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Employment Authorization, Alienage Discrimination and Executive Authority

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How can it be lawful to work here but not lawful to be here?
--Justice Samuel Alito[1]

I. Introduction

Ruben Juarez applied for and was granted deferred action under an Obama administration executive action call Deferred Action for Childhood Arrivals (DACA). The executive action grants deferral of removal, but not legal immigration status, to those who arrived in the United States as children and who were in undocumented status. Soon after receiving DACA deferred action and the employment authorization document that comes with it, Ruben applied for a social security number.[2] He then sought an internship with Northwestern Mutual Life Insurance Co. He interviewed and was offered a position. His interviewer asked for his employment documents and he supplied his social security number. His interviewer asked him if he was either a U.S. citizen or lawful permanent resident (LPR). Ruben explained his DACA status and that the Department of Homeland Security authorized his employment. Northwestern Mutual then declined to place him in its internship program solely because he was neither a citizen nor a LPR.[3] Ruben 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.[4] The plaintiffs alleged that Northwestern Mutual's employment ban against hiring DACA recipients discriminates against otherwise employment-authorized individuals based solely on immigration status,

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[1] United States v. Texas, Oral Argument, 15-674, at 28 (April 18, 2016).

[2] Complaint, Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.) This case was filed by the Mexican American Legal Defense and Educational Fund (MALDEF) on behalf of Ruben and a class of DACA-eligible individuals.

[3] Ruben's complaint claims that the Northwestern Mutual advertises a ban against hiring anyone who is not a U.S. citizen or LPR on its website. *See* Complaint, Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.); *see also* Opinion and Order on Motion to Dismiss, Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.).

[4] Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.).

in violation of 42 U.S.C. § 1981.[5] Northwestern Mutual argued that discrimination against DACA recipients was not alienage discrimination.[6]

This article explores the anomaly of what I call the "employment-authorized undocumented worker," the situation in which Ruben Juarez found himself. Scholars have not fully addressed how the liminal status of a growing number of noncitizens like Juarez affects their rights in the workplace. There is an assumption that immigration and employment law are in fundamental tension with each other. On one hand, anti-discrimination principles protect noncitizens from alienage discrimination. On the other hand, Congress enacted employer sanctions precisely to keep undocumented noncitizens out of the workplace. Many conclude without analysis that employers (and states) must be able to deny rights and benefits to undocumented noncitizens.[7] This creates a true dilemma for the employment-authorized undocumented worker, and challenges the federal government's acknowledged power to authorize employment for noncitizens.[8]

In this Article, I argue that employment-authorized undocumented workers such as Ruben Juarez are protected from workplace discrimination even though they do not have legal status in the eyes of immigration law.[9] Although undocumented under immigration law, persons with deferred action and similar liminal statuses are eligible for employment authorization, and therefore are "documented" for purposes of employment law.[10] This might seem like a simplistic proposition from an employment law perspective. If a purpose of employment law is to balance against the "inherent inequality of bargaining

[5] Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.).

[6] Northwestern defended its practice of hiring noncitizens only if they had some form of immigration status, as opposed to just having work authorization. It argued that as long as it had a policy of hiring noncitizens, it did not commit alienage discrimination by selectively denying employment to undocumented persons. This argument has a certain logic: although the persons may be "authorized" to work, it is not necessarily the case that refusing employment would be alienage discrimination. The district court concluded that 42 U.S.C. § 1981 covers all "lawfully present aliens," and that employment authorization signaled lawful presence in the workplace.

[7] This was Northwestern Mutual's argument on appeal. The company argued that "the district court's interpretation of § 1981 creates a significant conflict between the rights and obligations of employers under existing federal immigration law, because it purports to prohibit under § 1981 conduct that is expressly permitted under the Immigration and Nationality Act [namely, refusing to hire knowingly undocumented workers]." Northwestern Mutual Life Insurance v. Ruben Juarez, 15-136 (2d. Cir. 2015).

[8] *See* 8 C.F.R. § 274a.12(a)-(b) (listing the categories of noncitizens to whom the Department of Homeland Security can grant employment authorization).

[9] I do not focus in this Article on the rights and benefits of undocumented workers who do not have employment authorization (even though I believe these workers would still have workplace protections), in part because I seek in this Article to explore the effects of extricating an individual's identity rooted in workplace legitimacy from his identity rooted in immigration illegitimacy.

