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I. INTRODUCTION

This Essay explores the distinct identities of immigrant workers. The ancient myth of Janus as the gatekeeper who looks both backward and forward captures the duality of immigrant workers, who are both immigrants and workers.[1] On one hand the immigrant worker has a past that might include an undocumented entry into or overstay in the United States; on the other hand, the immigrant worker seeks protections from wrongful treatment by employers. Only by disaggregating these identities can we better understand how we should respond to immigrant workers in the workplace.

There is no normative framework that addresses the unique characteristics of the immigrant worker. Courts and policy makers generally respond to particular cases by considering immigrant workers primarily in terms of their immigrant status or in terms of their status as workers, thereby collapsing their identity in a reductive manner. Even worse, some courts and policy makers do not even perceive the dual identity of immigrant workers. A person who holds employment authorization is entitled to work, but courts often are confused about how to treat an undocumented immigrant who has employment authorization. One might legitimately question whether it makes sense to extend the protections of employment law to a worker who is not present in the country with documented status. Too often, a court sees before it only an immigrant, and it ignores that person's legal status as a worker.

The Obama Administration embraced this conundrum when it endorsed, even if indirectly, the idea of an employment-authorized undocumented worker.[2] This Essay provides a normative justification of the Obama

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1. *See generally* Donald L. Wasson, *Janus*, ANCIENT HISTORY ENCYCLOPEDIA (Feb. 6, 2015), http://www.ancient.eu/Janus/.

2. *See generally* Adam Kredo, *Obama Administration Approves 3 Million New Immigrant Workers in One Year*, THE WASHINGTON BEACON (Dec. 15, 2015, 3:20 PM), http://freebeacon.com/national-security/obama-approves-3-million-immigrant-workers/.

Administration's executive actions on these issues and then assesses their effectiveness in protecting immigrant workers. Needless to say, political fortunes have shifted in the meantime. Consequently, this Essay provides alternative normative underpinnings for such protections that might appeal to the Trump Administration, such as the governmental interest in attaining safety and security.

II. THE EMPLOYMENT LAW FRAMEWORK

We begin with employment law which is designed to protect all workers, some of whom may be undocumented.[3] Federal employment laws are based on the assumption that employees agree to subordinate themselves to employer control over working conditions and the operation of the workplace in exchange for their wages.[4] The law takes a static and broad approach to defining employees.[5] Employment statutes generally are remedial in nature, and so the broad definition of employee is read by courts as reflecting a normative view that as many workers as possible should benefit from the statutory protection.[6] Essentially, an employee is a worker who is not an independent contractor.[7] Employees are protected under federal statutes, whereas independent contractors are not.[8] Courts use a multi-factor test that includes considerations such as the extent to which the employer controls the worker's efforts, and the degree to which the worker has the opportunity to act entrepreneurially.[9] None of the factors of this well-worn test concerns the immigration status of the worker.[10] Nevertheless, employers have attempted to raise immigration status as an element to consider in defining an "employee" who receives workplace rights.[11] Courts generally have refused to withhold the substantive

3. *See* Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 203(e) (2014).

4. *See* OTTO KAHN-FREUND, LABOUR AND THE LAW 6 (2d ed. 1977).

5. *See generally* FLSA, 29 U.S.C. § 203(e) (2014).

6. *See id*. "[E]mployee means any individual employed by an employer." *Id*. "[E]mployee shall include any employee, and shall not be limited to the employees of a particular employer." National Labor Relations Act (NLRA) of 1935, 29 U.S.C. § 152(3) (2014)

7. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000(e) (1964)).

8. *See* NLRA, 29 U.S.C. § 152(3) (2014).

9. *See* FedEx Home Delivery v. N.L.R.B., 563 F.3d 492, 497 (D.C. Cir. 2009); *see also* Alexander v. FedEx Ground Package. Sys., 765 F.3d 981, 988 (9th Cir. 2014).

10. *See* U.S. Dep't of Lab., Wage and Hour Div., Comment Letter on Fact Sheet #13, Am I an Employee? Employment Relationship under the Fair Labor Standards Act (FLSA) (May 2014), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf. The sheet contains examples of the factors used by agencies and courts to determine whether an employment relationship exists in the workplace. *See id.*

11. *See* Hoffman Plastic Compounds v. N.L.R.B., 535 U.S. 137, 148-49 (2002); *see also* Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883, 906 (1984); *see also* EEOC v. Tortilleria La Mejor, 758 F. Supp. 585, 593-594 (E.D. Cal. 1991). "Congress did not intend that the IRCA amend or repeal any of the

protections provided by employment law from workers on the basis of their immigration status.[12] However, in limited circumstances the employer has prevailed. *Hoffman Plastic Compounds Inc.,* represents one such case in which the Supreme Court of the United States accorded a normative preference to immigration law's enforcement goals over the National Labor Relations Act's purpose of maintaining positive labor relations in the workplace.[13]

