legal changes at the federal level laid the groundwork for the modern state and for a new vision of individual rights.").

³ See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 2 (2004) ("Employed in western and southwestern agriculture during the middle decades of the twentieth century, today illegal immigrants work in every region of the United States, and not only as farmworkers. They also work in poultry factories, in the kitchens of restaurants, on urban and suburban construction crews, and in the homes of middle-class Americans. Marginalized by their position in the lower strata of the workforce and even more so by their exclusion from the polity, illegal aliens might be understood as a caste, unambiguously situated outside the boundaries of formal membership and social legitimacy.").

should be that, if the government is going to set a lower boundary of labor standards that apply to all, it has to be prepared to police that boundary, lest it become too porous and thereby allow too many to fall through into the world of unregulated employment below.⁴ The low-wage workforce of unauthorized immigrants is hugely consequential to American household prosperity and the nation's macroeconomic strength.⁵ As the workplace rights of today, granted to us in prior generations, continue to wane, whether these rights can be asserted by the most vulnerable workers will similarly have consequences for all.

The labor rights of unauthorized immigrants come up for discussion with some regularity in Congress,⁶ predictably as a fraught topic that precludes much compromise.⁷ The polarized nature of the debate draws moral outrage away from the vulnerability of unauthorized workers in low-wage work, although that fact is increasingly being documented. A recent landmark study by the National Employment Law Project (NELP) found that more than two-thirds of low-wage workers surveyed had experienced at least one pay-related violation in the work week prior to the survey.⁸ The study

⁴ See RUBEN J. GARCIA, *MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION* 4 (2012) ("Workplace law is seen as a political battlefield between labor and capital, with each successive political change leading the pendulum either more toward the laissez-faire or toward New Deal-style regulation. This political see-saw has created a class of 'marginal workers'—workers who fall through the margins of different bodies of law that are supposed to protect them, but lack the political power to fix the holes in the legislation. These pendulum swings have produced a statutory framework that has left numerous gaps and incomplete protections for all workers.").

⁵ See MARK S. KRICKORIAN, *THE NEW CASE AGAINST IMMIGRATION: BOTH LEGAL AND ILLEGAL* 133 (2008) ("[W]hile immigration certainly increases the overall size of our economy, it subverts the widely shared economic goals of a modern society: a large middle class open to all, working in high-wage, knowledge-intensive, and capital-intensive jobs exhibiting growing labor productivity and avoiding too skewed a distribution of income.").

⁶ See, e.g., Ashley R. Parker & Steven Greenhouse, *Labor and Business Reach Deal on Immigration Issue*, N.Y. TIMES, Mar. 30, 2013, available at <http://www.nytimes.com/2013/03/31/us/politics/deal-said-to-be-reached-on-guest-worker-program-in-immigration.html> (describing an agreement "in principle on a guest worker program for low-skilled, year-round temporary workers").

⁷ ARISTIDE R. ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 23 (2008) ("Whereas policy regarding the 'front gate' is shaped by the relatively free play of competing societal interests (political science's traditional 'pluralism'), refugee policy is shaped by 'realism' (in which the state looms as a major agent pursuing interests of its own), and 'back-door' policy comes close to fitting classical 'class-conflict' theories.").

⁸ ANNETTE BURNHART, ET AL., *BROKEN LAWS, UNPROTECTED WORKERS; VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 27 (2009); available at http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf.

found that the rate of wage violations for immigrant, and especially unauthorized, workers in this group was up to more than twice as high as for native-born workers.⁹ There is “widespread agreement that unauthorized immigrants are vulnerable to abuse,” but more work still to be done to measure the rate of violations.¹⁰ It is nevertheless clear that more should also be done to guard the rights of those workers.¹¹

In Part I of this article, I will begin by explaining how the persistence of a working underclass that has difficulty accessing the rights of the rest of the workforce has always been a feature of the nation’s economy, rather than a bug. I will then argue for the importance of labor standards enforcement in such a context, and identify the sources of resistance that would accompany such efforts. In Part II, I will describe how the regulatory failure of the Freedmen’s Bureau helped kick off a long period of low worker protection, embodied by the Supreme Court’s *Lochner* decision and the still-ascendant doctrine of employment at-will, and provides a cautionary example of why the rights of the most vulnerable workers should be paramount for regulators. Finally, in Part III, I will explain how this enforcement focus should apply to the modern low-wage and unauthorized workforce, and attempt to respond to the likely vehement opposition that advocacy for such a regulatory focus would prompt.

I.

A. *The Persistent American Underclass*

The enactment of the Civil Rights Act of 1964 was the pinnacle of the rights revolution of the twentieth century, and the beginning of its end.¹² The revolution had taken decades to unfold, be-

⁹ *Id.* at 42–43 (also noting that “foreign-born Latinos had an especially high minimum wage violation rate of 35 percent, double the rate of U.S.-born Latinos and nearly six times the rate of U.S.-born whites. And race plays a marked role among U.S.-born respondents, where African-American workers had a violation rate three times that of white workers.”).

¹⁰ DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 89 (2013) (“While there is widespread agreement that unauthorized immigrants are vulnerable to abuse, there is surprisingly little research that systematically compares employers that violate labor standards with those that violate employer verification (i.e. immigration) requirements.”).

¹¹ *Id.* (“However, there is strong evidence that low-wage immigrants work at high rates in particular industries and firms that substantially violate labor laws.”).

¹² CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, at V (1990) (“By the ‘rights revolution’ I mean the creation, by Congress and the President, of a set of legal rights departing in significant ways from those

ginning during the New Deal with the passage of worker-protection laws such as the Fair Labor Standards Act (FLSA), in 1938. No new employment-rights statutes of significance have been enacted in the half-century since the Civil Rights Act, apart from its amendment and broadening in 1991, and, arguably, the Americans with Disabilities Act, the Family and Medical Leave Act, and ERISA.¹³

Specialized statutes governing occupational safety and unemployment insurance remain important to the well-being of American workers, but they do not primarily regulate (some would say intrude upon¹⁴) the employment contract. In the meantime, union density under the system of labor relations established by the National Labor Relations Act (another New Deal-era statute) continues to erode, with all that entails. The inescapable conclusion is that the rights enjoyed by workers in the modern American legal system are far more likely to shrink than to expand in the future,¹⁵ and that there are no better ones on offer.

It becomes all the more crucial, then, that efforts to enforce these rights be targeted towards the most vulnerable in the American workforce, whether that vulnerability is the result of the operation of other federal laws (such as in the case of unauthorized immigrants),¹⁶ the operation of a particular economic sector (such as in agriculture and meatpacking),¹⁷ expressions of bigotry, or a

recognized at the time of the framing of the American Constitution. The catalogue is a long one, but the most prominent examples include rights to . . . freedom from public and private discrimination on the basis of race, sex, disability, and age. The rights revolution was presaged by the New Deal and by President Roosevelt's explicit proposal of a Second Bill of Rights in 1944; it culminated, at least thus far, in the extraordinary explosion of statutory rights in the 1960s and 1970s.”)

¹³ GARCIA, *supra* note 4, at 66 (“Besides the Americans with Disabilities Act passed in 1990 to cover disability discrimination, no new categories of protection had been added to Title VII since its passage in 1964, until the Genetic Nondiscrimination Act of 2008.”).

¹⁴ See, e.g., WALTER K. OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 308 (1997) (“The new employment law makes scarcely a single promise that it does not break. It promises a fairer sharing of the blessings and burdens of work, but doles out its rewards capriciously, giving most to those who already are doing the best.”).

¹⁵ See, e.g., *Vance v. Ball State Univ.*, No. 11-556, slip op (U.S. Sup. Ct. Jun. 24, 2013) (narrowing the definition of “supervisor” for the purposes of employer liability under Title VII of the Civil Rights Act).

¹⁶ Maria Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, 16(2) *NEW LABOR FORUM*, 26, 28 (2007) (“From a Thirteenth Amendment perspective, *Hoffman [Plastic]* creates a caste of workers, primarily people of color, whose status is beneath that established for free labor.”).

¹⁷ See ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 149–150 (2001) (“Migrant workers have long played an important role in the agricultural economy of other states, picking berries in Oregon, apples in Washing-

combination of multiple such factors.¹⁸

It is widely agreed-upon that unremedied violations of universal labor standards occur more frequently at the lower, rather than the middle or higher, end of income.¹⁹ Accordingly, any agent whose mission is the eradication of such violations should go where they most occur. For unauthorized immigrants, the real or perceived absence of impartial outside assistance when they are wronged²⁰ helps ensure that such workers are looked to first by employers when economic forces encourage their exploitation, as such forces have always done.²¹

The low-wage workforce is also vulnerable because the incentive to commit wage violations for a given employer in any particular employment situation can rise as the amount of money at issue declines. This may seem counterintuitive—surely an employer has a higher incentive to fail to pay wages when the amount to be gained is higher. The additional variable that changes this calculation is the *likelihood of dispute*, and this is where employment laws play their role. In the case of wages, employers are able to routinely “nickel and dime” their low-wage workers out of amounts that readers of this article (and lawyers generally) would consider small. The employers can do this because, on average, the money will be too little to justify enforcement efforts by the employee or anyone else.²² At the same time, these wages are meaningful portions of

ton, and tomatoes in Florida. Today, the United States, for the first time in its history, has begun to rely on a migrant industrial workforce. Thousands of new migrants now travel north to work in the slaughterhouses and meat processing plants of the High Plains . . . These migrants come mainly from Mexico, Guatemala, and El Salvador. Many were once farm workers in California, where steady jobs in the fields are now difficult to find. To farm workers who’ve labored outdoors, ten hours a day, for the nation’s lowest wages, meatpacking jobs often sound too good to be true. Picking strawberries in California pays about \$5.50 an hour, while cutting meat in a Colorado or Nebraska slaughterhouse can pay almost twice that amount. In many parts of rural Mexico and Guatemala, workers earn about \$5 a day.”)

¹⁸ See generally NGAI, *supra* note 3.

¹⁹ See BURNHART ET AL., *supra* note 8, at 2 (“Many employment and labor laws are regularly and systematically violated, impacting a significant part of the low-wage labor force in the nation’s largest cities.”).

²⁰ See MEISSNER ET AL., *supra* note 10, at 84-87 (describing enforcement resources of Wage & Hour Division of U.S. Department of Labor and information-sharing agreements with Immigration and Customs Enforcement agency).

²¹ Cf. JAMES C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA* 24 (2010) (“The concentration of people and production at a single location required some form of unfree labor when population was sparse, as it was in Southeast Asia. All Southeast Asian states were slaving states, without exception, some of them until well into the twentieth century.”).

²² See BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* 210 (2001) (“So if low-wage workers do not always behave in an economically rational

each individual employee's meager overall income, and meaningfully large enough to the employer in aggregate to justify continuing the practice.²³

Unauthorized workers in particular suffer this condition by reason of a legal demarcation alone, ostensibly one to do with national sovereignty, and not primarily motivated by these workers' roles in the labor market.²⁴ Upon closer examination, it becomes apparent that the labor aspect of immigration controls in American history was arguably the aspect that mattered most in the century that followed Emancipation and the loss of the slave workforce,²⁵ and that it remains so today.

B. *Exploitation as Feature, Not Bug*

A system of labor regulation will only imperfectly cover the working population to which it applies. Mostly, it is a question of scale. The informal economies at the low end of global income, such as what exists today in much of India,²⁶ often dwarf the formal economies that exist alongside them. In other instances, this imperfect coverage is by design.²⁷ In the United States, founded upon the principle of equality before law, formal law has been used

way, that is, as free agents within a capitalist democracy, it is because they dwell in a place that is neither free nor in any way democratic. When you enter the low-wage workplace—and many of the medium-wage workplaces as well—you check your civil liberties at the door, leave America and all it supposedly stands for behind, and learn to zip your lips for the duration of the shift.”).

²³ See BURNHART, ET AL., *supra* note 8, at 5 (“The average worker lost \$51, out of average weekly earnings of \$339. Assuming a full-time, full-year work schedule, we estimate that these workers lost an average of \$2,634 annually due to workplace violations, out of total earnings of \$17,616. That translates into wage theft of 15 percent of earnings.”).

²⁴ See RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 69 (1984) (“During the nineteenth century the phenomenon of migrant labour was perceived as a blessing rather than as a problem. In the high days of *laissez-faire*, with its ethos of free enterprise and ready movement of labour and capital, even the system of requiring travelers to carry passports with them fell into disuse. The problems of migrant labour were simply problems of labour generally. This century, however, has witnessed dramatic change, spurred in large part by World War I, with its welter of restrictions and controls. It was then that the phenomenon of international migration for employment began to command attention as a problem in its own right.”).

²⁵ See, e.g., ZOLBERG, *supra* note 7, at 287.

²⁶ See KATHERINE BOO, *BEHIND THE BEAUTIFUL FOREVERS* 6 (2012) (ethnographic account of lives of slum dwellers in Mumbai, India, where “only six of the slum’s three thousand residents had permanent jobs. (The rest, like 85 percent of Indian workers, were part of the informal, unorganized economy.)”).

²⁷ See, e.g., Fair Labor Standards Act, 29 U.S.C. § 213 (2004) (listing categories of employees exempt from wage and hour standards of FLSA).

throughout the nation's history to maintain a sizable population to whom normal worker protections do not apply. In the nineteenth century, it was chattel slavery that fulfilled this function;²⁸ in the twentieth and twenty-first, it is the immigration system.

Before the passage of our modern workplace protections, the rights of American workers had been defined by the sweeping civil rights goals of Reconstruction,²⁹ and their resounding defeat.³⁰ The era that followed that defeat is embodied in the doctrine of employment at will, which came into being in the decades after Reconstruction.³¹ The turn of the twentieth century saw the Supreme Court hold in *Lochner v. New York*³² that the individual liberty to contract that had been so central to Emancipation forbade state regulation of working conditions. *Lochner* was of course overruled to make way for the New Deal, but the doctrine of employment at will continues to predominate. Nevertheless, the modern employment relationship is generally better than what an employer might otherwise provide, given his druthers.³³

Observing that the employment relationship in this country was largely one of master-servant before Emancipation, and remained so for much of the century following,³⁴ does not diminish

²⁸ See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 25 (2007) (“The many gradations of unfreedom among whites made it difficult to draw fast lines between any idealized free white worker and a pitied or scorned servile Black worker. Indentured servitude [et al.] made for a continuum of oppression among whites. Of course . . . that continuum did not extend to the extreme of chattel slavery as was inflicted on people of color.”).

