Freedmen and Day Laborers: Why Enforcement Matters

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FREEDMEN AND DAY LABORERS: WHY ENFORCEMENT MATTERS

Raja Raghunath*

Abstract:

As the one hundred and fiftieth anniversary of Emancipation approaches, there is a cautionary lesson for modern workers from the period that followed the abolition of chattel slavery. Reconstruction, after the Civil War, 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, as the rights that the federal government 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 the lesson of this failure is that modern enforcement agencies must pay increased attention to labor standards enforcement for foreign born workers, in particular unauthorized immigrants, and that such a focus will benefit all workers in the national economy. The modern American underclass has expanded to substantially include unauthorized immigrants, and their presence in an industry or labor market, such as day labor or domestic work, is a reliable marker that the most vulnerable workers may be found there. By focusing on these most vulnerable workers, state enforcement efforts can help overcome the collective action problem that is created by any system of minimum labor standards.

What primarily stands in the way of such an enforcement focus is the misplaced reliance on moral culpability that drives so much of the debate over unauthorized workers. This article argues that the exploitation of vulnerable workers is a behavior that has persisted through the centuries, and that this persistence matters as much as, or more than, the motivations for such behavior, like racism or hostility to foreigners. Finally, it offers some potential responses to what would be an expected backlash to this argument.

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# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>3</td>
</tr>
<tr>
<td><strong>Part 1</strong></td>
<td></td>
</tr>
<tr>
<td>A. The Border Separating Protected and Unprotected Workers</td>
<td>5</td>
</tr>
<tr>
<td>B. The Persistence of an American Underclass</td>
<td>8</td>
</tr>
<tr>
<td>C. Workers’ Rights as the Original Civil Rights</td>
<td>11</td>
</tr>
<tr>
<td>D. What Comes After a Grant of Rights</td>
<td>13</td>
</tr>
<tr>
<td>E. A Founding Failure of Enforcement</td>
<td>16</td>
</tr>
<tr>
<td><strong>Part 2</strong></td>
<td></td>
</tr>
<tr>
<td>A. Punctuated Equilibrium of Rights</td>
<td>20</td>
</tr>
<tr>
<td>B. Enforcing Mutuality in the American Employment Contract</td>
<td>25</td>
</tr>
<tr>
<td>C. Focusing on Vulnerable Workers for the Entire Workforce</td>
<td>28</td>
</tr>
<tr>
<td>D. The Labor Market as Collective Action Problem</td>
<td>31</td>
</tr>
<tr>
<td>E. The Value of a Disposable Workforce</td>
<td>34</td>
</tr>
<tr>
<td><strong>Part 3</strong></td>
<td></td>
</tr>
<tr>
<td>A. Misplaced Reliance on Moral Culpability</td>
<td>37</td>
</tr>
<tr>
<td>B. There is No Lawn</td>
<td>39</td>
</tr>
<tr>
<td>C. The Exploitation Matters More than Its Motivations</td>
<td>41</td>
</tr>
<tr>
<td>D. Potential Responses to an Expected Backlash</td>
<td>44</td>
</tr>
<tr>
<td>Conclusion</td>
<td>47</td>
</tr>
</tbody>
</table>
INTRODUCTION

The origins of our modern workers’ rights lie nearly one hundred and fifty years ago, in Reconstruction, the period that followed the Civil War. During Reconstruction, the United States passed the first laws requiring the equal treatment of black Americans, laying the groundwork for the universal rights guarantees of the twentieth century. But the federal government’s failure to enforce these laws helped nullify the promise of equality that was made by the abolition of slavery. 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.

An important lesson of Reconstruction is 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. Sought after and condemned in seemingly equal measure, the low-wage workforce that is mainly populated by unauthorized workers in the American shadow economy is hugely consequential to American household prosperity and macroeconomic strength. In the same way, these workers’

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1 See Kate Masur, An Example for All the Land: Emancipation and the Struggle over Equality in Washington, D.C., at 6 (UNC Press 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.”)

2 See Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America, at 2 (Princeton University Press 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.”)

3 See generally Ruben J. Garcia, Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them without Protection (NYU Press 2012)

4 Ngai at 2 (“Undocumented immigrants are at once welcome and unwelcome; they are woven into the economic fabric of the nation, but as labor that is cheap and disposable.”)

5 See Mark S. Krikorian, The New Case Against Immigration: Both Legal and Illegal, at 133 (Sentinel 2008) (warning that, “while immigration certainly increases the overall size of our economy, it subverts the widely shared economic goals of a modern society: a large
inclusion or exclusion in the enforcement of the laws governing work in this country has consequences for all, especially as the workplace rights granted in prior generations continue to wane in the present and future.

When the topic of the labor rights of unauthorized immigrants comes up, as it did during the most recent immigration-reform effort in Congress, the discussion inevitably turns to the land border with Mexico, usually in the context of its increased fortification in exchange for increased workplace protections for those who make it through. This article is concerned with a different border, not that physical and political one, but rather the one separating unrecognized workers from the acknowledged workforce. This is the border that was crossed and re-crossed by the freedmen, the people freed by Emancipation, starting a century and a half ago. This article proposes the increased fortification of that border, for the purpose of keeping all workers in the national economy within its boundaries, rather than maintaining some within and some without.

After all, it is the workers who are already on the margins who are most likely to find themselves outside the borders of protection. 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. The study 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. There is “widespread agreement that unauthorized 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.”


7 Aristide R. Zolberg, A Nation by Design: Immigration Policy in the Fashioning of America, at 23 (Harvard University Press 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.”)


9 Burnhart 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.”)
immigrants are vulnerable to abuse,” but more work still to be done to measure the rate of violations.\textsuperscript{10} It is nevertheless clear that more should also be done to guard the rights of those workers.\textsuperscript{11}

\textbf{PART 1}

\textit{A. The Border Separating Protected and Unprotected Workers}

The enactment of the Civil Rights Act of 1964 was the pinnacle of the rights revolution of the twentieth century. The revolution took decades to unfold, beginning during the New Deal, with the passage of worker-protection laws such as the Fair Labor Standards Act (FLSA) in 1938. There are many candidates for the date on which this rights revolution ended, and all passed long ago.\textsuperscript{12} 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.\textsuperscript{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 upon\textsuperscript{14})

\textsuperscript{10} Doris Meissner et al., “Immigration Enforcement in the United States: The Rise of a Formidable Machinery,” at 89 (Migration Policy Institute 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.”)