[10] Arguably, under current doctrine they are protected under employment and labor laws even if they are undocumented, but in indirect ways. *See* Hiroshi Motomura, *The Rights of Others*, 59 DUKE LAW JOURNAL 1723, 1728-29 (2010).

power between employer and employee,"[11] then employment authorization should offer protections that achieve bargaining equality, including protections for undocumented immigrants against discrimination based on their foreign-born status. On the other hand, in an increasingly anxious society concerned with growing numbers of undocumented noncitizens, the urge to limit rights and benefits that come with liminal immigration status such as deferred action is heightened. Recent Supreme Court holdings, both in and outside the immigration arena, however, support an evolving theory of workplace protection for workers in liminal immigration categories. I draw from these cases to suggest the revival of a theory that fuses liberty and equality principles with federalism and structuralism to protect noncitizens as historically disadvantaged groups. Toward this end, I explore three concepts –employment authorization, executive authority and alienage nondiscrimination principles – that provide the foundation for protecting the employment authorized undocumented worker.[12]

Immigration issues typically inspire arguments grounded in either structuralism or rights. For example, the federal government might argue that the federal immigration statute trumps state attempts at immigration regulation.[13] Or, private litigants might argue that a state statute seeking to give law enforcement officers the authority to ask for immigration status based on reasonable suspicion violates equal protection principles.[14] In this article, I draw from both of these argumentative traditions. As recent Supreme Court cases have shown in the same-sex marriage context, the principles of rights and structure can be viewed as working in tandem.[15] In cases such as *United States v. Windsor*[16] and *Obergefell v. Hodges,*[17] the Court fused structuralist theories such as federalism with rights theories such as due process and equality to protect a historically disadvantaged group. Heather Gerken has suggested that a theory of structuralist arguments working in the service of rights principles produced unprecedented levels of protection for those seeking the right to same-sex marriage.[18] I demonstrate that this same framework existed in the development of congressional protections against alienage discrimination and also in the cases supporting alienage nondiscrimination principles. I conclude that the interplay of these principles protects the employment-authorized undocumented worker from alienage discrimination by virtue of the President's power to confer employment authorization, both under statute and regulation.

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[11] *See*, OTTO KAHN-FREUND, LABOUR AND THE LAW 6 (2nd ed. 1977).
[12] *See* Heather Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 Boston U. L. Rev. 587, 592-600 (2015) for an explanation of how "the ends of liberty and equality are served by both rights and structure" in *United States v. Windsor*.
[13] *See* Arizona v. United States, 567 U.S. __, 132 S. Ct. 2492 (2012).
[14] *See* Valle del Sol v. Whiting, 732 F.3d 1006 (2013).
[15] *See* Gerken, *supra* note 12 at 592.
[16] United States v. Windsor, 570 U.S. __; 133 S. Ct. 2675 (2013).
[17] Obergefell v. Hodges, 576 U.S. ___ ; 135 S. Ct. 2584 (2015).
[18] Gerken, *supra* note 12 at 592.

Part two of this Article explores the questions surrounding protection for the employment-authorized undocumented worker. These questions arose at oral argument in the Supreme Court's deliberation of *United States v. Texas*, a case in which the states challenged the implementation of the Obama administration's expansion of deferred action categories.[19] During oral argument the Justices acknowledged the complexities surrounding workplace protections for the employment-authorized undocumented worker, but these issues were not addressed when the deadlocked Court failed to issue an opinion. I use several exchanges during oral argument as starting points to explore the role of employment authorization in worksite protection. Part three of this Article discusses the current employment law paradigm that assumes employment authorization is linked to legal status. This unwarranted assumption is problematic for those in some form of liminal status such as deferred action. Part four discusses the structuralist arguments against the employment-authorized undocumented worker. Although structuralist in form, these arguments betray a normative discomfort with the notion that civil rights –e.g., anti-discrimination protections –could be made available to undocumented individuals. In Part five, I argue that application of alienage nondiscrimination principles are not new, and that in fact these principles arose in response to the historically marginalized status of the foreign-born, one manifestation of which was the creation of liminal immigration categories.[20] In part six, I analyze contemporary equal protection and due process cases in the same-sex marriage context and compare it to early and twentieth-century alienage discrimination cases. I demonstrate similarities between noncitizens and same-sex couples as historically disadvantaged groups. I argue that the Supreme Court's approach to same-sex marriage is very similar to that found in earlier alienage discrimination cases. From this analysis we can revive a path for protection of noncitizen workers that is consonant with the recent approaches that use structuralist arguments in the service of due process and equality principles.[21] This legal framework resolves the paradox of the employment authorized undocumented worker even while recognizing that the Supreme Court has only a vague self-understanding of the framework it has been creating.