²⁹ W.E.B. Du Bois described the mission of the Freedmen's Bureau as “to settle the Negro problems in the United States of America.” W. E. Burghardt Du Bois, *The Freedmen's Bureau*, *THE ATLANTIC MONTHLY*, Mar. 1901, Part One available at <http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm>; Part Two available at <http://www.theatlantic.com/past/docs/issues/01mar/dubois2.htm>.

³⁰ See David Blight, *The Civil War and Reconstruction Era, 1845-1877* (On file with Open Yale course HIST 119, lecture 24, at 5:45) (“80% of freedmen were sharecroppers by as early as the late 1860's.”).

³¹ James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 *COMP. LAB. L. & POL'Y J.* 773, 798 (2010) (“As is well known, American common law departed from its English roots when it developed the at-will rule in the late nineteenth century. The presumption that indefinite-term hirings were terminable at the discretion of either party, that there was no mutuality of obligation regarding job tenure in these contracts, coincided with the rise of *laissez-faire* capitalism.”).

³² 198 U.S. 45 (1905).

³³ *SATURDAY NIGHT LIVE: THE BEST OF CHRIS ROCK* (NBC Home Video 1999) (The comedian Chris Rock joked that the message a boss sends to a person who works for minimum wage is: “If I could pay you less, I would.”).

³⁴ See BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* 116 (2010) (“Bracketing the Civil War and Reconstruction as the end point of an era ignores the ugly continuities between slavery

the gains that have been made. A focus on the poorest, most vulnerable workers in the economy today begins at a much better place than it did during Reconstruction, when subsistence farming was a state to which most freedmen aspired.³⁵ The modern exploitation of vulnerable workers is the successor to the economic behavior that our employment laws were first written to eliminate,³⁶ even though the overall conditions of these workers have improved alongside everyone else.

This commonality between eras is illustrated by the fact that we can find these workers in many of the same places they were found 150 years ago—in farms and fields, kitchens and bathrooms. The faces of most of the workers have changed. This does not imply that black Americans have sufficiently overcome racism such that they no longer have a need for the laws originally written to benefit them, and those laws can now focus on another disadvantaged group. To the contrary, now more than ever, those laws are still needed for that original purpose.³⁷

But society no longer accepts the race of the worker as an express justification for exploitation. It may, however, accept his or her immigration status.³⁸ The common thread between the centuries for the exploitation in question is that it happens to the most

and the stunted freedom enjoyed by the vast majority of African Americans in the South by the century's end.”).

³⁵ AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 41 (1998) (“In the eyes of many former slaves, land ownership represented the natural outcome of emancipation—a bounty of war, a recompense for unrequited toil, an entitlement due by the labor theory of property. As defined by Georgia freedmen, freedom did not mean substituting the impersonal discipline of wage contracts for slave masters’ personal dominion but rather being independent and owning property other than the self: the right to ‘reap the fruit of our own labor,’ to ‘take care of ourselves,’ and to ‘have land, and turn it and till it by our own labor.’”).

³⁶ Ontiveros, *supra* note 16, at 27-28 (“This conception of free labor protects the uniquely human rights of workers-rights which are inherently placed in danger when labor becomes a commodity. The Supreme Court found that the Thirteenth Amendment, at its core, stands for the proposition that human labor must be treated differently and given more respect and protection than other things which get bought and sold via contracts. The Amendment protects workers rights as human rights.”).

³⁷ See Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in 50 Years*, WASH. POST BLOG, (Aug. 28, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years>.

³⁸ See DAVID WEIL, *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT, A REPORT TO THE WAGE AND HOUR DIVISION* 20 (2010), available at <http://www.dol.gov/whd/resources/strategicEnforcement.pdf> (including among “sources of workforce vulnerability” the effect of “a large influx of immigrant (and in many cases undocumented) workers, who are particularly vulnerable to exploitation . . .”).

vulnerable workers, and that there remain third parties empowered to take action under laws written for that situation, and not the reasons given.”³⁹

To their credit, the federal workplace enforcement agencies state plainly that they do not consider employee immigration status in their enforcement efforts.⁴⁰ But the lesson of Reconstruction, as it approaches its sesquicentennial, is that this is not enough. To fully effectuate equality before the law in the workplace, enforcement agencies must explicitly commit to seeking out firms and industries employing unauthorized immigrants, as the U.S. Equal Employment Opportunity Commission (EEOC) does,⁴¹ because the labor standards that all US workers enjoy are best served when they are enforced for these most vulnerable members of the working population.⁴² By the same token, when these standards are inevitably narrowed, it tends to hit this subset of workers hardest.⁴³

³⁹ See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 867* (The Oxford history of the United States, Vol. 6) (1988) (“Eternal vigilance against the tyrannical power of government remains the price of our negative liberties, to be sure. But it is equally true that the instruments of government power remain necessary to defend the equal justice under law of positive liberty.”).

⁴⁰ See Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 *BERKELEY J. EMP. & LAB. L.* 227, 239–240 (2012) (“[The *Hoffman Plastic* decision] triggered a rapid response from all three federal workplace agencies. Within months of *Hoffman*, the NLRB, the DOL, and the EEOC promulgated policy statements, internal memoranda, and a variety of regulatory guidance on the interpretation and implementation of case law. While none of these promulgations took the form of notice and comment rules and not all carried the independent force of law, these documents memorialized the agencies’ interpretation of existing law and indicated how they planned to exercise their discretion. The defining characteristic of each guidance document was an agency interpretation that blunted the Supreme Court’s opinion. While the specific exercise of discretion varied across agencies, each agency read *Hoffman* narrowly, reaffirmed that immigration status is not relevant to the labor and employment rights they protect, and emphasized that the agency practice is not to inquire into immigration status in the course of investigations.”).

⁴¹ The second priority listed in the agency’s most recent Strategic Enforcement Plan is “Protecting immigrant, migrant and other vulnerable workers. The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory language policies affecting these vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.” EEOC STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, *available at* <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

⁴² See generally WEIL, *supra* note 38 (setting forth enforcement priorities and strategies for Department of Labor to increase focus on violations against low-wage workers).

⁴³ See, e.g., Teresa Tritch, *The Family Unfriendly Act*, N.Y. TIMES BLOG (May 10, 2013, 9:00 PM) <http://takingnote.blogs.nytimes.com/2013/05/10/the-family-unfriendly-act/> (criticizing U.S. Congressional bill to allow “private-sector employers to offer compensatory time off in lieu of time-and-a-half pay for overtime,” noting that “employees can use their comp time only at the employer’s convenience,” and that the

The traditional conservative perspective on the individual freedom to contract sees employment laws such as antidiscrimination statutes as overly intrusive,⁴⁴ economically inefficient,⁴⁵ or some damning combination of the two.⁴⁶ Another point of view, informed by the history of Reconstruction and its aftermath, is that protecting a particular worker's freedom from an unlawful contract is very much a protection of the basic right to contract for all.⁴⁷ The Abolitionists were among the first to raise equality in the employment relationship to the prominence of the more traditionally popular values of efficiency and utility.⁴⁸

As discussed at greater length in Part II, the first new individual rights amendments to the Constitution since the original Bill of Rights⁴⁹ were a necessary step to ensure the legal status of the

only "recourse for coerced workers would be to sue, a far-fetched and unaffordable option for most people").

⁴⁴ See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 145-266 (1992).

⁴⁵ See DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* 105 (2001) ("[T]he historical choice with regard to particular New Deal regulatory issues was often between federal government regulation and unregulated labor markets. Because of their lack of political influence, for most of the period after Reconstruction and before the modern civil rights era African Americans were better off with free labor markets than with federal regulation.").

⁴⁶ See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 198 (1993) ("[Discriminatory firms] will, over time, be driven from the market by non-discriminatory firms which are prepared to lower their costs or increase their productivity through the hiring of appropriately qualified blacks or increase their profits through the servicing of black clientele - profits that firms with discriminatory proprietors are denying to themselves. This argument is not so much that anti-discrimination laws are inefficient as that they are unnecessary, and given that their administration entails some costs, including error costs, these laws may simply impose a deadweight social cost on the community" (citations omitted)).

⁴⁷ See, e.g., CHARLES E. LINDBLOM, *THE MARKET SYSTEM: WHAT IT IS, HOW IT WORKS, AND WHAT TO MAKE OF IT* 20 (2001) (including, among basic preconditions for market system, that "coordination" is required "to curb injuries that otherwise people inflict on each other"); *id.* at 56 ("Market relations do not begin with exchanges of performances and objects somehow 'there' to be exchanged. Market relations determine what is to be made or done—and brought to exchange.").

⁴⁸ Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 228-29 (2013) ("But outside of the antidiscrimination precinct, individual employment law does not protect particular classes or axes of identity. Its protections are, in an important sense, universal . . . When we explore the application of employment law outside of the discrimination context, we will find that concerns about social equality—although not named as such—lie at the heart of the questions the doctrine asks and answers.").

⁴⁹ SUNSTEIN, *supra* note 12, at 16-17 ("Perhaps the most important individual rights provisions of the original Constitution were the contracts clause—exempting freedom of contract from governmental interference—and the privileges and immunities clause, which entitled citizens of each state to be free from protectionist interference

freedmen as workers.⁵⁰ Emancipation brought a great mass of new workers into the light of full civil society,⁵¹ requiring the federal government to make free labor its earliest enforcement priority.⁵² The United States was newly dedicated to the universal individual rights for workers,⁵³ because enslavement was formally the loss of control over their own labor, by force as well as operation of law.⁵⁴ Freedom at work thus became the template for individual freedom as a whole.⁵⁵

from the governments of other states. Moreover, the eminent domain clause, safeguarding private property, was a prominent part of the Bill of Rights, which has usually been thought, rightly, to find an organizing principle in the desire to prevent collective interference with private ordering. In these respects, the original constitutional rights were 'negative' in character—rights to be free from governmental intrusion, rather than rights to affirmative governmental assistance.”).

⁵⁰ See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* at 244 (Henry Steele Commager & Richard B. Morris eds., 1988) (“In constitutional terms, the Civil Rights bill represented the first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom. Again and again during the debate on Trumbull’s bills, Congressmen spoke of the national government’s responsibility to protect the ‘fundamental rights’ of American citizens. But as to the precise content of these rights, uncertainty prevailed.”).

⁵¹ See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 235 (2009) (“Human slaves had been freed many times before—from the Israelites, to the Romans, to Africans in the vast British Empire as recently as 1834. But no society in human history had attempted to instantly transform a vast and entrenched slave class into immediate full and equal citizenship. The cost of educating freed slaves and their children came to seem unbearably enormous, even to their purported friends. Their expectations of compensation radically altered the economics of southern agriculture. And even among the most ardent abolitionists, few white Americans in any region were truly prepared to accept black men and women, with their seemingly inexplicable dialects, mannerisms, and supposedly narrow skills, as true social equals.”).

⁵² See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350-1870*, at 181 (1991) (“Ultimately, it was only as a result of the long ideological struggle that preceded the Civil War and the war itself that the modern way of seeing peonage (and indentured servitude) was finally consolidated and became the exclusive view of all forms of legally compelled labor.”).

⁵³ George Rutherglen, *Constitutionalizing Employees’ Rights: Lessons from the History of the Thirteenth Amendment*, 27 *WIS. J.L. GENDER & SOC’Y* 162, 165 (2012) (“[The Thirteenth Amendment has] a more immediate connection to labor and employment than [either the Fourteenth Amendment or the Commerce Clause] or, indeed, to any other provision in the Constitution. It excludes altogether certain forms of the master-servant relationship from among those allowed by American law.”).

⁵⁴ STANLEY, *supra* note 35, at 55-56 (“Principles of contract rang through the halls of Congress during the debate over the Civil Rights Act. The act asserted the principle of equality before the law and the authority of the national government to guarantee the irrevocable rights of citizens, which it enumerated as those of contract, property, and personal liberty. But its immediate purpose was to nullify the Black Codes, and the equal right of contract was the nub of the legislation.”).

⁵⁵ See William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513, 552, 554 (1974) (noting

C. *The Role of Labor Standards Enforcement*

Today, individual equal rights at work remain vulnerable to inadequacies in the enforcement process.⁵⁶ It is impossible for such rights to be enforced behind a “veil of ignorance” that allows for equitable decision-making in all cases,⁵⁷ and therefore enforcement priorities must take into account existing inequities. Cass Sunstein classifies the employment market as a “prisoner’s dilemma” or “collective action problem,” which arises when a “majority of citizens might support regulation that would prevent them from engaging in the very conduct which, in an unregulated system, they are led to choose.”⁵⁸

Sunstein explains that policies addressing a prisoner’s dilemma often take the form of “redistributive measures [that] do not directly transfer resources to disadvantaged people or to those whom we wish to subsidize, but instead attempt to deal with coordination or collective action problems faced by large groups.” In the United States, this is the function of the private right of enforcement for earnings, which is what American workers “get” from the state in lieu of direct wealth transfers to the working poor.

Sunstein calls such a policy choice an “effort[] to overcome the difficulties of organization of many people in the employment market.”⁵⁹ He contrasts this collective-action problem with the “analogous problem” of “coordination,” in which the government arranges

private behavior in such a way as to satisfy private desires which, if left to individual decision, would produce chaos or disorder. Either a social norm or legal constraint is necessary to solve the problem. Unlike in a prisoner’s dilemma, a coordination problem presents no incentive to defect once the solution is in place. An agreement to solve a coordination problem is stable; an

that the “antislavery ideal of equality” before law “became commonplace in post-Civil War judicial opinions,” particularly “in opinions dealing with enforcement of the Civil War amendments and the federal legislation enacted pursuant thereto”).

⁵⁶ SUNSTEIN, *supra* note 12, at 103 (“Statutes designed to reduce or eliminate the social subordination of disadvantaged groups are frequently subject to skewed redistribution and failure as a result of inadequate implementation. The very problems that make such statutes necessary in the first instance tend to undermine enforcement; market failure is matched by government failure.”).

⁵⁷ See JOHN RAWLS, A THEORY OF JUSTICE 211 (2009) (“[E]ven in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation,” since “[b]y enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules.” He called this “Hobbes’s thesis.”).

⁵⁸ SUNSTEIN, *supra* note 12, at 51.

⁵⁹ *Id.* at 55.

agreement to solve a prisoner's dilemma is not.⁶⁰

The prisoner's dilemma for employers is deciding whether to exploit their employees amidst a background of declining labor standards for employees in general,⁶¹ and changing economic conditions, while employees must decide whether or not they will accept such behavior. In the language of economics, these employers are not fully internalizing their actual labor costs. When the likelihood of employees who are so treated challenging this behavior is factored into the calculation, it becomes clear that the incentive to defect for employers in any such employment transaction is high, and vastly greater than the employees'. Sunstein's point is that such a situation is unstable and requires active intervention. That is also the point of this article.