\textsuperscript{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.”)

\textsuperscript{12} Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State, at v (Harvard University Press 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 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 [three other examples and] 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.”)

\textsuperscript{13} Garcia 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.”)

\textsuperscript{14} See, e.g., Walter K. Olson, The Excuse Factory: How Employment Law is Paralyzing the American Workplace, at 308 (The Free Press 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
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 be expanded in the future, and that there are no better ones on offer.

It is 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), the operation of a particular economic sector (such as in agriculture and meatpacking), expressions of bigotry, or a combination of multiple such factors. Equal protection for all is best served by delivering protection from unequal treatment where it is most needed, at the lower end of income and in the shadows.

The first reason for this is the widely agreed-upon, yet still not entirely proven, empirical conclusion that unremedied violations of universal labor standards occur more frequently at the lower, rather than the middle or higher, end of income. 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 wronged helps ensure that such workers are looked to first by employers when economic forces encourage their exploitation, as such forces have always done.

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15 See, e.g., Vance v. Ball State University, Slip. Op. No. 11-556 (U.S. Sup. Ct., June 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 26-33 and 139 (Spring 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 generally Eric Schlosser, Fast Food Nation: The Dark Side of the All-American Meal (Harcourt 2001).

18 See generally Ngai

19 See Burnhart, et al., at 2 (concluding that “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., at 84-87 (describing enforcement resources of Wage & Hour Division of US Department of Labor and information-sharing agreements with Immigration and Customs Enforcement agency)

The second reason is that this largely 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. At the same time, these wages are meaningful portions of each individual employee’s meager overall income, and meaningfully large enough to the employer in aggregate to justify continuing the practice.

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. Upon closer examination, it becomes apparent that the labor aspect of immigration controls in American history was arguably the aspect that 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.

See Barbara Ehrenreich, Nickel and Dimed: On (Not) Getting By in America, at 210 (Owl Books 2001) (“So if low-wage workers do not always behave in an economically rational 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.”)

See Burnhart, et al., 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.”)

See Richard B. Lillich, The human rights of aliens in contemporary international law, at 69 (Manchester University Press 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.”)
mattered most in the century that followed Emancipation and the loss of the slave workforce, and that it remains so today.

B. The Persistence of an American Underclass

A system of labor regulation can of course only imperfectly cover the working population to which it applies. In some cases, this is by design. 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, in many instances dwarf the formal economies that exist alongside them. In the United States, founded upon the principle of equality before law, formal law has been used 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; in the twentieth and twenty-first, it is the immigration system.

Until the passage of our modern workplace protections, the equal rights of American workers had been defined by the sweeping civil rights goals of Reconstruction and their resounding defeat. The doctrine of employment at will, which continues to predominate today, came into being in the decades after Reconstruction. The turn of the twentieth century saw

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25 See, e.g., Zolberg, at 287 (“In June 1940, the INS was transferred from the Department of Labor to the Department of justice, and a registration requirement was imposed on all aliens.”)

26 See, e.g., 29 U.S.C. § 213 (listing categories of employees exempt from wage and hour standards of FLSA)

27 See generally Katherine Boo, Behind the Beautiful Forevers (Random House 2012) (ethnographic account of lives of slum dwellers in Mumbai, India)

28 See David R. Roediger, The Wages of Whiteness: Race and the Making of the American Working Class, at 25 (Verso 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 WEB Du Bois described the mission of the Freedmen's Bureau as “to settle the Negro problems in the United States of America.” The Atlantic (Vol. 87, No. 519, pp. 354-365) (1901).

30 See David Blight, The Civil War and Reconstruction Era, 1845-1877 – Audio (Open Yale course HIST 119, lecture 24 at 5:45) (noting that “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
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 American doctrine of employment at will continues to ensure that no modern wage laborer is likely to outlast his employer in a contest of those wills without outside assistance, given the vast differences between their respective stakes in the dispute.\(^{33}\)

The employment relationship in this country was largely one of master-servant before Emancipation, and remained so for much of the century following.\(^{34}\) Even today, it does not provide much guarantee of income or security of position. Yet it is generally better than what an employer might otherwise provide, given his druthers.\(^{35}\) Due to the advancement of human prosperity overall (and as the modern Indian slum dweller knows all too well), it is still usually preferable to subsistence farming, which was nevertheless considered one hundred and fifty years ago by many freedmen to be their highest ideal of self-sufficiency.\(^{36}\)

This leads to another reason why the enforcement of our modern worker protections should focus on the poorest, most vulnerable workers. The exploitation of vulnerable workers is the modern successor to the very

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\(^{32}\) 198 U.S. 45 (1905).

\(^{33}\) Samuel R. Bagenstos, Employment Law and Social Equality, at 14 (“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.”) (available at ssrn.com/abstract=2208883)

\(^{34}\) See Barbara Young Welke, Law and the Borders of Belonging in the Long Nineteenth Century United States, at 116 (Cambridge University Press 2010) (arguing that “...bracketing the Civil War and Reconstruction as the end point of an era ignores the ugly continuities between slavery and the stunted freedom enjoyed by the vast majority of African Americans in the South by the century's end.”)

\(^{35}\) The comedian Chris Rock joked in *Bigger and Blacker* that the message your boss is sending you when you work a minimum-wage job is, “If I could pay you less, I would.”

\(^{36}\) Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation, at 41 (Cambridge University Press 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.’”)
economic behavior that our employment laws were first written to eliminate. This is not an argument that the work performed by unauthorized immigrants, or low-wage workers generally, is the equivalent of slavery. Such an assertion would require the absence of actual slavery in the world today, and we have not yet reached that point. Nor is it meant to imply that black Americans have sufficiently overcome racism such that they no longer have a need for the laws originally written to benefit them, so those laws can now focus on another disadvantaged group. To the contrary, now more than ever, those laws are still needed for that purpose.

But there are many other reasons why a worker may be exploited today. Our society no longer accepts the race of the worker as an express justification for that exploitation. It may, however, accept their immigration status. The common thread between the centuries is not the larger reason that the particular exploitation in question is occurring, only that it continues to occur for the most vulnerable workers, and that there remain third parties empowered to take action under laws written for that situation.