II. *United States v. Texas* and the Employment Authorized Undocumented Worker

[19] *United States v. Texas*, Oral Argument, 15-674 (April 18, 2016).

[20] In a pattern very similar to today's acknowledgement of the employment-authorized undocumented worker, immigrants historically resided in the United States "legally" in the sense that they arrived under labor agreements and treaties between the United States and other countries, including China. Yet, they were constructed as "illegal" when Congress began to restrict their movement and their entry through immigration law. *See* CHARLES MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA, 10-11 (1994).

[21] See generally, Gerken, *supra* note 12.

On June 23, the Supreme Court extinguished the hopes of millions of people who would have benefitted under President Obama's executive actions granting deferred action to certain undocumented noncitizens.[22] As a result of a tie vote after the death of Justice Scalia, the Supreme Court in *United States v. Texas*[23] affirmed the Fifth Circuit's decision to uphold a nationwide injunction of the President's expansion of Deferred Action for Childhood Arrivals (DACA) and its adoption of Deferred Action for Parents of Americans (DAPA). Although difficult to read much into an opinion that simply states, "The judgment is affirmed by an equally divided court,"[24] we can infer from oral argument that granting legal protections for noncitizens may prove problematic, even if the President acts within his authority. For example, Justice Alito expressed skepticism that deferred action –a status the federal government claims offers no rights or benefits under immigration law –could beget employment authorization. Justice Alito's puzzlement was crystallized in a question posed to Solicitor General Donald Verrilli: "How can it be lawful to work here but not lawful to be here?"[25] This question points to foundational uncertainties at the intersection of employment and immigration law, and the challenge to the President's executive actions have simply highlighted their salience. DACA and DAPA deferred action would have extended a growing and evolving pattern of creating liminal[26] categories of noncitizens.[27]

Clearly, the paradox of the employment-authorized undocumented worker vexed the Supreme Court justices during oral argument in *United States v. Texas.* The Justices expressed several concerns about the nature of the employment-authorized undocumented worker, all framed in the context of determining the scope of the power of the executive branch to expand the liminal category. To understand and then address the Justices' concerns, I first explore the details of the case and the source of the paradox.

A. The President's Executive Actions Regarding the DACA and DAPA Programs

In June 2012, President Obama announced a centralized form of prosecutorial discretion that would allow noncitizens who arrived in the United States before

[22] United States v. Texas, 579 U.S. __ (2016).
[23] United States v. Texas, 579 U.S. __(2016).
[24] United States v. Texas, 579 U.S. __ (2016).
[25] United States v. Texas, Oral Argument, 15-674 at 28 (April 18, 2016).
[26] I use "liminal" in both of the usual senses of the word. First, liminal status reflects an uneasy position on both sides of a boundary. Second, liminal status reflects a transitional category or an initial stage of a new process. See text, section III, *infra.*
[27] Ruben Juarez and his DACA counterparts are examples of this liminality. They remain eligible to work because the states did not challenge the initial round of DACA executive actions.

the age of sixteen to remain in the United States.[28] The plan was called Deferred Action for Childhood Arrivals (DACA).[29] Under the plan, childhood arrivals could apply for deferred action, a form of immigration "nonstatus,"[30] that promises deferral from removal. Under this centralized form of deferred action, eligible applicants would be granted deferred action for two years, subject to renewal. Almost 1.2 million individuals were eligible for the program, including Ruben Juarez.[31] This program was implemented and is still in place.[32]

In November 2014, President Obama undertook two additional executive actions that would increase the numbers of noncitizens with liminal status but eligible for work authorization. First, an executive action expanded the group of childhood arrivals eligible for deferred action to include those who arrived before age 16 and who have been continuously present since January 1, 2010.[33] This program came to be known as 'extended DACA.' Whereas the previous program capped the age of eligibility at 31, the newly expanded program would have removed the age cap. As a result, an estimated additional 280,000 people would be eligible under these expanded guidelines, bringing the total number of DACA recipients to almost one million.[34] Second, a new group – parents of U.S. citizens or lawful permanent residents born on or before November 20, 2014 –would be eligible for deferred action if they have been continuously present in the United States since January 1, 2010.[35] The program came to be known as Deferred

[28] PRESIDENT BARACK OBAMA, WHITE HOUSE PRESS STATEMENT, REMARKS BY THE PRESIDENT ON IMMIGRATION, June 15, 2012, *available at* https://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration.