Regulations like the prohibition on unequal treatment in employment are best understood as limitations on "positional competition" between better- and worse-situated parties in a competitive labor market. Employers who are willing to discriminate, pay below minimum wage, or leave out overtime are given an advantage over competitors who will not, and workers who will take such treatment are similarly (dis)advantaged with respect to those who won't.⁶² President Roosevelt, of course, made the expansion of individual rights at work a touchstone of national policy in the New Deal, recognizing the importance of avoiding such a race to the bottom at a time of mass economic deprivation.⁶³

⁶⁰ *Id.* at 51.

⁶¹ Katherine V.W. Stone, *The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries* 33, UCLA SCHOOL OF LAW, LAW-ECON Research Paper No. 12-19, (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181082 ("In the U.S. Japan, Canada, Australia, and many European countries, there has been a sizeable growth in several types of nonstandard employment and a decline in job tenure for men in their mid-career years.").

⁶² In making this point, the blogger Matthew Yglesias also described the labor market as a collective action problem. See Matthew Yglesias, *Labor Market Regulation and the Freedom Red Herring*, SLATE (July 4, 2012, 1:55 PM) http://www.slate.com/blogs/moneybox/2012/07/04/labor_market_regulation_freedom_and_property_rights_are_red_herrings.html ("[O]ftentimes I think we're arguing about curbing positional competition. You can easily imagine a workplace in which every worker would prefer to work slightly shorter hours and would be willing to accept less pay, and where managers would be willing to make that bargain. But the managers (naturally) look a bit askance at whomever it is they deem to be the laziest worker, and the workers (naturally) are therefore reluctant to present themselves as the laziest in the office. Therefore nobody actually asks to make the hours/pay tradeoff. Group decision-making, whether through a collective bargaining agreement or legislation, can create a situation that most people are happier with.").

⁶³ Franklin D. Roosevelt, Commonwealth Club Address (Sept. 23, 1932), available at www.teachingamericanhistory.org/library/index.asp?document=447.

The axiom “money paid for work done,” or some variant thereof, underlies all wage law enforcement, public or private.⁶⁴ The existence of wage laws is universally accepted, with their parameters often disputed,⁶⁵ because those laws support the widespread expectation of impartial state enforcement of bargaining obligations freely made,⁶⁶ which grows out of the precepts of basic fairness learned by all in childhood.⁶⁷ In this way, the enforcement of wage laws is grounded in the exchange principle at the heart of contracts: mutuality.⁶⁸ Arguably this principle is even more central to the operation of the employment contract than nondiscrimination.⁶⁹

The effective enforcement of agreed-upon individual worker protections like wage laws⁷⁰ can also help offset the existing tilt of

⁶⁴ See, e.g., U.S. DEP’T OF LABOR, FACT SHEET NO. 48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTIC DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2002), available at <http://www.dol.gov/whd/regs/compliance/whdfs48.htm> (“[Enforcement of wage laws is] distinguishable from ordering back pay under the NLRA. In *Hoffman Plastics* (sic), the NLRB sought back pay for time an employee *would* have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA or MSPA, the Department (or an employee) seeks back pay for hours an employee has *actually worked*, under laws that require payment for such work.” (emphasis in original)).

⁶⁵ See, e.g., Ed Sealover, *How wage-theft regulations bill became OK with Colorado businesses*, DENVER BUSINESS JOURNAL, Apr. 17, 2014, http://www.bizjournals.com/denver/blog/capitol_business/2014/04/how-wage-theft-regulations-bill-became-ok-with.html (lauding a successful modification to the state wage law “as a testament to what business can do when it works with legislators to find compromise on an issue with a seemingly unbridgeable divide”).

⁶⁶ See TREBILCOCK, *supra* note 46, at 23 (“As Arrow has pointed out, a private property-private exchange system depends, for its stability, on the system’s being non-universal. For example, if political, bureaucratic, regulatory, judicial, or law enforcement offices were auctioned off to the highest bidder, or police officers, prosecutors, bureaucrats, regulators, or judges could be freely bribed in individual cases, or votes could be freely bought and sold, a system of private property and private exchange would be massively destabilized.” (citing Kenneth Arrow, *Gifts and Exchanges*, 1 PHIL. AND PUB. AFF. 343 (1972))).

⁶⁷ See, e.g., EVE BUNTING, *A DAY’S WORK* (1997) (children’s book narrating an instance of conflict between a Spanish-speaking day laborer and employer).

⁶⁸ See BJÖRN BARTLING, ET AL., *USE AND ABUSE OF AUTHORITY: A BEHAVIORAL FOUNDATION OF THE EMPLOYMENT RELATION* 33 (2012), available at <http://ssrn.com/abstract=2175701> (“We find that the principals have an almost universal preference for employment contracts –regardless of whether they are used in an efficient or an inefficient way – while workers resist accepting employment contracts if a large number of principals use them to assign inefficient (abusive) tasks.”).

⁶⁹ See LINDBLOM, *supra* note 47, at 4 (“This gives us a definition of the market system sufficient for our immediate purposes: it is a system of society wide coordination of human activities not by central command but by mutual interactions in the form of transactions.”).

⁷⁰ Compare TIM JUDSON & CRISTINA FRANCISCO-MCGUIRE, *WHERE THEFT IS LEGAL* 4

the law of employment in the United States,⁷¹ which by default favors the better-resourced initiator of the employment contract (the employer) over the other party.⁷² This bias is so pervasive that the question of whether the other party to an agreement to work is an “employee,” so as to qualify for protection under most employment laws, becomes a matter of central dispute in any instance of wages going unpaid.⁷³

Given these inequities, and the vast differences between the stakes of individual employees and employers in a dispute,⁷⁴ employees still largely require outside assistance to assert their rights against an employer with other preferences. It was precisely this type of good-faith assistance from others that was absent for so many of the freedmen during Reconstruction,⁷⁵ and that is often

(2012) (noting that California has only wage orders, not statutes, but ranks well compared to other states because of the quality of their enforcement), *and* GREGORY D. KUTZ & JONATHAN T. MEYER, DEPARTMENT OF LABOR: WAGE AND HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW-WAGE WORKERS VULNERABLE TO WAGE THEFT, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-458T, (Mar. 25, 2009), available at <http://www.gao.gov/new.items/d09458t.pdf> (“WHD’s investigations were frequently delayed by months or years, but once complaints were recorded in WHD’s database and assigned as a case to an investigator, they were often adequately investigated”).

⁷¹ See MEISSNER ET AL., *supra* note 10, at 84 (“Low-wage immigrants, particularly the unauthorized, are highly concentrated in certain industries that have traditionally experienced substantial labor standards violations. In addition, some employers exploit the fear of deportation to discourage unauthorized immigrants from reporting violations of law and protesting substandard conditions. Exploitation of unauthorized workers by unscrupulous employers drives down wages and working conditions for all workers, and gives such employers a competitive advantage.”).

⁷² See George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1563 (“[Civil rights and economic rights], while never entirely coextensive, had solidified as the foundation for the regime of freedom of contract—what we would call today formal equality of opportunity. Everyone has the same legal rights to make contracts, hold property, and go to court. No guarantee is offered to individuals of the resources to develop or exercise these rights, which therefore differ drastically in value depending upon an individual’s economic and social position.”).

⁷³ See GARCIA, *supra* note 4, at 34 (“The misclassification of workers has become a serious problem in the economy. A broader definition of worker is necessary. Recent studies estimate that up to 30 percent of companies misclassify workers. Independent contractors cannot organize or get the protection of labor laws.”).

⁷⁴ Bagenstos, *supra* note 48, at 116, available at <http://ssrn.com/abstract=2208883> (“Asymmetric vulnerability is a particular concern in employment markets—especially in times of high unemployment. For an individual worker, having and keeping a job is supremely important. For the employer, by contrast, individual employees are often replaceable or even fungible.”).

⁷⁵ CHARLES L. FLYNN, JR., WHITE LAND, BLACK LABOR: CASTE AND CLASS IN LATE NINETEENTH-CENTURY GEORGIA 38 (1983) (relating incident in 1866 when “the head of the Freedmen’s Bureau in Georgia . . . appointed agents from among the resident white . . . to serve without salary” but instead “receive fees from employers and freed-

not available for unauthorized immigrants working today.

D. *Sources of Resistance to Equal Treatment for the Unauthorized*

The national immigration laws have an attenuated relationship (if any at all) to the actual levels of supply and demand for workers in this country's labor market.⁷⁶ Nevertheless, they have great influence on the availability and treatment of many of the workers in that market.⁷⁷ Significant portions of the American population believe that unauthorized immigrants are both unwelcome and unneeded in the United States, and, extending this premise to the enforcement of labor standards, they conclude that the unauthorized are ineligible for the same protection from unlawful workplace practices that authorized workers enjoy.⁷⁸

As discussed at greater length in Part III, this view, while widespread, is ahistorical and ignores the degree to which workplace injustice in modern production and service operations is fungible.⁷⁹ For example, low-wage Latino workers with valid work status may receive comparable treatment to the undocumented workers alongside whom they work or compete for day laboring positions.⁸⁰

men for the witnessing of contracts." However, the "resident white appointees . . . shamefully abused' their power and 'occasionally inflicted cruel and unusual punishments,' reported General Oliver O. Howard, and "the Georgia bureau returned to a system of salaried, mostly northern agents in January, 1867.").

⁷⁶ ZOLBERG, *supra* note 7, at 14 ("While post-World War II policies constituted a liberalization in relation to the extremely restrictionist regime established in the first quarter of the century, the contemporary regime retains a 'near-zero baseline' with regard to the supply of entries in relation to the demand for them as well as in relation to the size of the resident population-current annual U.S. immigration, for example, amounts to approximately one-third of 1 percent.").

⁷⁷ See, e.g., Brian Bennett & Michael Memoli, *Senators' immigration talks stall*, L.A. TIMES, Mar. 22, 2013, <http://articles.latimes.com/2013/mar/22/nation/la-na-immigration-unfinished-20130323> (noting that one of the difficulties in negotiation was that "the two sides couldn't agree whether foreign workers should be paid the same wages as Americans.").

⁷⁸ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). See also KRIKORIAN, *supra* note 5, at 1 (arguing that defects in the structure of the American labor market require further restricting immigration into the United States).

⁷⁹ As the libertarian blogger Will Wilkinson put it, "Appealing to fairness is a strategy for bargaining over the division of the surplus, not a way of determining in advance the 'correct' division. Our discourse would be a lot less confused if everyone grasped this." *Market forces and appeals to fairness*, THE ECONOMIST (June 25, 2013, 2:26 PM), www.economist.com/blogs/democracyinamerica/2013/06/economic-inequality?fsrc=scn/tw_ec/market_forces_and_appeals_to_fairness.

⁸⁰ See, e.g., BURNHART ET AL., *supra* note 8, at 14 (noting that "[c]onsistent with recent trends in the low-wage labor market, immigrants comprise a large part of our sample—30 percent of the sample was U.S.-born, with the remainder comprised of naturalized citizens, and authorized and unauthorized immigrants [and 63% Latino/a].").

The same process may cause entire industries to adopt lowest-common-denominator conditions, once native-born workers—who may be perceived as more likely to dispute rights violations—no longer predominate the workforce.⁸¹

The effects of the immigration system admittedly interact with other social conditions today to apply a discount to the labor of the working poor.⁸² But immigrants have the dubious distinction of being the *de jure* underclass that persisted in America after Emancipation.⁸³ The first successful tests of the application of the universal guarantees of the Fourteenth Amendment beyond black Americans were brought before the Supreme Court by Chinese immigrant plaintiffs in the nineteenth century.⁸⁴ The enslavement of Chinese “coolies” became a topic of Congressional discussion almost immediately after the legislative efforts for abolition concluded in full,⁸⁵ and their labor was at least as important to the

⁸¹ See, e.g., Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 395 (2012) (“[T]hough peripheral work may now be less transnational in reality, the perception of transnationalism can be ‘sticky.’ Peripheral jobs have become branded as ‘immigrant work,’ and the associated stigma may repel local workers.”).

⁸² See, e.g., BURNHART ET AL., *supra* note 8, at 5 (“Women were significantly more likely than men to experience minimum wage violations, and foreign-born workers were nearly twice as likely as their U.S.-born counterparts to have a minimum wage violation. The higher minimum wage violation rate for foreign-born respondents was concentrated among women—especially women who are unauthorized immigrants. Foreign-born Latino workers had the highest minimum wage violation rates of any racial/ethnic group. But among U.S.-born workers, there were significant race differences: African-American workers had a violation rate triple that of their white counterparts (who had by far the lowest violation rates in the sample).”).

⁸³ See, e.g., NGAI, *supra* note 3, at 135 (describing the “economic structure of migratory wage-labor,” wherein “[g]rowers wanted not only seasonal workers,” but also “a labor surplus so they could obtain workers on demand, at low wages, and in plentiful supply to pick their crops early and quickly.” This dynamic was “the ruin of Anglo small farmers and sharecroppers,” who complained that the “‘farmers would be better off here if we did not have so many Mexicans.’ Many farmers compared their plight to that of small white farmers in the South ‘injured by the Negro slavery system before the Civil War.’”).

⁸⁴ National citizenship under the Fourteenth Amendment was upheld by the Supreme Court in *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898). Equal protection was upheld much earlier, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁸⁵ See Moon-Ho Jung, *Outlawing “Coolies”: Race, Nation, and Empire in the Age of Emancipation*, 57 AM. Q. 677, 678 (2005) (“These congressional debates remind us of the extent to which slavery continued to define American culture and politics after emancipation. The language of abolition infused the proceedings on Chinese exclusion, with no legislator challenging the federal government’s legal or moral authority to forbid ‘coolies’ from entering the reunited, free nation. Indeed, by the 1880s, alongside the prostitute, there was no more potent symbol of chattel slavery’s enduring legacy than the ‘coolie,’ a racialized and racializing figure that anti-Chinese (and putatively pro-Chinese) lawmakers condemned.”).

economy of the West in the years after the Civil War as black labor was to the South.⁸⁶

It is nevertheless outrageous to many that unauthorized workers should even be the subject of modern enforcement efforts, let alone a priority. In other words, “money paid for time worked” is no longer axiomatic when the work is done by someone who has snuck into the country, “cut in line,” or otherwise violated national immigration regulations. As one conservative columnist argued (albeit not in the context of employment), “It’s not a ‘crisis’ when people who shouldn’t be here anyway don’t have all the privileges of people who do have a right to be here. That’s how it *should* be.”⁸⁷ Under this view, such individuals simply do not deserve the attention.