This argument does not question the good faith of modern workplace enforcement agencies, when they state plainly that they do not

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37 Ontiveros (“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.”)


40 See David Weil, “Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division,” at 20 (May 2010) (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…”).

41 See James M. McPherson, Battle Cry of Freedom: The Civil War Era, at 867 (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.”)
consider employee immigration status in their enforcement efforts. The lesson of Reconstruction, as it approaches its sesquicentennial, is that this is not enough. Rather, 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 US Equal Employment Opportunity Commission (EEOC) does, 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. By the same token, when these standards are inevitably narrowed, it tends to hit this subset of workers hardest.

C. 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, the first equal rights statute

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42 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) (describing how 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.")

43 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.” (available at www.eeoc.gov/eeoc/plan/sep_public_draft.cfm)

44 See generally Weil (setting forth enforcement priorities and strategies for Department of Labor to increase focus on violations against low-wage workers)

45 See, e.g., Teresa Tritch, Editorial, “The Family Unfriendly Act,” N.Y. Times May 10, 2013 (criticizing US 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 only “recourse for coerced workers would be to sue, a far-fetched and unaffordable option for most people.”)

46 But see Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws, at 135 (Harvard University Press 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.”)
in American history. This original Civil Rights Act was Congress’s first exercise of its power to write legislation under Section 2 of the Thirteenth Amendment, to carry out the guarantee of slavery’s abolition.

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, after Reconstruction had already begun in the smoking and ruined South. 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.

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47 Ontiveros (“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.”)

48 Michael Vorenberg, Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment, at 50 (Cambridge University Press 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.”)

49 Vorenberg at 233.

50 McPherson at 818 (noting that, “by war’s end much of the South was an economic desert. The war not only killed one-quarter of the Confederacy’s white men 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.”)

51 See Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II, at 234 (Random House 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.”)
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, 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." 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.

D. What Comes After a Grant of Rights

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

52 But see US Dep’t of Labor, fact sheet (“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. 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.”) (available at www.dol.gov/dol/aboutdol/history/berman/reports/futurework/report/chapter2/main.htm)

53 Blackmon at 86.


55 Blackmon 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.”)

56 Blackmon at 42 (“The role of the African American in American society would not
Another prominent reason for the failure 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, and bring these rights to the working fields and cities of the South during the crucial years immediately after the War, did very little, a level of achievement that was matched by the Bureau’s successor agencies.57

But these agencies were crucial to the rights at issue. Once the issue of labor by coercion had been formally dealt with by the Thirteenth Amendment, the focus of Republican lawmakers in Congress turned from freedom to contract,58 as enshrined in the Civil Rights Act, to freedom from unlawful contracts.59 This meant more than simply a prohibition on work without pay, which was the baseline requirement for a nation in which the embodiment of individual freedom going forward would be wage labor.60 Individual liberty fully defined brought with it a broader set of expectations of fair treatment and non-discrimination,61 as enshrined in the Fourteenth Amendment and its doomed legislative progeny. The historian be clear for another one hundred years.”)

57 See Blackmon 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.”)
58 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) (noting that the “economic 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)
59 This was not an unforeseen turn. See Eric Foner, The Fiery Trial: Abraham Lincoln and American Slavery, at 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.”)
60 See Robert J. Steinfeld, Coercion, Contract, and Free Labor in the Nineteenth Century, at 10 (Cambridge University Press 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.”)
61 See George Rutherford, 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.”)
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.\(^{62}\)

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,\(^{63}\) and ultimately all was lost before the Supreme Court.\(^{64}\) 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.\(^{65}\) The first of these agencies was the Freedmen’s Bureau,\(^{66}\) the very creation of which required Congress to override the veto of the intemperate President Andrew Johnson, who had come to power after the assassination of President Lincoln.\(^{67}\)

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\(^{62}\) Masur 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.")

\(^{63}\) See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877, at 247-251 (Harper & Row 1988) (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 Act. Congress had earlier in the year been forced to do the same when Andrew Johnson vetoed the Freedmen’s Bureau bill.)

\(^{64}\) See The Slaughter-House Cases, 83 U.S. 36 (1872) and The Civil Rights Cases, 109 U.S. 3 (1883).

\(^{65}\) Welke 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.")

\(^{66}\) Stanley 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 coercion 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.’")

\(^{67}\) Blight (lecture 23 at 8:45 min. mark) noted that “fifteen different bills...were all vetoed from 1866 to 1867 by Andrew Johnson,” which was “more vetoes than all previous presidents put together.”
E. A Founding Failure of Enforcement

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

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 agents in the South at one time.

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68 Dylan C. Penningroth, The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South, at 112 (UNC Press 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.”)

69 WEB 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.”

70 See Laura F. Edwards, Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South, American Historical Review, at 390 (April 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.”)

71 Foner at 166.

72 Penningroth at 112.

73 Blackmon 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.”)

74 Penningroth at 116.
Though beloved of freedmen, the Bureau had few other friends, and where the agency’s efforts led to successes, they often came in no small part due to the contributions of the freedmen themselves. Indeed, encouraging such self-help was one of the priorities of the Freedmen’s Bureau and its backers.

The Bureau and its agents had nothing comparable to the resources and reach of modern federal agencies like the EEOC, the United States Department of Labor (DOL), or even the currently-undermanned National Labor Relations Board (NLRB), but its mandate was vast with

75 Foner 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.’”)

76 Foner 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.”)

77 See Evelyn Nakano Glenn, Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor, at 138 (Harvard University Press 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.”)

78 Stanley 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.”)

79 See Noel Canning v. NLRB, 705 F.3d 490, 514 (D.C. Cir. 2013) (holding invalid three recess appointments made to the National Labor Relations Board, and accordingly ruling that the “Board had no quorum, and its order is void”). Certiorari granted by NLRB v. Canning, 133 S.Ct. 2861 (Jun 24, 2013).
paternalistic enthusiasm, sweeping over not just paid employment\(^{80}\) for freedmen and freedwomen,\(^{81}\) but also their marriages and households.\(^{82}\)

The District of Columbia, a territory never overrun by the war, yet no stranger to slavery in the antebellum era, had a large black population that swelled as the war ground on,\(^{83}\) partly as a result of the early abolition of slavery there.\(^{84}\) In response, the Bureau rolled out a range of services for the newly-arriving freedmen, including low-income housing\(^{85}\) and a legal defense program.\(^{86}\) These efforts may have been the agency’s apotheosis.