[29] *See* JANET NAPOLITANO, DEPARTMENT OF HOMELAND SECURITY MEMORANDUM, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN, June 15, 2012, *available at* https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[30] *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AMERICAN L. REV. 1115, 1117 (2015) (defining "nonstatus" as the growing noncitizen population with acknowledged presence, protection from removal, but no rights or benefits).

[31] Randy Capps, Heather Koball, James D. Bachmeier, Ariel G. Ruiz Soto, Jie Zong, and Julia Gelatt, Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children, Migration Policy Institute 5 (2016) (*hereinafter*, "MPI Report").

[32] USCIS, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS, *available at* https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca

[33] *See*, JEH JOHNSON, DEPARTMENT OF HOMELAND SECURITY MEMO, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS, November 20, 2014, available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

[34] MPI Report, *supra* note 31 at 5.

[35] The program contains limitations and restrictions that make persons ineligible if they are enforcement priorities. Priorities include people who are threats to national or public security, who have been convicted of aggravated felonies, as defined in immigration law, of gang-related offenses, or of felonies under state law; have been convicted of a significant misdemeanor or of three misdemeanors or who entered the United States and cannot prove continuous residence since January 1, 2014. *See*, JEH JOHNSON, DEPARTMENT OF HOMELAND SECURITY MEMO, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES

Action for Parents of Americans, or DAPA. An estimated 3.6 million people would be eligible for this category of deferred action.[36] Because both programs granted eligible applicants employment authorization, under these executive actions almost 5 million undocumented noncitizens would be authorized to work in the United States.[37]

B. The States' Challenge to the President's Programs

The state of Texas sued the federal government seeking to enjoin the Obama administration from implementing the 2014 executive actions. Twenty-five states joined in filing *Texas v. United States*.[38] They alleged that the Department of Homeland Security exceeded its authority by creating categories of undocumented noncitizens who could stay in the United States with, among other privileges, work authorization and "lawful presence," even if they were undocumented.[39] A federal district court in Texas enjoined the executive actions, and ordered a stay in the implementation of extended DACA and DAPA nationally.[40] The federal government appealed the injunction.[41] The Fifth Circuit denied the federal government's petition to stay the federal district court's injunction.[42] The decision effectively prevented the implementation of the administration's extended DACA and DAPA programs during the remainder of President Obama's term.[43] The court held that the Obama administration's proposed implementation of its executive actions was a substantive rule implemented in violation of the Administrative Procedure Act's requirements for notice and comment rulemaking.[44] It also held that the executive branch overstepped its authority by attempting to issue employment authorization to the millions of undocumented individuals who would qualify under the administration's deferred action program.[45]

AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS, November 20, 2014, available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; JEH JOHNSON, DEPARTMENT OF HOMELAND SECURITY MEMORANDUM, POLICIES FOR THE APPREHENSION, DETENTION AND REMOVAL OF UNDOCUMENTED IMMIGRANTS, November 20, 2014, *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

[36] MPI Report, *supra* note 31 at 5.

[37] *Id.*

[38] Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[39] Texas v. United States, 86 F. Supp. 3d at 677 (S.D. Tex. 2015).

[40] Texas v. United States, 86 F. Supp. 3d 591 (S.D. Texas 2015).

[41] See USCIS EXECUTIVE ACTIONS ON IMMIGRATION, available at https://www.uscis.gov/immigrationaction (last visited August 8, 2016).

[42] United States v. Texas, 2015 WL 6873190 (5th Cir. 2015).

[43] *Id.*

[44] United States v. Texas, 809 F.3d 134, 178 (5th Cir. 2015).

[45] United States v. Texas, 809 F.3d at 169 (5th Cir. 2015).

The states argued that the President could not create a subcategory of undocumented individuals and give them protections (namely, the full protections that come with work authorization) unavailable to all undocumented persons. They also asserted that the President's executive actions impinged on states' rights to limit protections and grant benefits based on immigration status.[46] The issues before the Supreme Court ostensibly concerned both federalism –the proper role of the federal government compared to the states in regulating immigrants – and separation of powers –the President' executive authority with respect to Congress.