We can crystallize these issues by focusing on the legal protections against workplace discrimination. For immigrants, the most relevant protected characteristics are national origin and alienage.[14] Immigrants have argued successfully that alienage nondiscrimination principles protect the right to enjoy the equal application of laws that affect one's livelihood.[15] Once limited only to state action, this analysis subsequently has expanded to include private employer practices such as hiring, termination, and establishing the terms and conditions of employment.[16] The principles of alienage nondiscrimination parallel the protections that Title VII of the Civil Rights Act of 1964 provides for employees against discrimination based on race, religion, sex, color, and national origin even though they are rooted in the Civil Rights Acts of 1866 and 1870, which were codified as 42 U.S.C. § 1981.[17] At the time, Congress recognized that both freed slaves and immigrant workers were subject to discrimination based on race, and in the

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previously legislated protections of the labor and employment laws accorded to aliens, documented or undocumented, including the protections of Title VII." *Id*. at 593-94.

12. *See* Salas v. Sierra Chemical, 59 Cal.4th 407, 431, 327 P.3d 797, 812 (2014).

13. *See Hoffman*, 535 U.S. at 151-53.

14. *See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 419-20 (1948).

15. *See id*. at 416. The Court struck down a state law restricting commercial fishing licenses to citizens. *Id*. at 422. The Court has also struck down a state law restricting the employment of noncitizens. *See* Truax v. Raich, 239 U.S. 33, 43 (1915) (striking down state law restricting the employment of noncitizens); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (striking down a local ordinance regulating laundries).

16. *See generally* Civil Rights Act of 1870 CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870). Congress stated,

> [t]hat all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.

Id.; s*ee also* 42 U.S.C. § 1981 (2012).

17. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-2(b) (1964)).

case of immigrant workers— mostly Chinese coolies—their racial characteristics were intertwined with their immigrant status and their status as contract laborers.[18] Thus, the law was obliquely dealing with what would become the problem of the Janus-faced immigrant worker.[19] This was not the last time that immigrant and worker status conflated to create vulnerabilities.

III. RETRIEVING THE SPIRIT OF § 1981 IN ADDRESSING THE JANUS-FACED WORKER

The immigrant worker's dual identity underscores the need for alienage-based nondiscrimination principles. Historically, the conditions that have made immigrants vulnerable in the workplace are deeply tied to discrimination on the basis of race, ethnicity, and gender.[20] Prior to 1965, immigration regulation expressly relied on race and ethnicity as proxies for identifying sovereign prerogatives regarding security.[21] Moreover, the targets of immigration regulation have frequently been viewed as illegitimate participants in the workforce.[22] For example, the Chinese Exclusion Act expressly excluded Chinese laborers from entering or re-entering the United States.[23] In *Chae Chan Ping v. United States*,[24] a Chinese laborer and resident of the United States challenged the statute on federalism grounds, arguing that the federal government had no authority to regulate immigration.[25] The Supreme Court instead granted almost exclusive authority over immigration regulation to the federal government.[26] Although motivated to address the harms allegedly caused by coolie labor, the case applied to all Chinese immigrants.[27]

In the 1930's, state, local, and federal policies resulted in the repatriation of over one million Mexicans who had been living in the United States.[28] The repatriated included United States citizens even though the efforts were focused on federal efforts to deport non-citizens.[29] The stated rationale for this massive coordinated effort to dislocate people was the

18. *See* Chinese Exclusion Act of 1882, Sess. 1, ch. 126, 22 Stat. 58 (1882).
19. *See* Wasson, *supra* note 1.
20. *See* Chinese Exclusion Act of 1882, Sess. 1, ch. 126, 22 Stat. 58 (1882).
21. *See generally id.*
22. *See generally id.*
23. *See id.*
24. 130 U.S. 581 (1889).
25. *See id.* at 609.
26. *Id.*
27. *Id.* at 599-601.
28. *See* FRANCISCO E. BALDERRAMA AND RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 1 (1996).
29. *Id.* at 119-158.

need to protect American jobs.[30] Again, a set of policies aimed at reducing competition for jobs was billed as an immigration-related measure targeting racial minorities.[31]

Efforts to provide refugee status to displaced Jewish refugees during and after World War II were also mired in a public debate over job competition and sovereignty concerns.[32] Opponents of a Jewish refugee program pushed for restrictive quota policies, culminating in the disparate treatment of the passengers on the S.S. St. Louis, a passenger ship carrying approximately one thousand Jewish refugees from Europe that tried to land on a New York dock in 1939.[33] Federal officials refused to allow the ship to dock because the passengers did not have visas, even though the likely outcome was the return of Jewish refugees to Germany for certain death.[34]