Reconstruction was unprecedented in its scope and ambition,\(^{87}\) and this assured that the resistance it inevitably provoked was broad and

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\(^{80}\) See Blackmon at 27 (“Some white plantation owners attempted to coerce their former slaves into signing ‘lifetime contracts’ to work on the farms.”)

\(^{81}\) See Masur 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.)

\(^{82}\) See Stanley at 56 (noting that “it 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 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.”)

\(^{83}\) Masur 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.”)

\(^{84}\) See Foner, Fiery Trial 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.”)

\(^{85}\) Masur at 69 (describing how “bureau 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.”)

\(^{86}\) Masur 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.”)

\(^{87}\) Masur 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’
persistent. Congress became engaged in a series of 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. Ultimately, federal involvement in the South was ended as part of the agreement resolving the disputed election of 1876.

The Bureau, for its part, did not last that long. It could not even persist to the end of the decade. WEB Du Bois’ conclusion 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, 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.

88 Foner 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.”)

89 Charles L. Flynn, Jr., White Land, Black Labor: Caste and Class in Late Nineteenth-Century Georgia, at 37-38 (LSU Press 1983) (“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.”)

90 Blackmun at 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.”)

91 Du Bois, The Freedmen’s Bureau (“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...”)
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.\textsuperscript{92}

**PART 2**

**A. Punctuated Equilibrium of Rights**

Modern agencies like the EEOC and the DOL are not in danger of being entirely defunded and shuttered like the Freedmen’s Bureau, the occasional intemperate promise of a legislator to do so notwithstanding.\textsuperscript{93} However, in their enforcement work, these agencies must necessarily choose where to direct their focus in the vast domestic economy within their jurisdiction. The principle directing them in this choice must be the heritage of the very statutes these agencies were created to enforce, namely the protection of workers who are uniquely vulnerable to exploitation in the labor market.\textsuperscript{94}

Today, such workers are embodied by the day laborer and the domestic worker, which are largely unauthorized workforces,\textsuperscript{95} as well as unauthorized immigrants employed in many other forms of low-wage work. Any efforts to enforce our employment laws should focus on these workers’ comparative disadvantages in the employment relationship, and the exploitation that those disadvantages encourage.

Pervasive and deep-seated racism of course played its own motivating role in the enslavement of black Americans,\textsuperscript{96} and it continues to contribute to their oppression in the workplace and practically everywhere

\textsuperscript{92} The Freedmen’s Bureau (The Atlantic, March 1901).

\textsuperscript{93} To their credit, another key distinction is that the worst that could be said of either EEOC or the DOL is that they may have failed to adapt to changing conditions, as opposed to quickly and utterly failing in their core mission in the manner of the Bureau.

\textsuperscript{94} See Weil, supra.

\textsuperscript{95} See Valenzuela. See also Linda Burnham & Nik Theodore, “Home Economics: The Invisible and Unregulated World of Domestic Work” (National Domestic Workers Alliance 2012) at xi-xii (describing poor working conditions, including that “85 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.”)

\textsuperscript{96} Confederate Vice President Alexander Stephens famously declared in 1861 that the Confederacy’s “foundations are laid, its corner-stone 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.” (available at teachingamericanhistory.org/library/index.asp?documentprint=76)
else. Michelle Alexander has convincingly argued that the law’s oppressive focus with respect to black Americans has shifted, particularly since the beginning of the War on Drugs in the 1980s, from the civil and contractual to the criminal and penal.97 This large-scale removal from the workforce has allowed particular oppressions that were pioneered on working black Americans to spread to new generations of workers.98

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.99 There was some advancement in the enforcement of individual rights during this dark period, at both the federal100 and state101 levels, and during wartime.102 President Franklin Roosevelt famously brought the issue of workers’ rights to the fore of

98 See Michelle Alexander at 18 (arguing that “mass 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.”)
99 See Glenn 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 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.”)
100 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 division of the US Department of Justice to enforce the Thirteenth Amendment in the 1930s and 40s, before the major civil rights campaigns began).
101 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.”)
102 See Jeffery 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 FDR 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.)
federal policy-making at the close of this period, setting the stage for the
gains of the second half of the twentieth century.

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, aided by sympathetic Southern state governments and a disinterested
federal government. 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. There were advances as well,
including some that were the result of more active agency enforcement of

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103 In his famous “Commonwealth Club” speech in 1932, FDR 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.” (available at

104 See William E. Forbath, Civil Rights and Economic Citizenship: Notes on the Past
and 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.”)

105 Laura F. Edwards, The People and Their Peace: Legal Culture and the
Transformation of Inequality in the Post-Revolutionary South, at 297 (UNC Press 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.”)

106 Blackmon 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.”)

107 Blackmon 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.”)
existing labor laws,\textsuperscript{108} and others that were the result of legislative efforts.\textsuperscript{109}

It was only after a century of this equilibrium had passed that it was punctuated once again by invocations of universal equality, culminating in the passage of another Civil Rights Act in 1964.\textsuperscript{110} It was only in this decade of the twentieth century that the modern notion of formal, universal equality under law finally began to be enforced, and started to gain wider purchase in American society.\textsuperscript{111} 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.\textsuperscript{112}

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,\textsuperscript{113} generally safe working conditions,\textsuperscript{114} qualified rights to religious

\textsuperscript{108} See Goluboff
\textsuperscript{109} See Jenkins & Peck at 193-194 (describing how Rep. 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.”)
\textsuperscript{110} 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.”)
\textsuperscript{111} John J. Donohue III & James J. Heckman, 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.”)
\textsuperscript{112} See Donohue & Heckman at 1729-1730 (finding that “federal 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.”)
\textsuperscript{113} Fair Labor Standards Act, 29 U.S.C. § 201 et seq.
\textsuperscript{114} Occupational Safety and Health Act, 29 U.S.C. § 651 et seq.
and disability accommodation,\textsuperscript{115} as well as unpaid medical leave,\textsuperscript{116} and protection from retaliation or other extra-contractual wrongs.\textsuperscript{117}