The Supreme Court accepted the United States' *writ of certiorari*,[47] and it ultimately affirmed the Fifth Circuit's decision by virtue of being evenly divided.[48]

C. *United States v. Texas* and the Justice's Concerns at Oral Argument

Ostensibly, the issue in *United States v. Texas* centered on structuralist concerns, specifically the scope of executive authority to create new categories of deferred action under extended DACA and DAPA. Lurking below the surface of the executive authority issue, however, are substantive questions about the nature of protections and benefits available to the individuals eligible for deferred action. Nowhere is this more evident than in questions about the place of the employment authorized undocumented worker in the workplace. How can undocumented individuals be eligible for work authorization? What rights are implied by work authorization? Is the employment authorized undocumented worker protected against alienage discrimination, and if so, how does that square with employer sanctions provisions in immigration law? Finally, does the scope of executive authority extend to providing benefits such as work authorization to undocumented individuals? The first three are questions about the substantive rights and entitlement to protections available to people who may not be entitled to be present in the United States in the first place. The final question reflects the structural and procedural concerns embedded in decisions about which branch of

[46] I argue that the states' challenge to the de-linking of immigration status and employment authorization based on its effects on state sovereignty in the benefits arena (a federalism argument) is itself the use of a structuralist theory to limit the rights and protections of immigrant workers. It is not within the purview of states' rights to determine whether the de-linking of employment authorization and immigration status is a valid or proper use of authority. In fact, this argument focuses on the interlocking gears metaphor that Heather Gerken describes, in the immigration context. *See* Gerken, *supra* note 12 at 592-600. In this case, the executive branch is heeding the calls for social change of immigrant youth, and it is the states that are interfering with an interest conferred by the federal government to a historically subordinated group.

[47] United States v. Texas, 136 S. Ct. 906 (2016); The Court requested that the parties brief another separation of powers issue: whether the President violated the Take Care Clause by issuing an action that gave lawful presence to a category of individuals considered undocumented under immigration law. The Court did not address this issue at oral argument.

[48] United States v. Texas, 579 U.S. __ (2016).

government has the power to resolve the substantive issues. Because the Supreme Court remained deadlocked, the Fifth circuit's injunction was affirmed. These questions, therefore, remain ripe for future litigation involving the workplace rights of the employment authorized undocumented worker.

At oral argument, the Justices expressed three concerns involving the employment-authorized undocumented worker. First, some sought clarity about the paradox of the employment-authorized undocumented worker. Second, some sought clarity on the scope of alienage nondiscrimination principles and the extent to which they applied to the employment authorized undocumented worker. Third, some voiced concerns over executive authority to provide benefits such as employment authorization to undocumented noncitizens. All these questions signal an overriding concern about the responsibilities and benefits available to noncitizens with liminal status in the United States. In this section, I will describe these three sets of arguments. I will then analyze them –and the structuralist arguments behind them –in more detail in the sections that follow.

The first concern arises out of a strong discomfort with the anomalous status of an employment-authorized undocumented worker, as concisely captured in the question Justice Alito posed. The concern is not just with the creation of a liminal category, but with the consequences of placing undocumented individuals on the same footing as citizens in the workplace. The Justices focused on whether deferred action effectively trumped immigration statutes by converting undocumented status into some sort of lawful status (with rights) by virtue of the administration's decision to offer employment authorization to deferred action recipients. The following excerpt of the colloquy between Chief Justice Roberts, Solicitor General Donald Verrilli and Justice Alito illustrates the unease with which the Justices approached the existence of the employment-authorized undocumented worker:

> CHIEF JUSTICE ROBERTS: Lawfully present does not mean you're legally present.
> GENERAL VERRILLI: Correct.
> JUSTICE ALITO: [ ] [T]he DAPA beneficiaries are -- may lawfully work in the United States; isn't that correct?
> GENERAL VERRILLI: That's right.
> JUSTICE ALITO: And how is it possible to lawfully work in the United States without lawfully being in the United States?
> GENERAL VERRILLI: There are millions of people, millions of people other than the DAPA recipients about whom this is true right now [ ].
> JUSTICE ALITO: I'm just talking about the English language. I just don't understand it . . . How can you -- how can it be lawful to work here but not lawful to be here?[49]

[49] United States v. Texas, Oral Argument at 27-28 (April 18, 2016).

This discussion highlights the concern about the legitimacy of a status that recognizes that the individual is legitimately participating in the employment arena and yet remains illegitimate in the immigration arena. The Justices' questions reveal an unwillingness to distinguish one's work identity as an employee from one's identity rooted in immigration status.