Several years later, the federal government undertook Operation Wetback, another racialized deportation policy focused on the undocumented Mexican labor market that operated alongside the official Bracero labor program.[35] The Bracero program was a government-sponsored labor agreement between Mexico and the United States.[36] Concerned about the treatment of its citizens, Mexico engaged in negotiations with the United States government.[37] During negotiations, the federal government militarized the border between the countries, apprehended thousands of Mexicans, and transported them to the interior of Mexico.[38] The deportation action was conducted in the name of sovereignty, but again the target was workers.[39]

The original spirit of § 1981 was to recognize the intertwined nature of race and alienage, and to provide protection for immigrants accordingly.[40] Alienage nondiscrimination principles were founded on the ideal of providing equal protection to the most vulnerable in civil society. Each of these historical examples provided an opportunity to bring the spirit of §1981 to light in protecting immigrants in the workplace; however, immigration-related policies have overshadowed labor issues.[41] Alienage

30. *See id.* at 120.
31. *See generally id.*
32. *See generally* Mike Lanchin, *SS St Louis: The Ship of Jewish Refugees Nobody Wanted*, BBC (May 13, 2014), http://www.bbc.com/news/magazine-27373131.
33. *See id.*
34. *See id.*
35. *See generally,* JUAN RAMON GARCÍA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).
36. *See id*. at 18.
37. *See id*. at 24.
38. *See id.* at 184.
39. *See id.*
40. *See generally* 42 U.S.C. § 1981 (2012).
41. *See generally id.*

nondiscrimination principles were not pursued, and are barely acknowledged in these examples.[42] The consequence, of course, is that the immigration regulations help to create the vulnerability of immigrant workers.

The Obama Administration's attempt to protect undocumented immigrants through its Deferred Action for Childhood Arrivals (hereinafter "DACA")[43] initiative, invoked alienage nondiscrimination principles and evoked controversy. In an illustrative case, a college student invoked alienage discrimination principles against an employer who refused to consider him for employment, despite his employment authorization under DACA.[44] Ruben Juarez sought an internship with Northwestern Mutual Life Insurance Company.[45] He was offered the position after his interview, and then he was asked for documentation showing his employment authorization.[46] He supplied his social security number, and when his interviewer asked if he was a United States citizen or lawful permanent resident, (hereinafter "LPR") Ruben explained his DACA status and that the Department of Homeland Security had authorized his employment.[47] Northwestern Mutual then declined to place him in its internship program because he was neither a citizen nor a LPR.[48]

Juarez sued Northwestern Mutual on behalf of a class of potential employees who had work authorization but who were not hired solely because of their immigration status.[49] The plaintiffs alleged that Northwestern Mutual's ban on hiring DACA recipients discriminated against employment-authorized individuals solely on the basis of their immigration status, in violation of 42 U.S.C. § 1981.[50] Northwestern Mutual argued that discrimination against DACA recipients was not protected under 42 U.S.C. § 1981 because the persons who were employment-authorized nevertheless lacked legal immigration status.[51] By holding to a general policy of hiring noncitizens, Northwestern argued that it did not commit alienage discrimination by selectively denying

42. *See generally id.*

43. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (June 15, 2012), https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca. [hereinafter DACA].

44. Juarez v. Northwestern Mutual Life Ins. Co., Inc., 69 F. Supp. 3d 364, 365-66 (S.D.N.Y. 2014).

45. *Id.* at 366.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Juarez*, 69 F. Supp. 3d at 366.

50. *Id.*

51. *Id.* at 369.

employment to the category of undocumented persons with work authorizations.[52]

The arguments by Northwestern Mutual and Juarez essentially hinged on whether authorization to work could have legal force regardless of one's immigration status.[53] I have previously characterized this complexity in identity that resulted from the DACA program as the advent of the "employment authorized undocumented worker."[54] A person who is undocumented under immigration law but who has deferred action status is eligible for employment authorization.[55] In other words, these undocumented immigrants are "documented" for purposes of employment law.[56] Employment authorization accords legitimacy to a worker and extends the right for that worker to be treated like any other worker.[57]

The historical examples above show the interplay of immigration regulation and efforts to control access to the workplace.[58] DACA was not the first time that the executive branch exercised its authority under the immigration statute to provide employment authorization to noncitizens who are not lawfully admitted to the United States.[59] The true innovation of the DACA program was to recognize that an entire class of *workers* could be employment authorized despite lacking documented immigration status.[60] This innovation created a cognitive dissonance; how can someone be authorized to work lawfully if they are not lawfully present in the United States?[61] The conflict between an authorized worker and an undocumented

52. *Id.*

53. *Id.* at 368.