The Civil Rights Act of 1866 was revived by the Supreme Court a few years after the passage of its modern successor,\textsuperscript{118} and it lives on today as Section 1981, a private anti-discrimination cause of action.\textsuperscript{119} Employees still require reliable third parties to enforce these rights. For the most part, those third parties are government regulatory agencies,\textsuperscript{120} but they may also be private counsel, where fee-shifting statutes make such representation possible, and unions, where they still exist.\textsuperscript{121} It was precisely this type of good-faith assistance from others that was so often lacking for the freedmen during Reconstruction.\textsuperscript{122}

For-profit employment discrimination litigators are hardly guaranteed to secure compensation for the injuries suffered by their clients,\textsuperscript{123} but nevertheless they must look at the likelihood of such an

\begin{footnotes}
\item[115] Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.
\item[116] Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.
\item[118] See \textit{Jones v. Alfred H. Mayer Co.}, 392 U.S. 409 (1968)
\item[119] 42 U.S.C. § 1981
\item[120] See Gregory D. Kutz and 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. Government Accountability Office, (March 25, 2009) (“GAO’s overall assessment of the WHD complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints.”)
\item[121] The Bureau of Labor Statistics reported on January 23, 2013 that the rate of private-sector unionization in 2012 was “11.3 percent, down from 11.8 percent in 2011.” (available at www.bls.gov/news.release/union2.htm)
\item[122] See Flynn at 38 (relating incident in 1866 when “the head of the Freedmen’s Bureau in Georgia...appointed agents from among the resident whites...to serve without salary” but instead “receive fees from employers and freedmen 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.”)
\item[123] See Laura Beth Nielsen et al., \textit{Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States}, 7 J. of Empirical Legal Studies 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.”)
\end{footnotes}
outcome above all other factors in choosing which claims to pursue. Although there are some nonprofit organizations that are immune to this revenue-generating concern and are able to have a limited impact, the elimination of prevalent and longstanding violations of labor standards in the American economy has always been the heritage and mandate of the government agencies charged with enforcing these laws.

B. Enforcing Mutuality in the American Employment Contract

Admittedly, much of the discussion in this article conflates antidiscrimination laws (Title VII of the Civil Rights Act, Section 1981, and state statutes, among others) with wage and hour laws (the FLSA and state wage laws), because these two areas are the twin pillars of a plaintiff’s-side employment litigation practice. But antidiscrimination laws and wage laws have distinct social and economic functions that make the American public react differently to them. For this reason, it is easier to make the case for the increased enforcement of wage laws on behalf of unauthorized immigrants. Critics of antidiscrimination laws would presumably not dispute the validity of the axiom – “money paid for work done,” or some variant thereof – that underlies all wage law enforcement, public or private. If the existence of wage laws is universally accepted – with their parameters often disputed – it is because they support the widespread expectation of impartial state enforcement of bargaining obligations freely made, which grows out of the precepts of basic fairness learned by all in

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124 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 www.law.du.edu/index.php/law-school-clinical-program/civil-litigation-clinic

125 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 www.dol.gov/whd/regs/compliance/whdfs48.htm) (stating agency position that the enforcement of wage laws is “distinguishable from ordering back pay under the NLRA. In Hoffman Plastics, 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)

126 See Michael J. Trebilcock, The Limits of Freedom of Contract, at 23 (Harvard University Press 1993) (“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 Philosophy and Public Affairs 342 (1972))
childhood. In this way, the enforcement of wage laws is grounded in the exchange principle at the heart of contracts: mutuality. Arguably this principle is even more central to the operation of the employment contract than nondiscrimination.

The effective enforcement of agreed-upon individual worker protections like wage laws also helps offset the existing tilt of the law of employment in the United States, which by default favors the better-resourced initiator of the employment contract (the employer) over the other party. 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. There is, of course, still


128 See Bjorn Bartling, et al., Use and Abuse of Authority: A Behavioral Foundation of the Employment Relation, at 33 (November 14, 2012) (“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.”) (available at ssrn.com/abstract=2175701)

129 See Charles E. Lindblom, The Market System: What It Is, How It Works, and What To Make of It, at 4 (Yale University Press 2001) (“This gives us a definition of the market system sufficient for our immediate purposes: it is a system of societywide coordination of human activities not by central command but by mutual interactions in the form of transactions.”)

130 Compare Tim Judson & Cristina Francisco-McGuire, “Where Theft is Legal,” at 4 (Progressive States Network 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 Kutz & Meyer, supra (concluding that “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.”).

131 See Meissner et al. 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.”)

132 See Rutherglen at 1563 (“These two kinds of rights [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.”)

133 See Garcia at 34 (“The misclassification of workers has become a serious problem in
disagreement that this existing bias should even be corrected as a matter of public policy.\textsuperscript{134}

There are many working poor, here and abroad, and the United States immigration system is often only one of many discounts that apply to these workers' labor.\textsuperscript{135} It is in large part, however, the form into which our domestic, legally-ratified underclass transformed after Emancipation.\textsuperscript{136} 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.\textsuperscript{137} The enslavement of Chinese “coolies” became a topic of Congressional discussion almost immediately after the legislative efforts for abolition concluded in full,\textsuperscript{138} and their labor was at least as important to the

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.”)

\textsuperscript{134} As the libertarian blogger Will Wilkinson puts 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.” (available at www.economist.com/blogs/democracyinamerica/2013/06/economic-inequality?fsrc=scn/tw_ec/market_forces_and_appeals_to_fairness)

\textsuperscript{135} See, e.g., Burnhart et al. 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)”)

\textsuperscript{136} See, e.g., Ngai at 135 (describing the “economic structure of migratory wage-labor,” wherein “Growers 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.’”)

\textsuperscript{137} National citizenship under the Fourteenth Amendment was upheld by the Supreme Court in \textit{Wong Kim Ark}, 169 U.S. 649 (1898). Equal protection was upheld much earlier, in \textit{Yick Wo}, 118 U.S. 356 (1886).