The Justices' second concern centered on the scope of alienage nondiscrimination and equal protection principles in 42 U.S.C. § 1981, and whether this provision extended to undocumented workers. The Justices sought guidance from the litigants but the parties did not provide definitive answers. The following discussion between Justice Alito and Tom Saenz, the attorney for the noncitizen intervenors, illustrates the assumption that noncitizens with liminal status may not have standing under the Civil Rights Act of 1870:

> JUSTICE ALITO: If an employer took the position that the employer was not going to hire a DAPA beneficiary because the employer believes that they are not -- that they are not lawfully authorized to work, would prefer someone else over them, could that person sue on any theory of discrimination, for example, under Section 1981?
> MR. SAENZ: They could, Your Honor. And -- and the outcome of that case, I think, has not been clearly established by precedent so far. [ ]
> JUSTICE ALITO: If that's true then, DAPA gives them a legal right. It's more than just putting them in a low-priority prosecution status.
> MR. SAENZ: I think it's important to note, Your Honor, that work authorization is a separate determination from deferred action itself. Not everyone who receives deferred action will receive work authorization [].
> [Saenz then noted that case precedent did not give a clear answer].
> JUSTICE ALITO: What is [ ] your position on that?
> MR. SAENZ: Our position would be that it is something to be litigated. In fact, to be -- in all candor, we have litigated it to a settlement. So, no, no established precedent to make it clear one way or the other.
> JUSTICE ALITO: But work authorization, in your view, gives them a legal right they did not have before.
> MR. SAENZ: It gives them the right to work with authorization, certainly.
> JUSTICE ALITO: But you believe they do have the right?
> MR. SAENZ: They do have work authorization, and that certainly means that they ought not be subject to unreasonable discriminatory bases for denying their work. It's different from when they don't have work authorization.[50]

This exchange indicates that at least one Justice contemplated the scope of § 1981 and whether it extended to undocumented workers, and that litigants had also

[50] *Id.* at 41-43.

contemplated and advocated the position that § 1981 covers the employment-authorized undocumented worker.[51] It also illustrates, once again, the need to resolve the question of whether one's workplace identity is separate from one's identity as undocumented under immigration law.

The third concern raised by the Justices merges the substantive concerns about the rights of the employment authorized undocumented worker with the structuralist concerns about authority. It was also at the center of the states' argument supporting an injunction. The justices focused on whether the executive branch overstepped its authority to regulate immigration when it authorized employment for a group of otherwise undocumented individuals. Justice Kennedy posed questions that reflected concerns with how protections for noncitizens – including granting employment authorization –square with separation of powers principles. The federal government's position, in response, reflected a preoccupation with the practical as well as the humanitarian consequences of allowing undocumented noncitizens to remain in the country. Consider the following exchange between Justice Kennedy and Solicitor General Donald Verrilli:

> JUSTICE KENNEDY: All of the briefs go on for pages to the effect that the President has admitted a certain number of people and then Congress approves it. That seems to me to have it backwards. It's as if -- that the President is setting the policy and the Congress is executing it. That's just upside down.
> GENERAL VERRILLI: [W]e have always had a policy that says when [ ] your presence is going to be officially tolerated, you're not here, you're violating the immigration laws by being here. You don't have any rights, but your presence is going to be officially tolerated. When you're in that circumstance, we allow you to work because it makes sense to allow you to work. Because otherwise -- you're going to be here, and otherwise, if you can't work lawfully, you're [not going to] be able to support yourself and be forced into the underground economy.[52]

Justice Kennedy's concern with the extent to which the executive branch's decision to grant a benefit (employment authorization) usurps power that belongs to Congress was not addressed due to the lack of an opinion following from the split court. Justice Kennedy's concern with structuralist issues and General Verrilli's response invoking humanitarian concerns, however, reflect the difficulty in finding a balance between rights and structuralist principles.