The question of what courts and enforcement agencies could or *should* do for unauthorized-immigrant workers flared into prominence in 2002, when the Supreme Court weighed in on the debate with its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.⁸⁸ The Court in *Hoffman Plastic* foreclosed the National Labor Relations Board (NLRB) from awarding back pay to an unauthorized-immigrant worker who had been terminated for supporting union organizing, for the reason that he “was never lawfully entitled to be present or employed in the United States.”⁸⁹ The majority opinion, authored by then-Chief Justice Rehnquist, found that “awarding backpay to illegal aliens runs counter to policies underlying” the Immigration Reform and Control Act of 1986 (IRCA),⁹⁰ and “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”⁹¹

Hoffman Plastic’s precedential effect was limited to the remedial powers of the NLRB, but its implications seemed vast, especially at first, when it became the citation of choice for every employer seeking to make a plaintiff’s immigration status an issue

⁸⁶ See ZOLBERG, *supra* note 7, at 182 (“Within California, as of the early 1870s, the Chinese constituted only about 9 percent of the total population; but since nearly all of them were adult males, they amounted to one-fifth of the economically active and probably one-fourth of all wage workers.”).

⁸⁷ Kurt Schlichter, *The Immigration “Crisis” Is No Crisis*, TOWNHALL (June 13, 2013), <http://townhall.com/columnists/kurtschlichter/2013/06/13/the-immigration-crisis-no-crisis-n1618034>.

⁸⁸ 535 U.S. 137 (2002).

⁸⁹ *Id.* at 146.

⁹⁰ *Id.* at 149.

⁹¹ *Id.* at 150.

in his or her case.⁹² These efforts were largely rebuffed on the merits by the courts that entertained them.⁹³ The *Hoffman* decision also “triggered a rapid response from all three federal workplace agencies” to reaffirm their position that immigration status was neither relevant nor inquired into for their enforcement efforts.⁹⁴

Ming Chen has concluded, from her own study of the enforcement efforts made by these three agencies, the United States Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), and the United States Department of Labor (DOL), that they appear to be putting forward their best efforts on behalf of unauthorized immigrants in the wake of the *Hoffman Plastic* decision, taking into account the significant legal and political constraints on their behavior.⁹⁵ There is likely more variety among the states that variously regulate their respective labor markets, but only limited data exists on this question.⁹⁶

Separate from the scope of the ruling, the logic of *Hoffman Plastic* illustrates once again that the law-breaking nature of unauthorized immigrants is central to the arguments against those immigrants’ working rights. Yet the manner in which a particular worker may have violated immigration regulations in the past does not meaningfully guide a present decision whether to prioritize such a worker’s claim for wages owed, in comparison to the claim of an authorized worker, since both types nevertheless participate in the same national economy.⁹⁷ What *can* provide guidance in this

⁹² See, e.g., Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 360 (2008) (“In the wake of *Hoffman*, employers have attempted to broaden the Court’s holding by arguing that immigration status is relevant to a whole range of employment-related civil litigation.”).

⁹³ See *id.* at 357 (“Since the *Hoffman* decision, lower courts have struggled to define the parameters of the case, and, while the jurisprudence is still evolving, many courts have limited *Hoffman*’s reach and found workers entitled to seek legal remedies for workplace violations under a variety of statutes.”).

⁹⁴ Chen, *supra* note 40, at 239.

⁹⁵ Chen, *supra* note 40, at 230-231 (describing “three case studies” of the NLRB, DOL, and EEOC that illustrated “a pattern of regulatory resistance to hostile immigrants’ rights laws. Characterizing these agency responses as reconfiguring, buffering, and mitigating respectively, the Article contends that federal workplace agencies use discretion to issue guidance that counters the contraction of immigrants’ rights in courts. Counterintuitively for immigration scholars, the Article attributes these acts of regulatory resistance to a professional ethos of protecting workers and to a commitment to enforcing labor laws independent of the policy preferences of the civil servants and political leadership.”).

⁹⁶ See, e.g., EUNICE HYUNHYE CHO, ET AL., *HOLLOW VICTORIES: THE CRISIS IN COLLECTING UNPAID WAGES FOR CALIFORNIA’S WORKERS* (2013) (NELP study comparing wage collection efforts in California and Wisconsin).

⁹⁷ See, e.g., Ramesh Ponnuru, *New Immigration Bill Has One Terrible Flaw*, BLOOM-

decision are the lessons learned from the first time the nation experienced such an influx of workers into its wage economy, in the wake of slavery's abolition.

II.

A. *Workers' Rights as the Original Civil Rights*

The common ancestor of all modern employment-rights laws in the United States is the Civil Rights Act of 1866,⁹⁸ the first equal rights statute in American history.⁹⁹ This original Civil Rights Act (more would follow) was Congress's first use of its newfound power to write legislation under Section 2 of the Thirteenth Amendment, to carry out the guarantee of slavery's abolition contained in Section 1 of the Amendment.¹⁰⁰

The principle of equality was central to abolition because American slavery rested on a belief in the inferiority of black Africans as a whole, and the enslaved among them specifically. This entrenched racism continued to drive behavior even after slavery itself was forbidden, of course, thus making the enforcement of "equality before the law" the primary mission of the federal agents charged with helping freed slaves integrate into the post-Emancipation American economy.

The Thirteenth Amendment was passed by Congress before the end of military operations in the Civil War, but not ratified by enough states to be enacted until December 1865,¹⁰¹ after Reconstruction had already begun in the smoking and ruined South.¹⁰²

BERG VIEW (Apr. 22, 2013, 6:00 PM), *available at* www.bloomberg.com/news/2013-04-22/new-immigration-bill-has-one-terrible-flaw.html ("One of the worst things about illegal immigration is that it creates a class of people who contribute their labor to this country but aren't full participants in it and lack the rights and responsibilities of everyone else.").

⁹⁸ *But see* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 135 (1992) (arguing that "the modern Civil Rights acts [are] patterned on the 1875 statute [overturned in the *Civil Rights Cases*] and not the earlier 1866 one").

⁹⁹ Ontiveros, *supra* note 16, at 27 ("By ending slavery, it sought to help the slaves and improve society by eliminating certain types of evils, which we currently think of as human rights or civil right violations, such as the selling of human beings, forced labor, lack of family autonomy, and racial inequality.").

¹⁰⁰ MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 50 (2001) ("[W]hen the Thirteenth Amendment was ratified in December 1865, the enforcement legislation that congressmen had in mind when they proposed the measure was nowhere to be found, and enforcement would have to await the Civil Rights Act of 1866.").

¹⁰¹ *Id.* at 233.

¹⁰² MCPHERSON, *supra* note 39, at 818 ("[B]y war's end much of the South was an economic desert. The war not only killed one-quarter of the Confederacy's white men

This period of American history is understood by all today as a failure on its own terms, such that by a half-century after the Civil Rights Act of 1866, many of the ostensibly-free black American working population labored in no better conditions than their fathers and mothers had in the antebellum (pre-Civil War) era.¹⁰³

Today, a half-century after our own most recent rights revolution, even if low-wage workers have made only meager material gains in the elapsed time,¹⁰⁴ at least that compares favorably to the dismal slide that began in Reconstruction, continued through the stark inequalities of the Gilded Age, and reached full flower during “the long era of Jim Crow in the twentieth century.”¹⁰⁵ It was only through the Great Migration to northern and western cities like New York, Chicago, and Los Angeles, which began during the First World War and did not conclude until after the civil rights movement, that the conditions of large numbers of black Americans began to improve.¹⁰⁶

The reasons for Reconstruction’s failure are many, predominant among them the fierce pushback that came from the reactionary South to the granting of equal rights to the newly-freed slaves. The so-called Redemption of state and local governments in the 1870s, and widespread vigilantism that gave birth to organiza-

of military age. It also killed two-fifths of southern livestock, wrecked half of the farm machinery, ruined thousands of miles of railroad, left scores of thousands of farms and plantations in weeds and disrepair, and destroyed the principal labor system on which southern productivity had been based. Two-thirds of assessed southern wealth vanished in the war. The wreckage of the southern economy caused the 1860s to become the decade of least economic growth in American history before the 1930s.”).

¹⁰³ See BLACKMON, *supra* note 51, at 234 (2009) (“Across the nation, the spring and summer of 1903 marked a venomous turn in relations between blacks and whites. A pall was descending on black America, like nothing experienced since the darkest hours of antebellum slavery.”).

¹⁰⁴ *But see* U.S. Dep’t of Labor, *Employment, Benefits, and Wages*, 14, available at www.dol.gov/dol/aboutdol/history/herman/reports/futurework/report/chapter2/main.htm (“Since the end of World War II, real wages for production workers have risen by more than half. Most of this growth occurred, however, in the 1950s and 1960s. (See chart 2.1.) After reaching a peak in 1973, real hourly earnings for production workers either fell or stagnated for two decades. During 1996–1998, growth in hourly earnings resumed, accelerating to over two percent in 1998.”).

¹⁰⁵ BLACKMON, *supra* note 51, at 86.

¹⁰⁶ See ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* 9 (2010) (“Over the course of six decades, some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America. The Great Migration would become a turning point in history. It would transform urban America and recast the social and political order of every city it touched. It would force the South to search its soul and finally to lay aside a feudal caste system. It grew out of the unmet promises made after the Civil War and, through the sheer weight of it, helped push the country toward the civil rights revolutions of the 1960s.”).

tions like the Ku Klux Klan, were the means by which the defeated South wrested back control.¹⁰⁷ This counter-revolution was the beginning of the nullification of Emancipation's guarantees in the ninety-eight years that passed between the two Civil Rights Acts.¹⁰⁸

Another prominent reason for the denial of the Thirteenth (and, eventually, the Fourteenth) Amendment's promise of "equality before the law" was the failure of the United States government to enforce this equality on behalf of the people it was intended to protect. The Freedmen's Bureau, the federal agency created to enforce that equality in the working fields and cities of the South during the crucial years immediately after the War, was not equal to the forces it was required to overcome to fulfill its mission.¹⁰⁹

Once the issue of labor by coercion had been formally dealt with by the Thirteenth Amendment, the focus of Republican lawmakers in Congress rightfully turned from freedom *to* contract,¹¹⁰ as enshrined in the Civil Rights Act, to freedom *from unlawful* contracts.¹¹¹ This meant more than simply a prohibition on work without pay, a baseline requirement for a nation in which the

¹⁰⁷ BLACKMON, *supra* note 51, at 157 ("Investigations of any kind by federal agencies were extraordinarily unusual in an era that predated the creation of the Federal Bureau of Investigation. Moreover, the South's long asserted right to manage the affairs of black residents without northern interference had finally been achieved. Nearly every southern state, including Alabama, had completed the total disenfranchisement of African Americans by 1901. Virtually no blacks served on state juries. No blacks in the South were permitted to hold meaningful state or local political offices. There were virtually no black sheriffs, constables, or police officers. Blacks had been wholly shunted into their own inferior railroad cars, restrooms, restaurants, neighborhoods, and schools. All of this had been accomplished in a sudden, unfettered grab by white supremacists that was met outside the South with little more than quiet assent. During the thirty years since Reconstruction—despite its being a period of nearly continuous Republican control of the White House—federal officials raised only the faintest concerns about white abuse of black laborers.").

¹⁰⁸ *Id.* at 42 ("The role of the African American in American society would not be clear for another one hundred years.").

¹⁰⁹ *See id.* at 262 ("Just as the federal Freedmen's Bureau agents sent into remote southern towns had learned immediately after the Civil War, the new representatives of northern justice brought more risk upon themselves than to any person still holding slaves.").

¹¹⁰ *See* William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 532 (1974) ("[E]conomic rights of property and contract probably ranked next to the right of personal liberty as the most important rights of which slaves were deprived" in abolitionist rhetoric).

¹¹¹ This was not an unforeseen turn. *See* ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 276 (2010) (quoting Lincoln in April 1864, "We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor.").

embodiment of individual freedom going forward would be wage labor.¹¹² Individual liberty fully defined brought with it a broader set of expectations of fair treatment and non-discrimination,¹¹³ enshrined in the Fourteenth Amendment and its doomed legislative progeny. The historian Kate Masur has described this as the difference between liberty and equality, two terms used to describe freedom in the era that required quite different levels of commitment from the government to carry out.¹¹⁴

The national government's newfound commitment to these individual rights was tested and found wanting in many different spheres. There were early struggles in Congress,¹¹⁵ and ultimately all was lost before the Supreme Court.¹¹⁶ Between these two events, the government's commitment to freed slaves' working rights found itself most sorely tested in the ruins of the defeated South, through the actions (and inaction) of the regulators created by Congress to guard these rights and enforce these new laws.¹¹⁷ The first of these agencies was the Freedmen's Bureau.¹¹⁸

¹¹² See ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 10 (2001) ("The origins of modern free wage labor are not to be found in the free contracts in free markets of the first half of the nineteenth century but in the restrictions placed on freedom of contract by the social and economic legislation adopted during the final quarter of the century.").

¹¹³ See George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551, 1552 (2012) ("Although its full effect was not achieved for nearly a century, [the Thirteenth Amendment] began the process of dismantling involuntary servitude as a widespread form of labor relations. It was the first constitutional amendment to restrict state power and the first to establish equality as an ideal in American life.").

¹¹⁴ MASUR, *supra* note 2, at 4 ("Whereas the concept of freedom almost always implied liberty—or people's ability to act as they chose, unconstrained by government or by other private persons—the concept of equality had everything to do with policy. When people demanded equal rights, they were in essence asking for government measures that would ensure that individuals who were in some ways unequal would be treated equally or offered equal opportunities.").

¹¹⁵ See FONER, RECONSTRUCTION, *supra* note 50, at 247-251 (describing how Congress was required in April 1866, "for the first time in American history," to "enact[] a major piece of legislation over a President's veto"—the Civil Rights Bill. Congress had earlier in the year been forced to do the same when Andrew Johnson vetoed the Freedmen's Bureau Bill.).

¹¹⁶ See *The Slaughter-House Cases*, 83 U.S. 36 (1872) and *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹¹⁷ WELKE, *supra* note 34, at 145 ("The Fugitive Slave Act of 1850 offered one of the first examples of administrative courts focused on an exclusive subject matter. The Civil War; Congressional Reconstruction; and the Bureau of Refugees, Freedmen, and Abandoned Lands were the first large-scale federal experiments in administrative governance, more generally.").