\textsuperscript{138} See Moon-Ho Jung, Outlawing “Coolies”: Race, Nation, and Empire in the Age of Emancipation, 57 American Quarterly 677, 678 (September 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
economy of the West in the years after the Civil War as black labor was to the South.\textsuperscript{139}

Significant portions of the American population today believe that unauthorized immigrants are both unwelcome and unneeded in the United States. When this premise is extended to the enforcement of labor standards, many additionally conclude that the unauthorized are therefore ineligible for the same protection from unlawful workplace practices that authorized workers enjoy.\textsuperscript{140} As discussed in greater length in Part 3, this view, while widespread, is ahistorical and ignores the degree to which workplace injustice in modern production and service operations is fungible. 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.\textsuperscript{141} 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.\textsuperscript{142}

\textit{C. Focusing on Vulnerable Workers for the Entire Workforce}

Regulations like the prohibition on unequal treatment 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

\textsuperscript{139} See Zolberg 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.”)

\textsuperscript{140} See Hoffman Plastic Compounds, Inc. \textit{v. NLRB}, 535 U.S. 137 (2002). See also Krikorian at 1 (arguing that defects in the structure of the American labor market require further restricting immigration into the United States)

\textsuperscript{141} See, e.g., Burnhart et al. 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].”)

\textsuperscript{142} See, e.g., Charlotte S. Alexander, Explaining Peripheral Labor: A Poultry Industry Case Study, 33 Berkeley J. Emp. \& Lab. L. 353, 395 (2012) (“though 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.”).
will take such treatment are similarly advantaged over those who won’t.\textsuperscript{143} 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.\textsuperscript{144}

One perspective on the individual freedom to contract sees employment laws such as antidiscrimination statutes as overly intrusive,\textsuperscript{145} economically inefficient,\textsuperscript{146} or some damning combination of the two.\textsuperscript{147} A more widely-accepted point of view, growing out of the history of Reconstruction and its aftermath, is that asserting a particular worker's freedom from an unlawful contract is very much a protection of the basic right to contract for all.\textsuperscript{148} The reformers of that era were the first to raise

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\item[143] In making this point, the blogger Matt Yglesias also described the labor market as a collective action problem (“…oftentimes 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.”) (available at www.slate.com/blogs/moneybox/2012/07/04/labor_market_regulation_freedom_and_property_rights_are_red_herrings.html)
\item[144] See the “Commonwealth Club” speech, supra
\item[145] See generally Epstein, Forbidden Grounds, Pt. III: Race Discrimination.
\item[146] See David E. Bernstein, Only One Place of Redress: African-Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal, at 101 (Duke University Press 2001) (arguing that “the 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.”)
\item[147] See Trebilcock at 198 (arguing that 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)
\item[148] See, e.g., Lindblom at 20 (including, among basic preconditions for market system, that “coordination” is required “to curb injuries that otherwise people inflict on each other”); and 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.”)
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equality in the employment relationship to the prominence of the more traditionally popular values of efficiency, utility, and individual liberty.\footnote{Bagenstos at 4 ("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.")}

The first new individual rights amendments to the Constitution since the original Bill of Rights\footnote{Sunstein 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 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.")} were needed to enshrine the legal status of the freedmen as workers.\footnote{Foner at 244 ("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.")} Emancipation brought a great mass of new workers into the light of full civil society,\footnote{See Blackmon at 235 ("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.")} requiring the federal government to make free labor its earliest enforcement priority.\footnote{See Robert J. Steinfield, The Invention of Free Labor: The Employment Relation in English & American Law and Culture, 1350-1870, at 181 (UNC Press 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.")} The United States had newly dedicated itself to the effectuation of a set of universal individual rights for workers,\footnote{See Rutherglen at 165 (arguing that 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} because as a formal matter enslavement was the loss
of control over one’s own labor, by force as well as operation of law.\textsuperscript{155} Freedom at work thus became the template for individual freedom as a whole.\textsuperscript{156}

\textbf{D. The Labor Market as Collective Action Problem}

Today, individual equal rights at work remain vulnerable to inadequacies in the enforcement process.\textsuperscript{157} It is impossible for such rights to be enforced behind a “veil of ignorance” that allows for equitable decision-making in all cases,\textsuperscript{158} and therefore enforcement priorities must take into account existing inequities. Cass Sunstein classifies the state of affairs in the employment market as a “prisoner's dilemma,” or alternatively a “collective action problem.” In Sunstein’s view, such a problem 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.”\textsuperscript{159}

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 describes the private right of altogether certain forms of the master-servant relationship from among those allowed by American law.”\textsuperscript{155}

\textsuperscript{155} Stanley 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.”)

\textsuperscript{156} See Nelson at 552, 554 (noting 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.”)

\textsuperscript{157} Sunstein 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.”)

\textsuperscript{158} See John Rawls, \textit{A Theory of Justice}, at 211 (noting that “even 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.”)

\textsuperscript{159} Sunstein at 51.
enforcement for earnings, which is what American workers get from the state in lieu of direct wealth transfers to the working poor. Sunstein describes such a policy choice as an “effort[ ] to overcome the difficulties of organization of many people in the employment market.”160

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 agreement to solve a prisoner’s dilemma is not.161

The prisoner’s dilemma for employers is the decision whether or not to exploit their employees amidst a background of declining labor standards for employees in general,162 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 employee’s. Sunstein’s point is that such a situation is unstable and requires active intervention. That is also the point of this article.

During Reconstruction, many reactionary Southerners considered it “illegitimate” for freedmen to work for their own benefit, rather than for the benefit of whites.163 The unauthorized immigrant, a figure both unwelcome and ubiquitous in our modern society,164 occupies a similar role in domestic

160 Sunstein at 55.
161 Sunstein at 51.
162 See generally Katherine V.W. Stone, The Decline in the Standard Employment Contract: Evidence from Ten Advanced Industrial Countries, at 33 (finding that, “[i]n 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.”) (available at ssrn.com/abstract=2181082)
163 Flynn at 58.
164 Ngai 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.
production processes. 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. But this particular discount comes entirely from a unique and contradictory legal status that makes his presence anathema for many of those same consumers.

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. Immigration enforcement presently consumes more of the executive branch's primary enforcement budget than the rest of federal law enforcement combined. 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 in this society, and many are not used to summoning law to their aid, only to being summoned.

But equal protection inequitably applied to the national workforce drives down conditions for all workers. The national immigration laws

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.”

See Wilkerson 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.”)

See, e.g., Ngai 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.”)

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 @josieiswriting.

See Meissner et al. at 9 (finding that “the US 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, US Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which stood at $14.4 billion in FY 2012.”)