A second colloquy between Justice Sotomayor and Texas Solicitor General Scott Keller, also explores whether the executive acted within its

[51] The exchange between Justice Alito and Thomas Saenz was, in fact, about Ruben Juarez's case, even though Ruben was not mentioned by name.
[52] *Id.* at 24-25.

authority, especially given the purpose of the 1986 Immigration Reform and Control Act to establish employer sanctions provisions in immigration law:

> MR. KELLER: [W]hat Congress did in 1986 with work authorization, and 1996 with benefits, is it restricted work and benefits as an alternative mechanism to enforce immigration law. Those judgments acknowledge there are going to be people in the country that are unlawfully present, and yet, Congress put forward those barriers to work and to benefits precisely to deter unlawful immigration. What the Executive is trying to do here is flout that determination.
> JUSTICE SOTOMAYOR: Except that the -- the work authorization ability of the Attorney General to do this has been clearly stated since 1986, and Congress hasn't taken that away. It may at some later point, but it still has not undone the 1986 regulation.
> MR. KELLER: But in 1986, Congress passed a comprehensive framework for combating the employment of unauthorized aliens. That was a decision to repudiate the past practice and enact a general Federal ban on the employment of unauthorized aliens.
> JUSTICE SOTOMAYOR: And -- and the regulation permitting the Attorney General to give work authorization to deferred-action individuals has stood since that time.
> MR. KELLER: But when that regulation was passed in 1987, the Executive said that the number covered by that regulation was so small as, quote, "to be not worth recording statistically," unquote, and, quote, "the impact on the labor market is minimal," unquote.[53]

The Justices' queries clearly identified complex issues that the Court ultimately was unable to address. Left for future cases are two key questions: to what extent does 42 U.S.C § 1981 protect undocumented noncitizens? Does the passage of IRCA and its anti-discrimination provisions define the parameters of alienage nondiscrimination principles, or is there a space left outside IRCA to extend protections to undocumented noncitizens? The current, fragmented state of immigration law doctrine fails to answer these questions fully or satisfactorily. There is no expressly articulated framework that combines anti-discrimination principles with structuralist arguments to support their enforcement. The following sections provide the statutory, historical, and precedential bases for the revival of these principles and their operation in tandem.

III. Employment Authorization and Liminal Immigration Categories

The concept of liminality in legal scholarship describes a "form of status that allows the government to maintain control over risky populations without

[53] *Id.* at 46-48.

having to offer rights-protective schemes."[54] It applies to those in subaltern or in-between states of immigration status in which noncitizens have some level lawful presence, or acknowledged presence, in the United States short of the full legal status or citizenship.[55] Liminal categories include temporary protected status, asylee status, parolee status and deferred action.[56] Those in liminal status have acknowledged presence and protection from removal but no rights or benefits.[57] A number of scholars highlight the growing schism between federal government acknowledgement of the presence of undocumented immigrants who have few rights or benefits.[58] I build on this scholarship, but also refer to liminal categories in the full senses of the word liminal. First, liminal status reflects an uneasy position on both sides of a boundary. In this case, the boundary is between "legal" and "undocumented." Here, of course, the boundary exists across substantive areas of law, and employment-authorized undocumented workers straddle a boundary that defines them as legal on one side and undocumented on the other. The employment-authorized undocumented worker lives at the intersection of two identities: her identity as an employee and her identity as a noncitizen with no recognizable legal status. The gray area for these individuals occurs because their intersectional identities are not fully recognized. Second, liminal status reflects a transitional category or an initial stage of a new process. In immigration law, I argue, it signals an initial stage of deconstructing and reconstructing a new meaning of nonstatus. As the federal government moves forward with establishing categories of in-between status like the employment-authorized undocumented worker, the nature of rights and benefits that accrue to the categories of liminality are evolving along with theories for understanding their place in our society. Liminality in this sense is a dynamic process, and we are at the initial stages of a new conception of workplace protection for undocumented workers. Liminality is important as a reference for the status of the employment-

[54] Jennifer Chacon, *Producing Liminal Legality*, 92 DENVER L. REV. 709, 709-710 (2015) (defining "liminal legal status").
[55] Cecilia Menjivar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 999-1007 (2006); Chacon, *supra* note 54 at 709-710.
[56] 8 C.F.R. § 274a.12(a)-(c).
[57] Geoffrey Heeren, *The Status of Nonstatus*, 64 AMERICAN L. REV. 1115, 1117 (2015) (defining the lack of rights or benefits for people in "nonstatus" status).
[58] *See, e.g.*, Chacon, supra note 54; Menjivar, *supra* note __ at 999-1007 (2006) (noting that legal liminality applies to those who live in subaltern statuses in the United States); Heeren, *supra* note 57 at 1117; Leisy Abrego and Sara M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 L. & POL'Y 265, 266 (2015); Leisy Abrego and Cecilia Menjivar, Immigrant Latina Mothers as Targets of Legal Violence, 37 INT'L J. SOC. FAM. 9, 12-14 (2011); Susan Bibler Coutin, et. al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 115-16 (2014); Miranda Cady Hallett, *Temporary Protection, Enduring Contradiction: The Contested and Contradictory Meanings of Temporary Immigration Status*, 39 LAW AND SOCIAL INQUIRY 621, 621-26 (2014); Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RIGHTS REV. 367, 374 (2013) (noting that balkanization of non-citizen categories masks the fact that immigrants, in general, lack equal protection rights).

authorized undocumented worker because it describes not just an in-between state, but the redefinition of the rights and benefits that attach to that category. It is crucial that rights and benefits be established at this initial point.