¹¹⁸ STANLEY, *supra* note 35, at 36 ("After the war the newly created Freedmen's Bureau enforced the regime of contract. Enjoining former slaves to obey the 'solemn obligation of contracts,' the bureau taught that freedom was inimical not just to coer-

B. *A Founding Failure of Enforcement*

The Freedmen's Bureau was an agency of the War Department, staffed by veterans of the Union army.¹¹⁹ Its mandate was no less than the establishment of a universal free labor and education system for former slaves,¹²⁰ a population for whom government action had never been a source of much comfort.¹²¹ "The Bureau's role in supervising labor relations reached its peak in 1866 and 1867,"¹²² after which time its mission fell to two other agencies, the military provost courts and the Southern Claims Commission.¹²³ Its presence was sorely needed in a South that sought black labor desperately but could not conceive of having to bargain for it.¹²⁴

Unfortunately, these three government agencies were much too short-lived and never had enough funding or staff to meet the needs of black southerners during Reconstruction . . . The Freedmen's Bureau, for example, never had more than 900

cion but to idleness and immorality. The bureau's chief, Gen. Oliver Otis Howard, explained the plan for dealing with the ex-slaves: 'If they can be induced to enter into contracts, they are taught that there are duties as well as privileges of freedom.'").

¹¹⁹ DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 112 (2003) ("In the 1860's the U.S. government extended legal rights and protections to four million black southerners through three major institutions: the provost courts, the Freedmen's Bureau, and the Southern Claims Commission. Each of these forums had a different mission and structure, but they all seemed to promise that ex-slaves might soon leave behind the uncertainties of plantation 'custom' for the evenhanded formalism of law . . . In many regions of the South, the army provost courts continued to act as a substitute legal system after the war ended. The Freedmen's Bureau, also a branch of the army and staffed by army officers, extended and institutionalized the provost marshal's legal protection of freedpeople.").

¹²⁰ W.E.B. Du Bois described a Bureau circular in *The Freedmen's Bureau* as follows: "The Bureau invited continued cooperation with benevolent societies, and declared, 'It will be the object of all commissioners to introduce practicable systems of compensated labor,' and to establish schools." W. E. Burghardt Du Bois, *supra* note 29, Part One.

¹²¹ See Laura F. Edwards, *Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South*, *THE AMERICAN HISTORICAL REVIEW* 390 (2007) ("Slaves did not so much use law as survive legal proceedings they had no choice but to endure. Their acceptance of the system might better be termed resignation. Although they knew that the legal system was capricious, they nonetheless lived with its processes and understood it as a means to regulate the communities in which they lived. They had to, because legal practice was so thoroughly integrated into the rhythms of daily life.").

¹²² FONER, *RECONSTRUCTION*, *supra* note 50, at 166.

¹²³ PENNINGROTH, *supra* note 119, at 112.

¹²⁴ BLACKMON, *supra* note 51, at 39 ("Without former slaves—and their steady expertise and cooperation in the fields—the white South was crippled. But this new manifestation of dark-skinned men expected to choose when, where, and how long they would work.").

agents in the South at one time.¹²⁵

Though beloved by many of the newly free,¹²⁶ the Bureau had few other friends,¹²⁷ and where the agency's efforts led to successes, they often came in no small part due to the contributions of freedmen themselves.¹²⁸ Indeed, encouraging such self-help was one of the priorities of the Freedmen's Bureau and its backers.¹²⁹

The Bureau and its agents had nothing comparable to the resources and reach of modern federal agencies like the EEOC or the DOL, but its mandate was vast with paternalistic enthusiasm, sweeping over not just paid employment¹³⁰ for freedmen and freedwomen,¹³¹ but also their marriages and households.¹³²

¹²⁵ PENNINGROTH, *supra* note 119, at 116.

¹²⁶ FONER, RECONSTRUCTION, *supra* note 50, at 169 ("In Wilmington, North Carolina, 800 blacks crowded into the Brick Church to voice support. 'If the Freedman Bureau was removed,' one speaker insisted, 'a colored man would have better sense than to speak a word in behalf of the colored man's rights, for fear of his life.' Somewhat taken aback, General [John] Steedman asked the assemblage if the army or the Freedmen's Bureau had to be withdrawn, which they would prefer to have remain in the South. From all parts of the church came the reply, 'The Bureau.'").

¹²⁷ *Id.* at 168 ("'Of course everyone abuses the Freedmen's Bureau,' the British ambassador reported after a visit to Virginia in early 1866, precisely when agents were exerting their greatest effort to induce blacks to sign labor contracts. Indeed, whatever the policies of individual agents, most Southern whites resented the Bureau as a symbol of Confederate defeat and a barrier to the authority reminiscent of slavery that planters hoped to impose upon the freedmen. Even if, in individual cases, the Bureau's intervention enhanced the power of the employer, the very act of calling upon a third and ostensibly disinterested party served to undermine his standing, by making evident to the freedmen that the planter's authority was not absolute.").

¹²⁸ See EVELYN NAKANO GLENN, UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR 138 (2002) ("In all localities blacks paid taxes or contributed in kind. Freedmen's Bureau records showed that in early 1867 at least half of the schools in ten southern states received financial assistance from black parents, and that except in Alabama and Florida, black parents put in at least \$25 for every \$100 expended by the Freedmen's Bureau. In Louisiana and Kentucky blacks paid more toward expenses than the Freedmen's Bureau.").

¹²⁹ STANLEY, *supra* note 35, at 123 ("Throughout the proclamations of the Freedmen's Bureau ran a double message: an affirmation of former slaves' right to liberty and a warning that freedom barred dependence. The bureau sought to dispel the notion that its mission was charitable, aiming its words both at former slaves and at northerners who shunned the prospect of permanently supporting a free black population.").

¹³⁰ See BLACKMON, *supra* note 51, at 27 ("Some white plantation owners attempted to coerce their former slaves into signing 'lifetime contracts' to work on the farms.").

¹³¹ See MASUR, *supra* note 2, at 64 (describing the creation of "several 'industrial schools' to promote freedwomen's financial independence," that either taught "hand and machine sewing" or "were basically large-scale laundries where women washed and ironed," and which "offered 'employment and instruction to some 369 women'" in 1866).

¹³² See STANLEY, *supra* note 35, at 56 ("[I]t was generally acknowledged that emancipation had made freedmen into proprietors of their own persons and labor, giving them the legal capacity to participate in voluntary exchange relations . . . Slavery's

The District of Columbia was not a site of battle during the Civil War, but had been no stranger to slavery in the antebellum era, and was host to a large black population that had swelled as the war ground on,¹³³ partly as a result of the early abolition of slavery there.¹³⁴ The Bureau's extensive efforts in DC were the agency's apotheosis, consisting of a range of services for the rapidly-arriving freedmen population that included low-income housing¹³⁵ and a legal defense program.¹³⁶

Reconstruction was unprecedented in its scope and ambition,¹³⁷ and this assured that the resistance it provoked was broad and persistent.¹³⁸ Congress became engaged in a series of

antithesis, agreed legislators from both sides of the Mason-Dixon line, was free contract—the right of self-owning freedmen to sell their labor for wages and to marry and maintain a household.”).

¹³³ See MASUR, *supra* note 2, at 19 (“During the antebellum years, Washington’s black population grew steadily, while the proportion of slaves to free blacks diminished. In 1860, 78 percent of the local black population was free, up from 73 percent ten years earlier.”); and 28 (“From 1860 to 1870, Washington’s black population grew more than any other [city], in both relative and absolute terms. During that decade, about 29,000 new black residents moved to the capital.”).

¹³⁴ See FONER, *THE FIERY TRIAL*, *supra* note 111, at 201 (“The first federal statute to grant immediate freedom to any group of slaves, the [April 1862] law ending slavery in Washington, D.C., fulfilled a long-standing abolitionist dream and marked a significant change in federal policy . . . It offered one example of how the war was inexorably expanding federal power.”).

¹³⁵ MASUR, *supra* note 2, at 69 (“[B]ureau agents opened their first rental apartments to freedpeople in October 1865, in a former military hospital at the north end of Seventh Street. By the winter of 1866, the bureau was renting apartments in three different barracks . . . as well as at the hospital,” an operation that “would continue into 1868, when the bureau embarked on plans to build new tenements and tear down the old ones, even as it gradually shut down its other operations.”).

¹³⁶ *Id.* at 116 (“[T]he Freedmen’s Bureau began a legal defense program in the summer of 1866 . . . lawyers working for the Freedmen’s Bureau made themselves available to people who walked into their office on Pennsylvania Avenue, and they visited the jail and police stations in search of people who needed legal representation. The bulk of their work related to enforcement of labor contracts and rental agreements, but they also sought justice for freedpeople involved in criminal cases,” making “683 visits to the jail” and working on “291 criminal cases, as well as almost 600 civil ones.”).

¹³⁷ *Id.* at 2 (“It was relatively straightforward to decree that human beings could no longer be considered property and that no one could enjoy the benefits of others’ uncompensated labor. Much more complicated was the question of postemancipation equality. In the Northeast, slavery’s abolition in the early nineteenth century had led not to a regime of racial equality, but rather to a society in which both customary and legal discrimination were commonplace. As southern slavery ended, Americans asked crucial questions about whether and how to eliminate the features of slavery that might remain in law and public life even after abolition.”).

¹³⁸ FONER, *RECONSTRUCTION*, *supra* note 50, at 244 (“As the first statutory definition of the rights of American citizenship, the Civil Rights bill embodied a profound change in federal-state relations and reflected how ideas once considered Radical had been adopted by the party’s mainstream.”).

rearguard actions to defend prior guarantees of rights. The Fourteenth Amendment was passed to preserve the constitutionality of the measures taken in the Civil Rights Act of 1866, the Reconstruction Acts followed to help ensure ratification of the Fourteenth Amendment, and so on.¹³⁹ Ultimately, federal involvement in the South was ended as part of the agreement resolving the disputed election of 1876.¹⁴⁰

The Bureau, for its part, could not last that long, failing to persist to the end of the 1860s.¹⁴¹ W.E.B. Du Bois' conclusion, looking back at the turn of the twentieth century, was wistful but unflinching:

It came to regard its work as merely temporary, and Negro suffrage as a final answer to all present perplexities. The political ambition of many of its agents and protégés led it far afield into questionable activities, until the South, nurturing its own deep prejudices, came easily to ignore all the good deeds of the Bureau, and hate its very name with perfect hatred. So the Freedmen's Bureau died and its child was the Fifteenth Amendment.¹⁴²

¹³⁹ FLYNN, JR., *supra* note 75, at 37–38 (“And so, one step led to the next: the Civil Rights Act of 1866, which, despite its questionable constitutionality, invalidated discriminatory black codes; the proposal of the Fourteenth Amendment, which would bar Confederate leaders from holding any office and make the Civil Rights Act constitutional and immutable; the Reconstruction Acts of 1867, which disfranchised former Confederate leaders and enfranchised the freedmen in a further effort to get what Republicans defined as ‘true unionist sentiment’ dominant in the politics of the South and to get the Fourteenth Amendment ratified; the Fifteenth Amendment to try to protect the new political system; and the Ku Klux Klan Act to try to counter anti-Republican and antiblack violence. These congressional actions went much further than all but the most radical Republicans had anticipated at the end of the war. Each step was meant to protect the step before, but the cumulative effect was as great as a second civil war.”).

¹⁴⁰ BLACKMON, *supra* note 51, at 87–88 (“A terrible depression in the 1870s had finally eased as the South began to emerge from economic ruin. In the disputed presidential election of 1876, white southern political leaders leveraged the electoral college system to rob the winner of a huge majority of the popular vote, Samuel J. Tilden, of the White House. In return, the Congress and the administration of the fraudulent new Republican president, Rutherford B. Hayes, finally removed the last Union troops from the South and ended a decade of federal occupation of the region.”).

¹⁴¹ W. E. Burghardt Du Bois, *The Freedmen's Bureau*, THE ATLANTIC MONTHLY, Mar. 1901, Part Two available at <http://www.theatlantic.com/past/docs/issues/01mar/dubois2.htm> (“The act of 1866 gave the Freedmen's Bureau its final form,—the form by which it will be known to posterity and judged of men. It extended the existence of the Bureau to July, 1868 . . .”).

¹⁴² *Id.*

C. *The Long Winter of the Lochner Era*

As with the two other great rights-producing events in United States history—the American Revolution and the twentieth century’s New Deal and civil rights campaigns—the campaign for human equality that reached its peak during Congressional Reconstruction was followed by long decades of regression to a less egalitarian mean.¹⁴³ There was some advancement in the enforcement of individual rights during this dark period, at both the federal¹⁴⁴ and state¹⁴⁵ levels, and during wartime.¹⁴⁶ President Franklin Roosevelt famously brought the issue of workers’ rights to the fore of federal policy-making at the close of this period,¹⁴⁷ setting the stage for the gains of the second half of the twentieth century.¹⁴⁸

¹⁴³ See GLENN, *supra* note 128, at 24 (“Liberalizing changes occurred rarely and usually only in the context of major social crises. Three periods in which major upheavals occurred were the years of the American Revolution and Confederation, the Civil War and Reconstruction, and the post-World War II civil rights era of the 1950s and 1960s. These times of expanding egalitarianism typically were followed by periods of regression during which hard-won gains were rolled back and new exclusions put in place—the current post-civil rights period being an obvious instance.”).

¹⁴⁴ See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L. J. 1609 (2001) (describing efforts of the first civil rights section of the U.S. Department of Justice to enforce the Thirteenth Amendment in the 1930s and 40s, before the major civil rights campaigns began).

¹⁴⁵ See David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1079 (2011) (“By the time Congress enacted Title VII of the Civil Rights Act of 1964, nearly two dozen nonsouthern states that were home to more than ninety percent of African Americans outside the South had already enacted legislation mandating equal treatment in employment.”).

¹⁴⁶ See Jeffrey A. Jenkins & Justin Peck, *Building Toward Major Policy Change: Congressional Action on Civil Rights, 1941-1950*, 31 LAW & HIST. REV. 139, 174 (2013) (describing how Franklin D. Roosevelt in 1941 “issued Executive Order 8802 to formally prohibit ‘discriminatory employment practices because of race, color, creed or national origin in government service, defense industries, and by trade unions,’” declaring it “‘the duty of employers and of labor organizations . . . to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origins,’” and creating “the non-salaried, five-man FEPC,” to administer the regime).

¹⁴⁷ In his famous “Commonwealth Club” speech in 1932, Franklin D. Roosevelt said: “We know that individual liberty and individual happiness mean nothing unless both are ordered in the sense that one man’s meat is not another man’s poison. We know that the old ‘rights of personal competency’—the right to read, to think, to speak, to choose and live a mode of life, must be respected at all hazards. We know that liberty to do anything which deprives others of those elemental rights is outside the protection of any compact; and that government in this regard is the maintenance of a balance, within which every individual may have a place if he will take it; in which every individual may find safety if he wishes it; in which every individual may attain such power as his ability permits, consistent with his assuming the accompanying responsibility.” See *supra* note 63.