54. Leticia M. Saucedo, *Employment Authorization, Alienage Discrimination and Executive Authority,* 38 BERKELEY J. OF EMP. AND LAB. L. 183, 187 (2017).

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* Part III.

59. *See generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–32 (2015). Several legal scholars have pointed out that deferred action was a mechanism used in line with prosecutorial discretion on several occasions before the Obama Administration implemented it as DACA. *See generally id.*; *see also* Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58 (2015); *see also* Letter from Scholars and Teachers of Immigration Law on the Obama Administration's Executive Actions on Immigration (Nov. 25, 2014), http://klhn.co/lawprofessors-2014-11-25.; *see also* Letter from Immigration Law Teachers and Scholars to the President of the United States Regarding Executive Authority to Protect Individuals or Groups From Deportation (Sep. 3, 2014), http://klhn.co/lawprofessors-2014-09-03.

60. *See* DACA, *supra* note 43.

61. Transcript of Oral Argument at 28, U.S. v. Texas, 137 S. Ct. 285 (2016) (No. 15-674) [hereinafter Oral Argument]. This was the question that Justice Alito asked during oral arguments when the United States appealed a lower court injunction of its extended DACA and DAPA programs, which would have provided deferred action and employment authorization to approximately five million noncitizens. *See id.*

noncitizen came to a head when these identities were embodied in a single person.[62]

IV. EMPLOYMENT AUTHORIZATION AS AN UNDESERVED BENEFIT

The authority to grant employment authorization became controversial during the Obama administration because it struck a collective nerve about the availability of work, the right to job security, and the centrality of work to an individual's identity.[63] In the United States, the ability to work is seen as a benefit that is reserved to members of the polity.[64] Stakeholders in society are permitted to create a livelihood for themselves, and work is viewed as an expression of self-sufficiency in a culture that values a Protestant work ethic, entrepreneurship, and self-reliance.[65] Finally, work exhibits important characteristics of democratic society, with workers empowered to enter into employment relationships and to end them as they see fit, exercising the choice to participate in the free exchange of labor for wages.[66] In short, employment binds individuals to the polity, and activates their self-sufficiency; therefore, work is not something to be casually offered to outsiders who have not waited in line and played by the rules.

The economic downturn in 2008 caused fault lines to appear in these narratives.[67] The recession challenged assumptions about job security, the ability of a job to provide a stable livelihood, and the meaning of the employment relationship.[68] After the recession subsided, but employment opportunities remained limited, a cultural shift occurred.[69] A new generation of adults was taught that they should find paths to self-fulfillment beyond work, and not to define themselves by their occupation.[70] The new advice was simple: do not feel compelled to take the first low-paying job offered, and form your identity outside of the workplace.[71] A job no longer defined the identity of middle class Americans who could not find one after graduating from high school or college.[72]

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62. *See generally id.*

63. Carl Hampe, *Obama's Go-It-Alone Immigration Move,* POLITICO (Nov. 19, 2014), http://www.politico.com/magazine/story/2014/11/busting-myths-about-obamas-immigration-move-113040.

64. *See* J.D. VANCE, HILLBILLY ELEGY 5-7 (2016); *see also* ARLIE HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT (2016).

65. See MAX WEBER, THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM AND OTHER WRITINGS 6-7 (Peter Baehr & Gordon C. Wells eds. trans., 2002).

66. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 510-11 (2007).

67. STEVEN HILL, RAW DEAL: HOW THE UBER ECONOMY AND RUNAWAY CAPITALISM ARE SCREWING AMERICAN WORKERS 4 (2015).

68. *See generally id*.

69. *See id*. at 6

70. *See id*. at 34.

71. *See id.*

72. HILL, *supra* note 67, at 34.

This cultural shift soothed those in society who operated with a safety net, but for vulnerable members of society, jobs are a matter of survival. These vulnerable persons directed their angst and anger at the people who were taking jobs away from Americans, or at the government for not responding properly to the crisis rather than directing their ire against the forces that caused the recession.[73] Vulnerable persons began to view jobs as a necessity that was in short supply, which that must be carefully rationed among full members of the polity.[74] In this political and social environment, the granting of employment authorization to undocumented persons became a flashpoint.[75]

The Trump campaign understood this phenomenon and cynically exploited it. While on the campaign trail, Trump used the imagery of the border wall to call for immigration restrictions that would end the flow of illegal laborers who competed for the dwindling number of jobs as the economy shrank in the Rust Belt, the Northeast, and the South.[76] President Trump's executive order implementing his "buy American, hire American" platform reflected the perception that jobs rightly belonging to Americans were being filled by undocumented workers instead.[77] From this vantage point, the granting of employment authorization inexplicably opened the workplace to undocumented persons, outsiders who are enemies of the polity rather than members.[78]