169 Edwards [article] at 374

But see Edwards [book] at 295 (“But the inequalities in the labor relation never drew the fire or the attention that racial inequalities did. In fact, the elimination of racial distinctions had the effect of extending those inequalities in labor law to all workers, regardless of race.”)
have at best an attenuated relationship to the actual levels of supply and demand for workers in this country’s labor market, yet they have great influence on the availability and treatment of many of the workers in that market. An interested observer does not need to look far to find examples of how this dynamic works in real employment situations.

E. The Value of a Disposable Workforce

The nadir of American employment practices today can be found in the immigrant-heavy domestic meatpacking industry, 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. 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,

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171 Zolberg 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.”)

172 See, e.g. Brian Bennett & Michael Memoli, “Senators’ immigration talks stall,” L.A. Times, March 22, 2013 (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.”) (available at articles.latimes.com/2013/mar/22/nation/la-na-immigration-unfinished-20130323)

173 See Alexander at 373-375 (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.”)

174 See Jerry Kammer, “The 2006 Swift Raids: Assessing the Impact of Immigration Enforcement Actions at Six Facilities” (Center for Immigration Studies 2009); and “EEOC Sues JBS Swift for Religious and National Origin Discrimination in Colorado and Nebraska” (Press Release, August 31, 2010) (available at 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.
tenant farming becoming as widespread as sharecropping, or the inevitable emergence of the rural South as a site of the worst practices.

The astonishing brutality and inhumanity of meatpacking work, performed under modern just-in-time production conditions, 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 does without some assurance that the vast majority so used will not

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175 Schlosser at Loc. 1949-1952 ("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.")

176 Schlosser at Loc. 2309-2313 ("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, Arkansas, Georgia, and Mississippi now produce more than half the chicken raised in the United States.")

177 Schlosser at Loc. 2867-2871 ("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.")

178 Schlosser at Loc. 2846-2850 ("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.")
press their case very far with the authorities, if at all.\textsuperscript{179} This is an assurance that a largely undocumented workforce can provide.\textsuperscript{180}

The meatpacking industry is not the only employment sector crying out for the enforcement of labor standards at the low end of worker income.\textsuperscript{181} Many so-called marginal or peripheral employers also routinely violate labor standards.\textsuperscript{182} 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.\textsuperscript{183}

\textsuperscript{179} Schlosser at Loc. 2661-2666 (“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.”)

\textsuperscript{180} See Ted Conover, “The Way of All Flesh: Undercover in an Industrial Slaughterhouse,” Harper’s Magazine, at 46 (May 2013) (“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.’”)

\textsuperscript{181} See Alexander 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.”)

\textsuperscript{182} See Garcia 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.”)

\textsuperscript{183} Alexander at 356-357.
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.\footnote{See Abel Valenzuela Jr. et al., “On the Corner: Day Labor in the United States,” 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.”)}

**PART 3**

**A. Misplaced Reliance on Moral Culpability**

It is presumably not a point of dispute that unpaid wages should be paid, or harms from discrimination remedied, in the abstract. Indeed, it may not even be controversial to claim that the forms of our modern employment laws derive from the circumstances and logic of equal rights during Reconstruction. What is in dispute is whether any of that matters.

From one side of the political spectrum, critics may simply wonder what enforcement agencies should do that they are not already doing. In 2002, the Supreme Court briefly brought this debate back into prominence, with its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,\footnote{535 U.S. 137 (2002).} denying back pay to unauthorized workers who had been unlawfully terminated because of their prior violations of immigration law. Ming Chen has concluded, from her own study of the enforcement efforts made by the EEOC, NLRB, and DOL on behalf of unauthorized immigrants after the *Hoffman Plastic* decision came down, that these agencies appear to be putting forward their best efforts, in the context of the legal and political constraints on their behavior.\footnote{Chen 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.”)}

There is likely more variety among the
states that variously regulate their respective labor markets, but only limited data exist on this question.\textsuperscript{187}

On the other side of the political spectrum, there is profound disagreement over the question of whether unauthorized workers should even be the subject of those agencies’ efforts. 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 \textit{should} be.”\textsuperscript{188} Under this view, such individuals simply do not deserve the attention.

The focus on moral culpability is comparable to a common reaction to prison-conditions litigation, which is verbalized as some variant of the principle that “a criminal deserves his punishment.”\textsuperscript{189} Although this principle does not by itself provide meaningful guidance for, say, the care and housing of a geriatric male in the late stages of a degenerative chronic condition, it is nevertheless inevitably deployed in response to an Eighth Amendment claim challenging such care. The salience of the adjectives “cruel and unusual” is immaterial to the issue, as is the extant question of what to do with such an individual, who will continue to remain incarcerated and require adequate care for the indefinite future.\textsuperscript{190}

“Criminal” is a term also used for unauthorized immigrants, although generally they have committed violations of civil, not criminal, law.\textsuperscript{191} Again, this is a lawyerly distinction to most people, irrespective of


\textsuperscript{189} See Michelle Alexander at 228 (“The widespread aversion to advocacy on behalf of those labeled criminals reflects a certain political reality. Many would argue that expending scarce resources on criminal justice reform is a strategic mistake. After all, criminals are the one social group in America that nearly everyone—across political, racial, and class boundaries—feels free to hate.”). Another popular formulation of this sentiment is, “He should have thought of that before he did what he did.”


\textsuperscript{191} See, e.g., Jose Antonio Vargas, “Immigration Debate: The Problem with the Word \textit{Illegal},” Time (September 21, 2012) (“How can using illegal immigrant be considered
their views on immigration policy. The lawbreaking aspect of the unauthorized immigrant is central to arguments against those immigrants’ working rights, in a logic that is identical to what is provoked by prison-conditions litigation. Yet the manner in which a particular worker 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 of workers nevertheless participate in the same national economy.

B. There is No Lawn

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. 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. 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.

neutral, for example, when Republican strategist Frank Luntz encouraged using the term in a 2005 memo to tie undocumented people with criminality?” (available at ideas.time.com/2012/09/21/immigration-debate-the-problem-with-the-word-illegal)

See, e.g., Hoffman Plastic.

See, e.g., Ramesh Ponnuru, “New Immigration Bill Has One Terrible Flaw,” Bloomberg News (April 22, 2013) (“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.”) (available at www.bloomberg.com/news/2013-04-22/new-immigration-bill-has-one-terrible-flaw.html)

See Epstein at 499 (“This position leaves me securely outside the mainstream.”)