¹⁴⁸ See William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and*

For the most part, however, the guardians of individual liberty in the *Lochner* era turned the equalizing guarantees of Reconstruction on their head to maintain the retrograde employment conditions of the antebellum era,¹⁴⁹ aided by sympathetic Southern state governments and a disinterested federal government.¹⁵⁰ The result for many of the descendants of the freedmen was a life little different than what their parents and grandparents had experienced before Emancipation.¹⁵¹ There were advances as well, including some that were the result of more active agency enforcement of existing labor laws,¹⁵² and others that were the result of legislative efforts.¹⁵³

The passage of another Civil Rights Act would not come for nearly a century.¹⁵⁴ It was only after this milestone that the modern notion of formal, universal equality under law finally began to be

Future of the Civil Rights and Labor Movements, 2 U. PA. J. LAB. & EMP. L. 697, 702 (2000) (“Jim Crow stood between the popular support the New Deal vision of social citizenship enjoyed and its enactment into law. The era saw a sustained effort to oust him.”).

¹⁴⁹ LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 297 (2009) (“Workers also resorted to legal appeals, trying to use Fourteenth Amendment rights to alter the balance of power at the workplace. But the courts consistently used the Fourteenth Amendment against them, maintaining that the ability to contract was a protected right.”).

¹⁵⁰ BLACKMON, *supra* note 51, at 157 (“Nearly every southern state, including Alabama, had completed the total disenfranchisement of African Americans by 1901. Virtually no blacks served on state juries. No blacks in the South were permitted to hold meaningful state or local political offices. There were virtually no black sheriffs, constables, or police officers. Blacks had been wholly shunted into their own inferior railroad cars, restrooms, restaurants, neighborhoods, and schools. All of this had been accomplished in a sudden, unfettered grab by white supremacists that was met outside the South with little more than quiet assent. During the thirty years since Reconstruction—despite its being a period of nearly continuous Republican control of the White House—federal officials raised only the faintest concerns about white abuse of black laborers.”).

¹⁵¹ *Id.* at 300 (“That was the work available to an independent black man like Green: free labor camps that functioned like prisons, cotton tenancy that equated to serfdom, or prison mines filled with slaves. The alternatives, reserved for African Americans who crossed a white man or the law, were even more grim.”).

¹⁵² See generally Goluboff, *supra* note 144.

¹⁵³ See Jenkins & Peck, *supra* note 146, at 193–94 (describing how Representative Adam Clayton Powell considered his National School Lunch Act of 1946 to be “‘the first civil rights amendment’ to pass Congress in the post-Reconstruction era”).

¹⁵⁴ See William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 WASH. & LEE L. REV. 3, 100 (1995) (“An obvious question that some might want to ask is when the shift to rights-centered constitutionalism occurred. Three dates suggest themselves. The first is 1938 — the year of *United States v. Carolene Products Co.* and of New York’s Constitutional Convention. The second is 1954—the year of *Brown v. Board of Education*. The third is the mid-1960s—the years of African-American and antiwar protest and of a solid liberal majority on the Warren Court.”).

enforced, and started to gain wider purchase in American society.¹⁵⁵ In the decade following, black Americans saw for the first time a measurable improvement in their economic conditions relative to whites; an effect that has either leveled off or reversed as the private right of action has become the primary means of enforcement.¹⁵⁶

The system of laws regulating labor in the United States today imposes a broader set of conditions on the at-will employment contract than just the non-discrimination at the heart of the twentieth century's two Civil Rights Acts. These conditions include a right to overtime, paid break periods,¹⁵⁷ generally safe working conditions,¹⁵⁸ qualified rights to religious and disability accommodation,¹⁵⁹ as well as unpaid medical leave,¹⁶⁰ and protection from retaliation or other extra-contractual wrongs.¹⁶¹ The Civil Rights Act of 1866 was revived by the Supreme Court a few years after the passage of its modern successor,¹⁶² and it lives on today as Section 1981, a private anti-discrimination cause of action.¹⁶³

However, employees still require reliable third parties to enforce these rights. For the most part, those third parties are government regulatory agencies,¹⁶⁴ but they may also be private counsel, where fee-shifting statutes make such representation possible, and

¹⁵⁵ John J. Donohue III & James J. Heckman, *Symposium: The Law and Economics of Racial Discrimination in Employment: Re-Evaluating Federal Civil Rights Policy*, 79 GEO. L. J. 1713, 1715 (1991) (“Between 1920 and 1990 there were only two periods in which black incomes rose relative to white incomes: during the economic rebound from the Great Depression induced by World War II, and in the decade following the launching of an intensive federal effort to guarantee the civil rights of blacks.”).

¹⁵⁶ *Id.* at 1729–30 (“[F]ederal antidiscrimination law is a powerful tool in attacking egregious forms of discrimination, such as that existing most conspicuously in the pre-1965 South,” but that the “process of breaking down these blatant barriers to black advancement in employment, schooling, voting, and housing was complete by roughly 1975.” Furthermore, “once the egregious forms of exclusion have been eliminated, a law enforced by the complaints of alleged victims of discrimination is not likely to produce further significant black improvement,” and in fact “there has been little improvement in the relative earnings of non-Southern blacks since the passage of Title VII and for Southern blacks after the egregious segregation was dismantled.”).

¹⁵⁷ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2013).

¹⁵⁸ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (2013).

¹⁵⁹ Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12113 (2013).

¹⁶⁰ Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2013).

¹⁶¹ *See, e.g.*, *CBOCS West v. Humphries*, 553 U.S. 442, 446 (2008) (holding that Section 1981 encompasses retaliation claims).

¹⁶² *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

¹⁶³ 42 U.S.C. § 1981.

¹⁶⁴ *See KUTZ & MEYER, supra* note 70, at “GAO Highlights” (“GAO’s overall assessment of the [Wage and Hour Division] complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints.”).

unions, where they still exist.¹⁶⁵ For-profit employment discrimination litigators are hardly guaranteed to secure compensation for the injuries suffered by their clients,¹⁶⁶ but nevertheless they must look at the likelihood of such an outcome above all other factors in choosing which claims to pursue. Although there are some non-profit organizations that are immune to this revenue-generating concern and are able to have a limited impact,¹⁶⁷ the elimination of prevalent and longstanding violations of labor standards in the American economy continues to be the heritage and mandate of the government agencies charged with enforcing these laws.

III.

A. *The Value of a Disposable Workforce*

The pervasive and deep-seated racism that motivated the enslavement of black Americans¹⁶⁸ continues to contribute to their oppression in the workplace and practically everywhere else. Michelle Alexander has convincingly argued that the predominant uses of force of law against black Americans have shifted, particularly since the beginning of the War on Drugs in the 1980s, from the civil and contractual to the criminal and penal.¹⁶⁹ This large-scale removal from the workforce has allowed particular oppres-

¹⁶⁵ *Union Membership (Annual) News Release*, BUREAU OF LABOR STATISTICS (Jan. 24, 2014), www.bls.gov/news.release/union2.htm (reporting that the rate of private-sector unionization in 2012 was “11.3 percent, down from 11.8 percent in 2011”).

¹⁶⁶ See Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. OF EMPIRICAL LEGAL STUD. 175, 178 (2010) (“In discrimination cases, what begins as a moral contest over whether discrimination occurred progressively becomes redefined as a shifting set of cost benefit analyses about how to dispose of a dispute before proceeding to the next, more costly stage. EDL cases are treated more harshly by the courts, with lower levels of settlement rates, higher rates of summary judgment motions against plaintiffs, higher plaintiff loss rates, and higher appellate reversal rates of plaintiff awards than is the case for other kinds of civil litigation.”).

¹⁶⁷ This author’s clinical program, which represents individuals bringing a variety of employment-related claims on a pro bono basis, is an example of one such organization. See <http://www.law.du.edu/index.php/profile/raja-raghunath> (last visited Jan. 11, 2015).

¹⁶⁸ Alexander Stephens, Confederate Vice President, Corner Stone Speech (Mar. 21, 1861), <http://teachingamericanhistory.org/library/index.asp?documentprint=76> (infamously declared in 1861 that the Confederacy’s “foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition”).

¹⁶⁹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IS THE AGE OF COLORBLINDNESS* 21 (2010) (“Since the nation’s founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time.”).

sions that were pioneered on working black Americans to spread to new generations of workers,¹⁷⁰ in particular workers who are estranged from formal law and its enforcement mechanisms.¹⁷¹

An example of the nadir of American employment practices today can be found in the immigrant-heavy domestic meatpacking industry,¹⁷² which in the first decade of the twenty-first century famously experienced large-scale federal enforcement actions of both the immigration laws and labor laws, in some instances at the same facilities.¹⁷³ As catalogued in the journalist Eric Schlosser's best-selling book *Fast Food Nation*, the role of immigrant labor in domestic food production is concededly part of a larger story that yields many other examples of injustices resonant of Reconstruction; for example, tenant farming becoming as widespread as sharecropping,¹⁷⁴ or the inevitable emergence of the rural South as a site of the worst practices.¹⁷⁵

¹⁷⁰ *Id.* at 18 (“[M]ass incarceration is designed to warehouse a population deemed disposable—unnecessary to the functioning of the new global economy—while earlier systems of control were designed to exploit and control black labor.”).

¹⁷¹ See ABEL VALENZUELA JR. ET AL., ON THE CORNER: DAY LABOR IN THE UNITED STATES (2006), http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Nat_Day_Labor-On_the_Corner1.pdf. See also LINDA BURNHAM & NIK THEODORE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK xi–xii (2012) (“[Eighty-five] percent of undocumented immigrants who encountered problems with their working conditions in the prior 12 months did not complain because they feared their immigration status would be used against them.”).

¹⁷² See Alexander, *supra* note 81, at 373–75 (citing estimates of 25%–60% of “peripheral poultry jobs” being held by immigrant workers, with “large numbers” undocumented, and noting that poultry industry’s “high-turnover labor regime can only function if (1) there is an unending supply of new workers ready to take the vacant jobs and (2) transaction costs are low enough such that turnover is relatively costless. The transnational labor market meets both criteria.”).

¹⁷³ See JERRY KAMMER, THE 2006 SWIFT RAIDS: ASSESSING THE IMPACT OF IMMIGRATION ENFORCEMENT ACTIONS AT SIX FACILITIES, CENTER FOR IMMIGRATION STUDIES 2009; and Press Release, The U.S. Equal Employment Opportunity Commission, EEOC Sues JBS Swift for Religious and National Origin Discrimination in Colorado and Nebraska (Aug. 31, 2010), www.eeoc.gov/eeoc/newsroom/release/8-31-10.cfm. In full disclosure, the author of this article is private counsel for six intervening plaintiffs in one of the above EEOC actions.

¹⁷⁴ SCHLOSSER, *supra* note 17, at 118 (“Over the past twenty-five years, Idaho has lost about half of its potato farmers. During the same period, the amount of land devoted to potatoes has increased. Family farms are giving way to corporate farms that stretch for thousands of acres. These immense corporate farms are divided into smaller holdings for administrative purposes, and farmers who’ve been driven off the land are often hired to manage them. The patterns of land ownership in the American West more and more resemble those of rural England.”).

¹⁷⁵ *Id.* at 139 (“The poultry industry was also transformed by a wave of mergers in the 1980s. Eight chicken processors now control about two-thirds of the American market. These processors have shifted almost all of their production to the rural South, where the weather tends to be mild, the workforce is poor, unions are weak, and farmers are desperate to find some way of staying on their land. Alabama, Arkan-

The astonishing brutality and inhumanity of meatpacking work, performed under modern just-in-time production conditions,¹⁷⁶ affects all workers in the industry, native-born or immigrant, authorized or not. But the meatpacking industry could not use up and discard workers at the pace that it does¹⁷⁷ without some assurance that the vast majority so used will not press their case very far with the authorities, if at all.¹⁷⁸ This is an assurance that a largely undocumented workforce can provide.¹⁷⁹

The meatpacking industry is not the only employment sector crying out for the enforcement of labor standards at the low end of worker income.¹⁸⁰ Many so-called marginal or peripheral employ-

sas, Georgia, and Mississippi now produce more than half the chicken raised in the United States.”).

¹⁷⁶ *Id.* at 173 (“One of the leading determinants of the injury rate at a slaughterhouse today is the speed of the disassembly line. The faster it runs, the more likely that workers will get hurt. The old meatpacking plants in Chicago slaughtered about 50 cattle an hour. Twenty years ago, new plants in the High Plains slaughtered about 175 cattle an hour. Today some plants slaughter up to 400 cattle an hour—about half a dozen animals every minute, sent down a single production line, carved by workers desperate not to fall behind.”).

¹⁷⁷ *Id.* at 172 (“Meatpacking is now the most dangerous job in the United States. The injury rate in a slaughterhouse is about three times higher than the rate in a typical American factory. Every year about one out of three meatpacking workers in this country—roughly forty-three thousand men and women—suffer an injury or a work-related illness that requires medical attention beyond first aid. There is strong evidence that these numbers, compiled by the Bureau of Labor Statistics, understate the number of meatpacking injuries that occur. Thousands of additional injuries and illnesses most likely go unrecorded.”).

¹⁷⁸ *Id.* at 160 (“Having broken the union at the Greeley slaughterhouse, Monfort began to employ a different sort of worker there: recent immigrants, many of them illegals. In the 1980s large numbers of young men and women from Mexico, Central America, and Southeast Asia started traveling to rural Colorado. Meatpacking jobs that had once provided a middle-class American life now offered little more than poverty wages. Instead of a waiting list, the slaughterhouse seemed to acquire a revolving door, as Monfort plowed through new hires to fill the roughly nine hundred jobs. During one eighteen-month period, more than five thousand different people were employed at the Greeley beef plant—an annual turnover rate of about 400 percent. The average worker quit or was fired every three months.”).

¹⁷⁹ See Ted Conover, *The Way of All Flesh: Undercover in an Industrial Slaughterhouse*, HARPER’S MAGAZINE, May 2013, at 46 (“Local 293, meanwhile, has not staged a major labor action in years. Some 1,300 people at the Schuyler plant are still unionized. And Greenwood says the union sticks up for its members: ‘Somebody gets screwed, we’ll take them all the way to court.’ But strikes, as he explains, are another thing: why walk off the job to ensure some oldtimer’s vacation pay if you may lose your job the next week in a Homeland Security raid? Still, says Greenwood, the passage of time has strengthened the union’s hand, as the first wave of Latino immigrants becomes more established in Schuyler: ‘A lot of them are staying put. They’ve become citizens, they’re second-generation, and so tomorrow means something for them now.’”).