V. RESOLVING THE CONUNDRUM: EMPLOYMENT RIGHTS FOR IMMIGRANT WORKERS

A. What it Means to be an Employee

The Obama administration granted employment authorization to undocumented individuals, and so the question remains how much, if any, of employment law protects these "documented workers?" More simply, what exactly does employment authorization bestow? At the deepest level, employment authorization bestows a sense of belonging in the workplace, an identity that is based in collective activity rather than one's origin.[79] This form of belonging is especially important to the immigrant worker who when defined as an immigrant, is faced with the negative, anti-immigrant

73. *See generally* HOCHSCHILD, *supra* note 64.
74. *See* VANCE, *supra* note 64, at 7.
75. *See* Texas v. United States, 86 F. Supp. 3d 591, 616 (S.D. Tex. 2015).
76. *See* VANCE, *supra* note 64, at 5-7.
77. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (April 17, 2017).
78. *See Texas*, 86 F. Supp. 3d at 604-05.
79. *See* Kate Walsh & Judith Gordon, *Creating an Individual Work Identity*, CORNELL U. SCH. OF HOTEL ADMIN. (2008), https://scholarship.sha.cornell.edu/articles/582, (describing the value that individuals derive from an identity associated with their work).

rhetoric typical of President Trump's campaign rallies.[80] Belonging is a form of solidarity between all workers, and this rests at the base of federal labor law's protection of workers in their concerted activities for mutual aid and protection.[81] By placing all workers on the same level playing field, employment authorization diminishes the sense of competition between workers in the same worksite.

In more concrete terms, employment authorization bestows the same rights and protections shared by all workers, including equal protection.[82] This equalizing factor is beneficial for all workers because equal rights decrease the incentive for the employer to adopt poor working conditions that undocumented persons are forced to accept in silence. In the end, employment authorization may help to preserve good jobs by defeating the race to the bottom, and this in turn could expand the type of jobs that citizens seek. With good jobs available to all, it is likely that citizens who do not suffer alienage discrimination by employers will have an advantage.

Employment authorization does not bestow the right to a job, nor does it give the holder any form of advantage over Americans seeking the same job. The supposed advantage of being an immigrant seeking work is really just an expression of the stereotype of the hardworking, subservient immigrant who happily accepts low-wage jobs that are assumed to be beneath Americans. Many employers say they seek out immigrant workers for their hard-working, complacent, and subservient characteristics, but this fantasy is premised on the deep vulnerabilities experienced by undocumented workers. In fact, employers simply have a preference for workers who cannot assert their rights. This narrative is ubiquitous in culture, including commercial advertisements.[83] Famously, a Super Bowl commercial this year featured a woman and her child making an arduous journey through Mexico.[84] It appears that American men were working on the border wall; however, when the mother and daughter appear before the wall, they find that the American men have built a door which opens up to

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80. Julie Hirschfeld Davis, *Trump Orders Mexican Border Wall to Be Built and Plans to Block Syrian Refugees*, NEW YORK TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/refugees-immigrants-wall-trump.html.

81. *See generally* Walsh & Gordon, *supra* note 79.

82. *See generally* Saucedo, *supra* note 54.

83. Libby Hill, *84 Lumber Responds to Controversy (and confusion) Over its Super Bowl Commercial*, LA TIMES (Feb 6, 2017 12:19 PM), http://www.latimes.com/entertainment/la-et-entertainment-news-updates-84-lumber-courts-controversy-and-1486409814-htmlstory.html (the commercial is available to view here in its entirety) [hereinafter 84 LUMBER].

84. *See* Sapna Maheshwari, *Challenge for Super Bowl Commercials: Not Taking Sides, Politically*, NEW YORK TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/business/media/super-bowl-advertising-fox-border-wall.html?mcubz=0.

invite them in.[85] The final tag line states, "[t]he will to succeed is always welcome here."[86] Moving in it's own way, the commercial works only because of the warped narratives about immigrant workers. By normalizing the image of the hard-working and persistent immigrant that employers desire for their workplaces, the commercial ignores the fact that the employer preference for immigrant workers is actually a product of them being vulnerable due to their undocumented status.

B. What it Means to be Lawfully Present in the United States

Legal immigration status bestows some level of stability in that the holder is authorized to stay in the United States for a period of time.[87] It may also in limited instances provide a path to citizenship, and therefore provide access to the general polity.[88] However, a person can have legal status and still be unauthorized to work.[89] For example, students attending an accredited school under the F1 Visa program are forbidden to work.[90] In that case, the legal immigrant is in the same position as the general undocumented worker with regard to the ability to work.[91]

Employment authorization and immigration status are two facets of the identity of the immigrant worker, but neither facet alone captures the full extent of rights and benefits available to immigrant workers. The assumption that an employee willingly subordinates herself to the employer's control of the workplace in exchange for wages can be disrupted by showing that the social, political, economic, and legal constraints that make undocumented immigrants highly vulnerable give rise to abusive employment settings in which the worker has no choice without legal authorization to work.[92] To conflate work authorization and immigration status on the other hand assumes that social rights derive from status, a proposition that seems too close to slavery to be viable in our society.[93] It is

85. *See* EIGHTY FOUR LUMBER, *supra* note 83.