See Garcia at 60 (noting “there is no political will to restore employee rights to undocumented immigrants.”)

See Ngai at 229 (“The civil rights movement was incontrovertibly about winning full and equal citizenship for African Americans, but citizenship occupied 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.”)
The immigration debate in modern America is a manifestation of age-old human territoriality, and so it is deeply felt and fiercely fought. 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.

At the risk of reducing the arguments of immigration opponents to an inchoate cry of “get off my lawn,” the issue of whether or not a particular worker should or should not be working in this country in the first place is not relevant to whether that worker should or should not be paid for time already worked, or that would have been worked absent his unlawful discharge. 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, 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.

197 See, e.g., Jared Diamond, The World Until Yesterday: What Can We Learn from Traditional Societies?, at Loc. 947-950 (Viking 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.”)

198 See Schilchter (asking “why we should just give citizenship away to people who have already disrespected us by coming here uninvited?”)

199 But see Hoffman Plastic.

200 Chen 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.”)

201 But see Zolberg at 12 (“As the complexity of contemporary debates on immigration policy in the affluent liberal democracies indicates, ‘utility’ encompasses not only a population’s economic value, but also its putative value in relation to cultural and political objectives.”)
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.\footnote{Krikorian 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.”)} 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.\footnote{See, e.g., Karla Mari McKanders, Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities, 61 Cath. U.L. Rev. 921, 951-952 (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.”)}

C. The Exploitation Matters More than Its Motivations

The freedmen were considered deserving of the lesser treatment they received, for their labor among many other things,\footnote{Wilkerson 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.’”)} 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 wages owed are paid as a matter of course (presumably the norm). 205

In this light, the conservative protest that the protected category framework should only ever have applied to racism against black Americans, 206 and lightly there, 207 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 reasons given to justify that conduct. 208

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. 209 Except that it is not entirely like that.

205 See Wilkerson 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.”)

206 See Olson 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.”)

207 See Bernstein 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…”)

208 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.’” (available at www.theatlantic.com/national/archive/2013/06/the-guileless-accidental-racism-of-paula-deen/277153)

209 See Bagenstos 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.”)
Likely the labor market that readers of this article enjoy is at least partly constrained in its actual practices 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.210 The Reverend Martin Luther King Jr., among many others, has made this observation.211 This dynamic is what drove exploitation of the 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.”212

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.213 This causes some of that latter 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 towards situations where other enablers of social sanction are absent, such as with migrant laborers.

210 See Zolberg 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.”)
211 Michelle Alexander 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 what happens to the people outside his group.’”) (quoting Martin Luther King Jr., Strength to Love (1963))
213 See Zolberg 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.”)
D. Potential Responses to an Expected Backlash

The danger is that such efforts 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.”\(^{214}\) 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.\(^{215}\) The state of Colorado made this argument, among others, to the US Supreme Court in *Romer v. Evans*,\(^{216}\) complaining that requiring it to recognize same-sex equality would detract from the rights of existing protected classes.\(^{217}\) 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.\(^{218}\)

But like a return to the gold standard, an attempt to reach the low immigration levels of the middle part of the last century would not turn out well in the modern world.\(^{219}\) The already-massive immigration enforcement


\(^{215}\) Nelson 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.”)


\(^{217}\) 517 U.S. at 635 (“Colorado also cites its interest in conserving resources to fight discrimination against other groups.”)

\(^{218}\) Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 796-797 (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.’”)

\(^{219}\) See Zolberg at 254 (“Thanks to the new law and postwar business 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
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. Immigration opponents gloss over the level of unpleasantness that individuals living in the United States would need to endure to choose to "self-deport." 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.  

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, with many accompanying benefits to all. In response, immigration opponents emphasize the short-term economic downside from illegal immigration for native-born low-wage and vulnerable workers. These effects could be directly ameliorated through

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.

20 See Krikorian 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.”)

21 See Krikorian 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.”)

22 See, e.g., Shaun Raviv, “If People Could Immigrate Anywhere, Would Poverty Be Eliminated?”, The Atlantic (April 26, 2013) (noting that, 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.’”) (available at www.theatlantic.com/international/archive/2013/04/if-people-could-immigrate-anywhere-would-poverty-be-eliminated/275332)

23 See, e.g., Giovanni Peri, “The Effect of Immigrants on U.S. Employment and Productivity,” FRBSF Economic Letter 2010-26 (August 30, 2010) (finding that “immigrants expand 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.”)

24 See David Frum, “Immigration Amnesty: The Path to Poverty,” The Daily Beast, March 22, 2013 (“The United States is already evolving into a society much harsher and
increased enforcement of the employment contract for the most vulnerable members of our workforce.225

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.226 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 their home countries provided,227 or have strong reasons not to

225 See Zolberg 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.’”)

226 See Zolberg 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 Editorial, “Secure enough,” The Economist (June 22, 2013) (noting that “[e]conomics probably matters more than enforcement” as cause of decline in illegal entries to US. “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)”.) (available at www.economist.com/news/united-states/21579828-spending-billions-more-fences-and-drones-will-do-more-harm-secure-enough)

227 See Alexander 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
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**

This argument attempts to move away from considerations of whether some particular modern exploitation in the employment relationship is or is not an equivalent of slavery. More important than establishing such an analogy is understanding the reasons why the laws governing employment in this nation first arose in the wake of slavery’s abolition: because if all who work are equally worthy of a common minimum level of working conditions, the government and third parties are required to 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 such violations, at the bottom of income and in the shadows.

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228 Alexander at 387-388 (“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.”)

229 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.”)

230 See, e.g., Plyler v. Doe, 457 US 202, 218-219 (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.”)
A future article will seek to add empirical support for the argument that un-remedied violations of universal labor standards occur more frequently at this lower end of income, and therefore agencies seeking to redress violations should concentrate there. Until then, the exploitation of vulnerable workers is the modern successor of the very behavior that our employment laws were first written to eliminate,\textsuperscript{231} and for this reason, it is the behavior to which the enforcers of those laws should direct the most attention. This is what is demanded by the heritage and mandate of equal rights in our system of law.

\textsuperscript{231} See Wilkerson at 317 ("…what 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.")