¹⁸⁰ See Alexander, *supra* note 81, at 398 (“For example, in its current Strategic Plan, the Department of Labor’s Wage and Hour Division has already named ‘meat and poultry processing’ as an industry with prevalent overtime misclassification.”).

ers also routinely violate labor standards.¹⁸¹ Under labor market segmentation theory, “peripheral” employers “tend to be smaller, less stable, and less profitable.” These employers

draw their workforce from the secondary labor market, require little worker skill, and provide little training. Peripheral firms do not invest in their workforce, and workers become fungible and easily replaceable, with low bargaining power. The results are low wages, job insecurity, and lack of promotion opportunities – the hallmarks of secondary jobs.¹⁸²

This describes the employment situation of most day laborers, the bottom rung of wage earners in the American economy and a category of workers overwhelmingly composed of the unauthorized.¹⁸³

On the one hand, the continued enforcement of wage and antidiscrimination laws seems widely accepted, so that critics of such laws who advocate for alternative regimes will readily concede that their positions are outside the mainstream.¹⁸⁴ Yet the political valences completely reverse when the question becomes whether unauthorized workers should be protected alongside the authorized workforce. It is hard to picture any national politician today making a full-throated endorsement of the rights of unauthorized workers to sue under employment laws.¹⁸⁵ Over a decade later, the central question that was raised by *Hoffman Plastic*—does the work done by the unauthorized properly fall within coverage of our workplace protections, and if so, which ones?—remains unsettled for good reason.¹⁸⁶

¹⁸¹ See GARCIA, *supra* note 4, at 9 (“In labor economics, the term has a specific meaning: marginal workers are those in irregular employment, because they are part-time, contractors, or disabled. In a broader sense, many workers are marginalized by the lines of demarcation in statutes themselves. The National Labor Relations Act, for example, excludes agricultural workers and those in domestic service. All statutes exclude independent contractors, and cover only those who are considered ‘employees’ who work under the control of an employer.”).

¹⁸² Alexander, *supra* note 81, at 356–57.

¹⁸³ See VALENZUELA JR. ET AL., *supra* note 171, at iii (National Day Labor Study 2006) (“The day-labor workforce in the United States is predominantly immigrant and Latino. Most day laborers were born in Mexico (59 percent) and Central America (28 percent), but the third-largest group (7 percent) was born in the United States. Two-fifths (40 percent) of day laborers have lived in the United States for more than 6 years. Three-quarters (75 percent) of the day-labor workforce are undocumented migrants. About 11 percent of the undocumented day-labor workforce has a pending application for an adjustment of their immigration status.”).

¹⁸⁴ See EPSTEIN, *supra* note 44, at 499 (“This position leaves me securely outside the mainstream.”).

¹⁸⁵ See GARCIA, *supra* note 4, at 60 (“[T]here is no political will to restore employee rights to undocumented immigrants.”).

¹⁸⁶ See NGAI, *supra* note 3, at 229 (“The civil rights movement was incontrovertibly about winning full and equal citizenship for African Americans, but citizenship occu-

B. *Otherness as Externality*

The immigration debate in modern America is a manifestation of age-old human territoriality,¹⁸⁷ and so it is deeply felt and fiercely fought.¹⁸⁸ Like the debate over fiscal policy, it is also hampered by a seemingly common-sense, but deeply misinformed, analogy between household and nation. Just as the merits and drawbacks of sovereign borrowing are fundamentally different from private borrowing, so is the violation of immigration entry regulations fundamentally different from private trespass.

The issue of whether a particular worker “should” be working in this country in the first place is not relevant to whether that worker should be paid for time already worked, or that would have been worked absent his unlawful discharge.¹⁸⁹ This is particularly true where effectively exempting such a worker from existing laws requiring payment would create an incentive to hire him over an authorized worker,¹⁹⁰ presumably the opposite of what is sought by immigration opponents. An entire class of workers who are *already participating* in the national economy cannot be excluded from coverage of the law without negatively affecting the other participants in that economy, whatever else is thought of those excluded workers.¹⁹¹

plied a more ambiguous and problematic position in immigration policy and reform discourse. Immigrants are aliens, not citizens—a fundamental distinction in legal status that bears on the scope of rights held by each class of persons, beginning with the right to be territorially present.”).

¹⁸⁷ See, e.g., JARED DIAMOND, *THE WORLD UNTIL YESTERDAY: WHAT CAN WE LEARN FROM TRADITIONAL SOCIETIES?* 947-950 (2012) (“Traditional peoples, living in societies of a few hundred individuals, obtain access to others’ lands by being known individually, by having individual relationships there, and by asking permission individually. In our societies of hundreds of millions, our definition of ‘relationship’ is extended to any citizen of our state or of a friendly state, and the asking of permission is formalized and granted en masse by means of passports and visas.”).

¹⁸⁸ See Kurt Schlichter, *The Immigration “Crisis” is No Crisis*, THE TOWNHALL (June 1, 2013, 12:01 AM), <http://townhall.com/columnists/kurtschlichter/2013/06/13/the-immigration-crisis-no-crisis-n1618034> (“[W]hy [should we] just give citizenship away to people who have already disrespected us by coming here uninvited?”).

¹⁸⁹ But see *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

¹⁹⁰ See Chen, *supra* note 40, at 232 (“The combined effect of *Hoffman* and IRCA was to create perverse economic incentives for employers to exploit immigrant workers suspected of lacking status and to dim the prospects for immigrant workers to challenge those abuses. The Department of Homeland Security’s (DHS) aggressive use of workplace raids as a strategy for immigration control—first under President Bush and continuing under President Obama, albeit to a lesser extent—has exacerbated the situation, making credible employer threats to expose the status of their immigrant workers lacking documentation in retaliation for those workers’ complaints.”).

¹⁹¹ But see ZOLBERG, *supra* note 7, at 12 (“As the complexity of contemporary debates on immigration policy in the affluent liberal democracies indicates, ‘utility’ en-

The argument is more difficult for antidiscrimination laws. Some immigration opponents use the fact that the bulk of modern immigrants would fall under one or more protected classes as a *reason* to oppose further legal or illegal immigration.¹⁹² This seems to be a larger complaint about the modern antidiscrimination regime, but nevertheless the temptation is to conclude that the way to resolve the second-class status of unauthorized workers is to resolve the second-class status of unauthorized immigrants generally.¹⁹³

The freedmen were considered deserving of the lesser treatment they received, for their labor among many other things,¹⁹⁴ because most whites considered inferiority to be in their essential nature. The reasons today for considering unauthorized workers unprotected by the labor standards that apply to other workers are ostensibly different than racial inferiority—not essentialist on their face, but conduct-based—yet the effect is the same: to create a class of workers on whose labor individuals and businesses are reliably able to make a greater profit margin than a worker to whom all

compasses not only a population's economic value, but also its putative value in relation to cultural and political objectives.”).

¹⁹² KRIKORIAN *supra* note 5, at 35 (“Whatever the merits of affirmative action, it would not be an assimilation issue if most new immigrants were what bureaucrats now call ‘non-Hispanic whites,’ and thus ineligible for affirmative-action benefits. But the overwhelming majority of immigrants are immediately eligible as members of ‘protected classes.’ Immigrants from Latin America, sub-Saharan Africa, and East and South Asia—i.e., ‘minorities’—accounted for 87 percent of new immigration during the first half of this decade.”).

¹⁹³ See, e.g., Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 CATH. U. L. REV. 921, 951–52 (2012) (“There is a striking similarity in the regulation of both slaves and migrant workers to low paying and low status jobs. Slaves performed jobs such as agricultural and household work. Today, both documented and undocumented migratory workers are pigeonholed into low paying agriculture, household, and construction jobs. In both positions, the law facilitates the exploitation of the most vulnerable population. The Reconstruction Amendments were intended to ‘abolish[] all class legislation in the States and [do] away with the injustices of subjecting one caste of persons to a code not applicable to another.’ Similarly, when immigration law and policy begin to recognize the humanity of the subjects of the laws, there will be more equitable policies towards immigrants who come to the United States as economic migrants. Most acknowledge that ‘[s]lavery was a system of racial adjustment and social order.’ So, too, is an immigration regime that has the indirect effect of targeting the poorest immigrants of color.”).

¹⁹⁴ WILKERSON, *supra* note 106, at 112 (“‘They done cheated you out of three dollars somewhere ‘cause if you picked the number of boxes you say you picked, you didn’t get paid for all of it. Two or three days’ pay had disappeared. It was hard to keep up . . . ‘Sometimes they would tell you that they paying one thing and when you get your pay, you got less,’ George said. ‘And if you couldn’t figure, you didn’t know the difference. They were very good at that.’”).

wages owed are paid as a matter of course (presumably the norm).¹⁹⁵

In this light, the conservative protest that the protected-class rights framework should only ever have applied to racism against black Americans,¹⁹⁶ and lightly there,¹⁹⁷ misses the point. The common thread between the centuries has always been the particular exploitative *conduct* that required regulation to make workers' rights meaningful, rather than the various subjective reasons given to justify that conduct.¹⁹⁸

Reactionary Southerners during Reconstruction considered it "illegitimate" for freedmen to work for their own benefit, rather than for the benefit of the whites.¹⁹⁹ The unauthorized immigrant, a figure both unwelcome and ubiquitous in modern society,²⁰⁰ occupies a similar role in domestic production processes.²⁰¹ His labor is provided at a discount so that consumers may purchase goods and services at the lower prices to which they have grown accustomed.²⁰² But this particular discount comes almost entirely from a unique and contradictory legal status that makes his *actual* pres-

¹⁹⁵ See, e.g., *id.* at 101 ("It took fourteen hundred pounds to make a bale, and George needed to make a bale every two or three days in the picking season. Mr. Edd took half.")

¹⁹⁶ See OLSON, *supra* note 14, at 87 ("The history of identity politics, like the history of discrimination law, has been built on a continuing series of analogies to the condition of blacks, each less convincing than the last.")

¹⁹⁷ See BERNSTEIN, *supra* note 45, at 110 (arguing that, although the "classical liberal vision of civil rights admittedly holds little utopian promise," in its favor, "unlike the modern regime, the classical liberal vision does not depend on granting the government massive regulatory powers . . .").

¹⁹⁸ The blogger Ta-Nehesi Coates once described "interviewing a gentleman who'd migrated up from the South in the 1930s," during which he "asked him why he'd left." The man responded that, "he was looking for 'protection of the law.'" Ta-Nehesi Coates, *The Guileless 'Accidental Racism' of Paula Deen*, THE ATLANTIC (June 24, 2013 11:40 AM), www.theatlantic.com/national/archive/2013/06/the-guileless-accidental-racism-of-paula-deen/277153).

¹⁹⁹ FLYNN, JR., *supra* note 75, at 58.

²⁰⁰ NGAI, *supra* note 3, at 4-5 ("But restriction meant much more than fewer people entering the country; it also invariably generated illegal immigration and introduced that problem into the internal spaces of the nation. Immigration restriction produced the illegal alien as a new legal and political subject, whose inclusion within the nation was simultaneously a social reality and a legal impossibility - a subject barred from citizenship and without rights. Moreover, the need of state authorities to identify and distinguish between citizens, lawfully resident immigrants, and illegal aliens posed enforcement, political, and constitutional problems for the modern state.")

²⁰¹ See Wilkerson, *supra* note 106, at 31 ("The hand had determined that white people were in charge and colored people were under them and had to obey them like a child in those days had to obey a parent, except there was no love between the two parties as there is between a parent and child. Instead there was mostly fear and dependence—and hatred of that dependence—on both sides.")

²⁰² NGAI, *supra* note 3, at 2 ("Undocumented immigrants are at once welcome and

ence anathema for many of those same consumers.²⁰³

Sunstein described the difference between coordination problems, which have stable solutions, and collective action problems that are unstable, and therefore require active management. Traffic lights are an example of a solution to a coordination problem: we would all like a system to regulate who gets to go when, and once in place, we are all happy to adhere to it (for the most part). The labor market is, in contrast, a collective action problem: we would act in our immediate best interest without regard to the welfare of others or optimal efficiency overall.²⁰⁴ Except that the labor market that readers of this article enjoy is likely constrained in part by the same sorts of social expectations that permit traffic engineers to assume that traffic lights will mainly be observed by drivers – that is, we remain capable of being outraged by egregious violations of these rules.

What allows many to systematically depart from this behavior is the absence of effective social sanction—those affected are “others,” not people we care about or identify with.²⁰⁵ The Reverend Martin Luther King Jr., among many others, has made this observation.²⁰⁶ This dynamic is what drove exploitation of the

unwelcome; they are woven into the economic fabric of the nation, but as labor that is cheap and disposable.”).

²⁰³ See, e.g., *id.*, at 36 (“Sociologist John Torpey points out that nationality is a legal fact that, to be implemented in practice, must be codified and not merely imagined. While ‘citizen’ is defined as an abstract, universal subject, the citizenry is not an abstraction but, in fact, a collection of identifiable corporeal bodies.”).

²⁰⁴ See Bagenstos, *supra* note 48, at 14–15 (“One particular threat to social equality is the phenomenon of asymmetric vulnerability. Where one individual is especially vulnerable to the exercise of another’s economic power, and the vulnerability is not reciprocated, it will be easier for the less vulnerable person to establish a relationship of domination over the more vulnerable one. Asymmetric vulnerability is a particular concern in employment markets—especially in times of high unemployment. For an individual worker, having and keeping a job is supremely important. For the employer, by contrast, individual employees are often replaceable or even fungible. For the worker, the loss of a job can lead to the loss of the means of making a living and of obtaining respect from self and community. Where jobs are scarce, a worker might be willing to subordinate herself in all sorts of ways to ensure that she doesn’t lose hers.”).

²⁰⁵ See ZOLBERG, *supra* note 7, at 339 (“Dominated by undocumented border-crossing Mexicans, with the remainder consisting mostly of visa ‘overstayers’ from widely ranging sources, including Caribbean Islanders as well as some Asians and Africans, in the eyes of many the unauthorized flow reinforced immigration’s disquieting otherness.”).

²⁰⁶ ALEXANDER, *supra* note 169, at 242 (“King recognized that it was this indifference to the plight of other races that supported the institutions of slavery and Jim Crow. In his words, ‘One of the great tragedies of man’s long trek along the highway of history has been the limiting of neighborly concern to tribe, race, class or nation.’ The consequence of this narrow, insular attitude ‘is that one does not really mind

freedmen, and it is what drives exploitation of the day laborer. As one social scientist described it in the context of public benefits policies, “diversity decreases the demand for redistribution by limiting solidarity and trust, the bases for a strong welfare state.”²⁰⁷

In economic terms, the harms suffered by workers “who shouldn’t be here anyway” are externalities, while identical harms to “hardworking Americans” with whom an employer identifies are able to be revisited back upon a wrongdoer through social sanction.²⁰⁸ This causes some of that harm to be factored into a potential wrongdoer’s calculus of the costs and benefits of discriminating, or failing to pay wages or overtime. Another way to make this process occur is through the increased enforcement of employment laws, targeted to situations where other enablers of social sanction are absent.