86. *See id.*

87. *See generally* ASS'N OF ST. AND TERRITORIAL HEALTH OFFICIALS, IMMIGRATION STATUS DEFINITIONS (2010), http://www.astho.org/Programs/Access/Immigration-Definitions/. [hereinafter Definitions].

88. *See generally id.*

89. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., STUDENTS AND EMPLOYMENT, https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment (last updated Mar. 3, 2016).

90. *Id.*

91. *See id.*

92. *See* Paul Harris, *Undocumented Workers' Grim Reality: Speak Out On Abuse and Risk Deportation*, THE GUARDIAN (Mar. 28, 2013), https://www.theguardian.com/world/2013/mar/28/undocumented-migrants-worker-abuse-deportation.

93. *See generally id.*

a hardened person who would accept any manner of workplace abuse inflicted on an immigrant worker simply because she is undocumented.[94]

C. Addressing the Needs of the Janus-Faced Immigrant Worker

We appear to be forced to make a choice between two options. The immigrant worker can be treated primarily as a worker based on her employment authorization. Alternatively, the immigrant worker can be treated primarily on the basis of his immigration status, effectuating a decision that one's immigrant identity controls the available rights and protections available in all aspects of society including the workplace. Courts rarely understand the distinctiveness of the two identities and the choice presented, but we can assume that the Trump Administration is poised to subsume all identities to immigration status. This simplistic approach is counter-productive to the articulated policy goals of the administration.

The Obama Administration clearly chose to recognize and put emphasis on the separate identities comprising an immigrant worker.[95] It cited humanitarian reasons for providing employment authorization to undocumented immigrants.[96] Having deferred taking any immigration actions against these persons, it made no sense to leave them without a legitimate means of earning a livelihood.[97] This path follows the spirit of protection that Congress articulated when it passed the Civil Rights Act of 1870, the precursor to § 1981.[98] The Act sought to ensure the equal protection of the law to immigrants in the workplace despite their immigrant status.[99] Due to a historically strong plenary power doctrine grounded in *Chae Chan Ping*, there has been no challenge to immigration policies that produce vulnerable immigrant workers.[100]

DACA was controversial because it strengthened the hand of immigrant workers in accordance with the spirit of § 1981, affording them equal workplace rights, and rejecting the long history of federal policy that rendered immigrant workers so vulnerable.[101] Whether intended or not, DACA's employment authorization for undocumented immigrants reflected

94. *See generally id.*

95. *See generally* Scott Horsley, *5 Things to Know About Obama's Enforcement of Immigration Laws*, NPR (Aug. 31, 2016), http://www.npr.org/2016/08/31/491965912/5-things-to-know-about-obamas-enforcement-of-immigration-laws.

96. *See id.*

97. *See* Oral Argument, *supra* note 61, at 26.

98. *See generally* Civil Rights Act of 1870 CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

99. *See id.*

100. *See Chae Chan Ping,* 130 U.S. at 610.

101. *See generally* DACA, *supra* note 43.

the nondiscrimination principles in § 1981.[102] DACA revived principles of anti-discrimination in the workplace by guaranteeing the immigrant worker's identity as a worker.[103] It provides equal application of employment laws for everyone who has the authorization and the sense of belonging in the workplace.[104]

The Trump Administration's recent executive orders related to immigration, including the so-called Muslim ban and an interior enforcement executive order are the latest examples of immigration-related, racialized removal and exclusion programs.[105] The Muslim ban restricts entry into the United States from six majority-Muslim countries, including Syria, Libya, Sudan, Somalia, Iran and Yemen.[106] Constitutional challenges to the ban focus on President Trump's discriminatory campaign rhetoric surrounding the call for a ban.[107]Candidate Trump's comments about the ban mostly focused on keeping all members of the Islamic faith from entering the United States.[108] President Trump then consulted with advisors to determine how to make arguments in favor of the ban that would pass constitutional muster.[109] Since then, the Trump Administration has shifted its arguments in support of the ban to a focus on security concerns.[110] Likewise, President Trump's executive order on interior enforcement resulted from campaign rhetoric invoking racist, stereotypical images of Mexicans as rapists, drug runners, and criminals.[111] His rhetoric urging us to "hire American, buy American," has resulted in administration policies supporting a border wall.[112] It has also resulted in an executive order targeting immigration law's labor-related visas.[113] These three executive orders taken together demonstrate both the racialized nature of the Trump

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102. *See generally id.*; *see also* 42 U.S.C. § 1981 (2012).

103. *See* DACA, *supra* note 43.

104. *See id.*

105. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

106. *Id.* A previous executive order, which the Trump Administration withdrew, also banned nationals of Iraq. *See* Exec. Order No. 13,769 82. Fed. Reg. 8,977 (Jan. 27, 2017).

107. *See* Andrew C. McCarthy, *Trump's Order on Entry into the United States; Implementation Problems*, NATIONAL REVIEW (Jan. 30, 2017), http://www.nationalreview.com/article/444388/trump-executive-order-implementation-problems.

108. *See* Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists*,' CNN (Jan. 30, 2017), http://www.cnn.com/2017/01/27/politics/trump-plans-to-sign-executive-action-on-refugees-extreme-vetting/index.html.

109. *See generally* Chris Cillizza, *The Supreme Court Finally Handed Trump a Travel Ban Victory*, CNN (June 26, 2017), http://www.cnn.com/2017/06/26/politics/trump-travel-ban-decision/index.html.

110. *See generally id.*

111. *See,* Tal Kopan, *What Donald Trump Has Said About Mexico and Vice Versa*, CNN (August 31, 2016), http://www.cnn.com/2016/08/31/politics/donald-trump-mexico-statements.

112. President Donald Trump, Inaugural Address (Jan. 21, 2017).

113. Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (April 17, 2017).

Administration's policies and the extent to which labor concerns motivate them.

The question is whether, in a Trump Administration, we can supplement the equal protection rationales in favor of DACA, and the employment authorized undocumented worker with other rationales that would have more salience or attractiveness. Historically, as the examples above demonstrate, federal immigration-related policies were grounded in racialized understandings of threats to security or sovereignty.[114] To turn these arguments against their proponents, it is possible to use the security rationales in support of employment authorization. A program that provides employment authorization for undocumented immigrants addresses security concerns because it serves a dual purpose— reducing the vulnerability that makes undocumented workers so desirable and tracking immigrants who previously were underground. Taking this step would require the federal government to acknowledge the real reasons for job insecurity in this country, and stop the use of immigrant workers as scapegoats for the problems of structural unemployment. This approach may seem unlikely to occur, but President Trump has said that he wants to protect DACA recipients.[115] He sees something of value in their remaining in the United States, despite the public rhetoric about the need to deport millions of immigrants.[116] Interestingly, the Trump Administration's rhetoric has continued to focus on the deportation of so-called criminal aliens in its enforcement policies rather than past policies that focused on entire populations in the name of security or sovereignty.[117]

Moreover, attitudes may be changing in the federal courts. The Trump administration's Muslim ban has been the most blatant attack on equal protection values in the public's recent memory.[118] The courts have had to confront long-held deference owed to Congress and the federal government in the area of immigration regulation in the face of clearly discriminatory actions based on religion and national origin.[119] The Muslim ban litigation has recently demonstrated courts' willingness to infuse immigration law with equal protection principles, a move that complements the already

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114. *See supra* Part III.

115. *See* Tal Kopan, *States Try to Force Trump's Hand on DACA*, CNN (July 1, 2017), http://www.cnn.com/2017/06/30/politics/trump-daca-bind/index.html.

116. *See id.*

117. *See id.*

118. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

119. *See* Robert Barnes, *Trump Gets a Powerful Lesson in the Role of Judiciary*, THE WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/politics/courts_law/trump-gets-a-powerful-lesson-in-role-of-judiciary/2017/02/09/a8f2f8d4-ef28-11e6-9662-6eedf1627882_story.html?utm_term=.e094bfd7a19b.

existing protections of § 1981.[120] This is an example of the power of equal protection principles, even in the face of immigration exceptionalism that is more than a century old.[121]

The equal protection sentiment in immigration law has existed in the Immigration and Nationality Act for several decades.[122] In 1965, Congress amended the Immigration and Nationality Act and banned discrimination in the issuance of visas based on otherwise protected categories.[123] The provisions states, "[n]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence."[124] This provision has received renewed scrutiny in the aftermath of the Trump administration's executive orders, especially its Muslim ban.[125] A well-publicized exchange between Senator Ted Cruz and former acting Attorney General Sally Yates over the executive order focused on the limiting effects of this provision on the President's authority.[126] The debate demonstrates that these principles exist even though they remain highly contested.[127] Nonetheless, the existence of the provision signals a Congressional purpose to eliminate a century of racialized decision-making about who deserves admission into the United States.