This would represent a significant shift in federal enforcement priorities. For unauthorized immigrants, the role of the United States government in their lives is defined by its ever-present threat to detain and exile them, likely following a chance encounter or unexpected event.²⁰⁹ Immigration enforcement presently consumes more of the executive branch’s primary enforcement budget than the rest of federal law enforcement combined.²¹⁰ The way the historian Laura Edwards described the situation of the freedmen during Reconstruction is apt to today’s unauthorized workers: they sit outside of full membership of society and many

what happens to the people outside his group.’”) (quoting MARTIN LUTHER KING JR., *STRENGTH TO LOVE* (1963)).

²⁰⁷ Hana E. Brown, *Race, Legality, and the Social Policy Consequences of Anti-Immigration Mobilization*, 78 AM. SOC. REV. 290, 298 (2013) (citations omitted).

²⁰⁸ See ZOLBERG, *supra* note 7, at 95 (“Considered together, these measures amount to deliberate efforts to erect an internal boundary, not simply between natives and aliens, as suggested by historians of nativism, but somewhat more ambiguously between ‘Americans’ and ‘Un-Americans.’ All natives were not equally American, nor all aliens equally un-American: the boundary builders placed on the one side well-behaved native-born and immigrants, and on the other disturbing aliens and Americans who adopt alien ways.”).

²⁰⁹ The journalist Jose Antonio Vargas, who has publicly revealed his own unauthorized work status, attempts to provide a more complete picture of unauthorized immigrants’ day-to-day lives than just this, however. He tweets under the handle @joseiswriting. *Jose Antonio Vargas*, TWITTER.COM, <https://twitter.com/joseiswriting> (last visited Jan. 11, 2015).

²¹⁰ See MEISSNER ET AL., *supra* note 10, at 9 (finding that “the U.S. government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined. In FY 2012, spending for CBP, ICE, and US-VISIT reached nearly \$18 billion. This amount exceeds by approximately 24 percent total spending for the FBI, Drug Enforcement Administration (DEA), Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which stood at \$14.4 billion in FY 2012.”).

are not used to summoning law to their aid, only to being summoned.²¹¹

The danger is that such an outreach effort would be viewed with hostility by native-born Americans who “perceived [equal rights] as a zero-sum game,” such that “the extension of rights to new members might be considered a dilution just as much as an expansion.”²¹² Indeed, this was the tenor of much of the reaction to the Executive Action announced in late 2014 to normalize the status of up to five million undocumented immigrants.²¹³ It was the late twentieth-century shift from cultural assimilation to multiculturalism that fueled a now-popular view of individual rights as a limited resource over which to compete, rather than an expanding pie.²¹⁴ The state of Colorado made this argument, among others, to the Supreme Court in *Romer v. Evans*,²¹⁵ complaining that requiring it to recognize same-sex equality would detract from the rights of existing protected classes.²¹⁶ Kenji Yoshino has concluded from the prevalence of what he calls this “pluralism anxiety” that a “new equal protection” will be needed to move forward.²¹⁷

It would not be productive to respond to this anxiety by attempting to return to the low immigration levels of the middle part of the last century.²¹⁸ Any such effort would create difficult (never

²¹¹ Edwards, *supra* note 121, at 374.

²¹² Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 430 (2013).

²¹³ See FoxNews.com, *Illegal Immigrants to be Eligible for Social Security, Medicare*, FOXNEWS.COM, Nov. 27, 2014, <http://www.foxnews.com/politics/2014/11/27/illegal-immigrants-to-be-eligible-for-social-security-medicare/> (“Stephen Miller, a spokesman for Sen. Jeff Sessions of Alabama, a leading Republican opponent of Obama’s executive actions, said making immigrants illegally in the U.S. eligible for Social Security and Medicare ‘is an attack on working families.’”),

²¹⁴ Nelson, *supra* note 154, at 75 (“Whereas early egalitarians had pursued the goal of enabling the urban, immigrant underclass to adopt elite, WASP cultural norms and thereby assimilate and integrate into the mainstream of society, newer rights egalitarians ceased to show respect for traditional norms and instead demanded that subordinated groups receive the right to develop their own culture and to live by their own lights on a level playing field with others.”).

²¹⁵ 517 U.S. 620 (1996).

²¹⁶ *Id.* at 635 (“Colorado also cites its interest in conserving resources to fight discrimination against other groups.”).

²¹⁷ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 796-97 (2011) (“Equality claims inevitably involve the Court in picking favorites among groups, a practice attended by pluralism anxiety. Liberty claims, in contrast, emphasize what all Americans (or, more precisely, all persons within the jurisdiction of the United States) have in common. The claim that we all have a right to sexual intimacy, or that we all have a right to access the courts, will hold no matter how many new groups appear in this country. As such, liberty-based dignity claims may be one way in which we fashion a new, more inclusive sense of ‘we.’”).

²¹⁸ See ZOLBERG, *supra* note 7, at 254 (“Thanks to the new law and postwar business

mind inadvisable) tensions in the modern world. The already-massive immigration enforcement apparatus would need to grow even larger, operate extensively within the country's interior—separating and culling individuals from workplaces, families, and neighborhoods—and cause vast amounts of human suffering. Opponents of immigration gloss over the level of suffering that individuals living in the United States would need to endure to choose to “self-deport.”²¹⁹ Much like letting the poor and old die on emergency room steps rather than expend public resources to treat them, it is something that, if made reality, would provoke strong opposition in our society, as it should.²²⁰

Increased government enforcement dollars should instead be directed towards what can be more directly improved with comparable effort. The systematic violation of labor standards, such as the wage and antidiscrimination laws, by employers of low-wage and vulnerable workers, in particular the unauthorized, causes harm to competing employers who refrain from that behavior, as well as all other workers in that industry. The empirical consensus is that increased immigration is positively correlated to national economic growth,²²¹ with many accompanying benefits to all.²²² In response,

doldrums, European immigration dipped by two-thirds from 652,364 in 1921 to a mere 216,385 the following year. The restrictionist scholar Roy Garis contended that ‘according to a careful estimate [the measure] kept from our shores 1,750,000 to 2,000,000 immigrants, few of whom we would have been prepared to receive and care for in a year of unemployment and readjustment.’ However, arrivals then climbed back to 364,339 in 1924, approximately the maximum level attainable under the new law.”. See also *id.* at 269 (“Documented Mexican immigration was brought down further to 3,333 in 1931, lowered to 2,171 the following year, and kept at roughly that level for the remainder of the decade. Moreover, according to the Census, the Mexican-born population in the four southwestern states (Arizona, California, New Mexico, and Texas), which numbered 616,998 in 1930, dropped to 377,433 in 1940, a net loss of about 240,000.”).

²¹⁹ See KRIKORIAN, *supra* note 5, at 219 (“It’s true that raids at workplaces and elsewhere will always be needed as an enforcement tool (like speed traps or random tax audits in other contexts), because every illegal alien must understand that he or she may be deported at any time.”).

²²⁰ See *id.* at 184 (“Immigrants don’t just cross a physical border when entering the United States; they also cross a moral border, entering a nation that will not tolerate the kind of premodern squalor and inhumanity that is the norm in much of the rest of the world.”).

²²¹ See, e.g., Shaun Raviv, *If People Could Migrate Anywhere, Would Poverty Be Eliminated?* THE ATLANTIC (Apr. 26, 2013), www.theatlantic.com/international/archive/2013/04/if-people-could-migrate-anywhere-would-poverty-be-eliminated/275332 (“[Although] the research on migration’s effects is far from complete, what [one researcher] has found ‘suggests that the gains from reducing emigration restrictions are likely to be enormous, measured in tens of trillions of dollars.’”).

²²² See, e.g., Giovanni Peri, *The Effect of Immigrants on U.S. Employment and Productivity*, FRBSF ECONOMIC LETTER 2010–26 (Aug. 30, 2010) (finding that “immigrants expand

immigration opponents emphasize the short-term economic downside from illegal immigration for native-born low-wage and vulnerable workers.²²³ These effects could be directly ameliorated through increased enforcement of the employment rights of the most vulnerable members of our workforce.²²⁴

At the same time, increased enforcement of existing labor standards would not “incentivize” illegal entry into the country, the bugaboo of all proposed extensions of rights to the unauthorized. As long-term trends have shown, macroeconomic factors overwhelmingly determine year-by-year inflows.²²⁵ Indeed, one of the benefits to employers of hiring the unauthorized is that such workers may only dimly understand that the rights they enjoy in the United States as workers are formally greater than what the laws of

the economy’s productive capacity by stimulating investment and promoting specialization,” which “produces efficiency gains and boosts income per worker,” while “evidence is scant that immigrants diminish the employment opportunities of U.S.-born workers.”).

²²³ See David Frum, *Immigration Amnesty: The Path to Poverty*, THE DAILY BEAST, (Mar. 22, 2013) (“The United States is already evolving into a society much harsher and less hospitable for the less-skilled. Yet American elites seem determined to enlarge and perpetuate a problem they already don’t know how to solve: how to create economic opportunities for the least economically competitive half of the population.”), available at www.thedailybeast.com/articles/2013/03/22/immigration-amnesty-the-path-to-poverty.html.

²²⁴ See ZOLBERG, *supra* note 7, at 372 (“Although legalization and admission [in 1986] to permanent residence hardly transformed the immigrants’ social and economic situation, the changes did afford them some tangible benefits. As of 1992, while the jobs they held were still among the poorest paying, ‘the picture was not uniformly bleak’; overall, ‘The advent of work authorization acted as a ‘union card,’ fostering widespread occupational mobility. Legalization also fostered widespread investments in education, training, and language skills, which—at least for Mexican men—reaped substantial wage gains.’”).

²²⁵ See *id.* at 374, 375 (“Although employer sanctions had been touted ever since the 1950s as a decisive deterrent to illegal immigration, most analysts concurred from the outset that their effect was likely to be extremely limited, as the flow across the border was largely shaped by economic conditions on both sides, and these powerful ‘push’ and ‘pull’ factors outweighed the costs that sanctions imposed on either employers or workers . . . entries in fact increased slightly after IRCA, and that those ineligible for legalization had no intention of returning home to Mexico or Central America but planned to increase the length of their stay in the United States so as to minimize the frequency of risky crossings. It concluded that the effect of employer sanctions was mainly to stimulate an expansion of the market in fake documents.”). See also The Economist, *The US-Mexico Border, Secure Enough*, THE ECONOMIST (June 22, 2013), available at www.economist.com/news/usa/2013/06/22/billions-more-fences-and-drones-will-do-more-harm-good-secure-enough (“Economics probably matters more than enforcement [as cause of decline in illegal entries to U.S.]. America’s downturn cost many illegal migrants their jobs, just as opportunities were blossoming back home in Mexico. In the past two years Mexico’s economy has grown at a healthy 3.9% annually, creating jobs (albeit at much lower pay than in America)).

their home countries provided,²²⁶ or have strong reasons not to care.²²⁷ Increased domestic enforcement of the working poor's labor rights may not do much to improve this level of knowledge among people not already arrived in the nation, but it could greatly help educate American employers and workers on the unitary labor standards that will be applied to all who work here, even those they consider outsiders.

CONCLUSION

As others have pointed out, arguments over whether a particular modern form of exploitation in the employment relationship is an equivalent of slavery are largely insufficient to justify action.²²⁸ In contrast, an understanding of the reasons why the laws governing employment in this nation first arose in the wake of slavery's abolition helps lead to the conclusion that, if all who work are equally worthy of a common minimum level of working conditions, the government and third parties must undertake great effort to maintain this level, against those who would seek to violate it. Such effort is best directed towards the workers most likely to experience

²²⁶ See Alexander, *supra* note 81, at 382 (“Peripheral poultry workers may carry over legal knowledge from their home countries, which may have less robust, or even less robustly enforced, labor and employment rights regimes. They may have experience with corruption in the justice systems of their home countries. Undocumented workers in particular may have a deep mistrust of the U.S. government, believing that interaction even with ‘friendly’ or ‘status-neutral’ agencies puts the worker at risk of deportation. Even if workers are fully informed about their rights at work, they may not know how to find a lawyer who speaks their language, will accept what they can pay, and is willing to challenge the biggest, most powerful employer in town.”).

²²⁷ *Id.* at 387-88 (“Gleeson proposes that undocumented workers view themselves as temporary, hard workers who do not complain. By tolerating substandard conditions, peripheral workers strike a sort of bargain with society at large: their work ethic ‘sets them apart from their native-born and documented counterparts, and ultimately justifies their undocumented presence’ in the United States. Filing a lawsuit, complaining to a government agency, or organizing into a union would upset the implicit exchange of labor for presence. In this way, immigration law writ large, and the state of ‘legally constructed subservience’ that it creates for undocumented workers, serves as a powerful silencing force.”).

²²⁸ See Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1895 (2012) (“Nonblack groups sometimes have been able to analogize their predicaments to ones that Blacks suffer, just as the latter have sometimes been able to win relief for new injuries by comparing them to ones that their slave ancestors suffered, but often the effort has failed. Thus wartime internment, language discrimination, suppression of Native American religions, and profiling based on presumed foreign appearance—afflictions that do not stem from the enslavement of Blacks—have largely gone without redress under American law, even though these injuries might appear comparable to ones that lie at the heart of our system of racial remedies.”).

such violations, at the bottom of income and in the shadows.²²⁹ The exploitation of these vulnerable workers is the very behavior that our employment laws were first written to eliminate,²³⁰ and it is accordingly the wrong to which the enforcers of those laws should direct the most attention, as demanded by the heritage and mandate of equal rights in our system of law.

²²⁹ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982) (“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.”).

²³⁰ See WILKERSON, *supra* note 106, at 317 (“[W]hat was becoming clear was that, north or south, wherever colored labor was introduced, a rivalrous sense of unease and insecurity washed over the working-class people who were already there, an unease that was economically not without merit but rose to near hysteria when race and xenophobia were added to preexisting fears. The reality was that Jim Crow filtered through the economy, north and south, and pressed down on poor and working-class people of all races. The southern caste system that held down the wages of colored people also undercut the earning power of the whites around them, who could not command higher pay as long as colored people were forced to accept subsistence wages.”).