VI. CONCLUSION

The workplace is infused with two very different images of the immigrant worker. Separating out the dual identity of the immigrant worker allows us to more completely examine how best to protect immigrants in the workplace. The immigrant worker is either an employment-authorized individual first, holding the full rights available to all workers, including citizens, or the immigrant worker is an immigrant first who lacks ordinary rights because of his immigration status. The Obama Administration, wittingly or not, helped resolve the tension between these views by

120. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

121. *See generally* Michelle Mark & Harrison Jacobs, *Federal Judges Block Deportations in Emergency Rulings on Trump's Immigration Order*, BUSINESS INSIDER (Jan. 28, 2017), http://www.businessinsider.com/a-federal-judge-issued-a-stay-on-trumps-executive-order-immigration-ban-2017-1.

122. *See generally* Immigration and Nationality Act (INA) of 1952, 8 U.S.C. § 1101-1178 (2013).

123. *See* 8 U.S.C. § 1152(a)(1) (2000).

124. *Id.*

125. *See* Olivia B. Waxman, *What to Know About the 1952 Law Invoked by President Trump's Immigration Order*, TIME (Feb. 6, 2017), http://time.com/4656940/donald-trump-immigration-order-1952/.

126. *See generally* Jaclyn Reiss, *Ted Cruz Gets into a Heated Exchange With Sally Yates, Prompting Laughter and Groans*, BOSTON GLOBE (May 8, 2017), https://www.bostonglobe.com/news/politics/2017/05/08/ted-cruz-gets-into-heated-legal-exchange-with-sally-yates-prompting-laughter-and-groans/9Wf3FkwoG4TWPar6iQPapO/story.html.

127. *See generally id.*

prioritizing the identity of undocumented individuals in the workplace as workers.[128] By acknowledging the primacy of work identity, the administration also— possibly inadvertently— gave a nod to immigration law's roots in sovereignty and security.[129] By granting employment authorization to those who received deferred action, the administration threaded the needle.[130] It acknowledged the need to treat immigrant workers the same as other employees in the workplace by legitimizing their presence through employment authorization, but it also created a means to track this category of undocumented individuals when it established an application process for deferred action.[131] The Obama Administration's action was a counter-proposal to the typical calls for deportation and removal arising out of the security/sovereignty argument.[132] However, unlike calls for deportation, the Obama Administration showed that we could create a way to acknowledge and recognize individuals who are in the country and create a process to track them all without trampling the alienage-based rights of millions of immigrants in the country.[133] A good case can be made that this was a smart approach to security, even if that was not one of the animating purposes of DACA.

Of course, the security rationale for DACA and employment authorization does not adequately respond to the discriminatory character of the sovereignty and security arguments throughout American history since the Chinese Exclusion Act.[134] DACA is exemplary because it breaks clearly from a normative framework that begins with the need to exclude rather than to keep track of the immigrant population in the country.[135] The fact that DACA is seen by President Trump as exceptional— and not a model to replicate—demonstrates the power of the sovereignty narrative to overwhelm even the security narrative.[136]

In response to the provocations by the Trump Administration, there are many people who are contesting the security narrative and championing the

128. *See* Kredo, *supra* note 2.

129. *See generally id*.

130. *See generally id*

131. *See generally id*

132. *See .id.* The Trump Administration, like many before it has called for deportation of undocumented individuals in the name of security/sovereignty concerns, and interestingly the deportation path does not track individuals who enter and leave the country. *See* Mica Rosenberg & Reade Levinson, *Exclusive: Trump Targets Illegal Immigrants Who Were Given Reprieves from Deportation by Obama*, REUTERS (Jan. 9, 2017), http://www.reuters.com/article/us-usa-immigration-deportations-exclusiv-idUSKBN1902I4.

133. *See* Kredo, *supra* note 2.

134. *See generally* DACA, *supra* note 43.; *see also* Chinese Exclusion Act of 1882, Sess. 1, ch. 126, 22 Stat. 58 (1882).

135. *See generally* DACA, *supra* note 43.

136. *See generally id*.

humanitarian values of equal protection and equal treatment.[137] By stepping back and refusing to accord supremacy to immigration enforcement, it is possible to acknowledge the undocumented immigrant's presence and grant her authorization to work. Alienage nondiscrimination principles provide a way to ensure workplace fairness which in turn may alleviate the fears about immigrant workers. Connecting employment authorization to registration and oversight ensures that security concerns are addressed. Ultimately, political pressure will open a viable path.

137. *See* Evan Osnos, *The Gathering Storm of Protest Against Trump*, THE NEW YORKER (Nov. 17, 2016), http://www.newyorker.com/news/news-desk/the-gathering-storm-of-protest-against-trump.; *see also* John Cassidy, *The Trump Resistance: A Progress Report*, THE NEW YORKER (April 17, 2017), http://www.newyorker.com/news/john-cassidy/the-trump-resistance-a-progress-report.