Recipients of DACA deferred action like Ruben Juarez are emblematic of the growing population of immigrants with liminal status, and this group has become a lightning rod for opponents who argue that noncitizens should not receive extra benefits due to their liminal status. Critics begin with a binary assumption that citizens have full rights and privileges, and undocumented immigrants have no rights and privileges. This assumption is strongly rooted in a recent general trend to strip undocumented immigrants of the rights and benefits offered to those with citizenship or some other form of full legal status.[59] Restrictive changes in welfare and social benefits laws reflected a normative sentiment that undocumented noncitizens did not deserve access to most federal benefits, including medical care, social security, welfare benefits, and sometimes even unemployment benefits or workers compensation.[60] The categories were the crystallized: one is either documented or not under immigration law and the designation carried over into other areas of law.

It was against this simple and intuitive framework that President Obama created expanded DACA and DAPA. By providing employment authorization to a large number of undocumented immigrants, the Obama administration challenged the assumption that undocumented immigration status precluded access to all rights and benefits.

A. The Construct of Employment Authorization and its Connection with Anti-Discrimination Principles

The notion of employment authorization is a relatively new concept in the world of immigration regulation. Until 1986, workers did not need to verify their work authorization because employers were not subject to penalties for employing workers without such authorization.[61] In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which required employers to ensure

[59] *See* Heeren, *The Status of Nonstatus*, *supra* note 57 at 1117 (arguing that the "nonstatus" category has grown precisely because government officials can offer a form of legal status without rights, which makes their presence less controversial); Sameer Ashar, Edelina Burciaga, Jennifer Chacon, Susan Bibler Coutin, Alma Garza, Stephen Lee, *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions,* UCI Legal Studies Research Paper Series No 2016-5 (2016) (exploring the "hardships and barriers to incorporation imposed by liminal legal status" and "the ways that uncertainty has reshaped the social, political, and legal environment in which immigrant-serving organizations and their constituents interact").

[60] *See* Personal Responsibility and Work Opportunity Reconciliation Act, Publ. L. No. 104-193, 110 Stat. 2105 (1996) (denying benefits to all but select categories of noncitizens such as lawful permanent residents, asylees, refugees and certain parolees).

[61] IMMIGRATION REFORM AND CONTROL ACT, Publ. L. 99-603; 100 Stat 3445 (1986).

employment authorization as a means of immigration regulation designed to reduce the number of undocumented persons by removing their ability to support themselves.[62] During the past thirty years, employers have been legally responsible for ensuring that they do not hire unauthorized workers.[63] Although the concept of employer sanctions for undocumented work had been around since the 1950s, the requirement that prospective employees had to prove their immigration status was new.[64]

Recognizing that a system of employment verification that held employers accountable might result in employers refusing to hire foreign-born or foreign-looking workers, Congress included anti-discrimination provisions on the basis of alienage in IRCA as a form of counter-balance to the employer sanctions provisions.[65] On one hand, IRCA would punish employers who fostered the influx of noncitizen workers, particularly those who knowingly hired undocumented workers.[66] On the other hand, the anti-discrimination provisions would ensure that employers did not avoid sanctions simply by refusing to hire foreign-looking workers, or by treating them differently.[67] In this balance, Congress acknowledged that the federal government has the power to regulate immigration, but also that it also has a duty to enforce equal protection of laws for all, including foreign-born immigrants. Employers chafed at the prospect of liability for hiring undocumented workers and eventually sought safe harbors in the employer sanctions provisions protecting them from liability for good faith efforts at compliance.[68] Nonetheless, both employer sanctions and anti-discrimination provisions remain in the statute. With the rise of liminal immigration categories, the issue is now whether this or other anti-discrimination laws apply to undocumented employees.[69]

B. The Traditional Paradigm for Protection: Linking Documented Immigration Status with Employment Authorization

The traditional paradigm for workplace protection of noncitizens hinges, for the most part, on an assumption that employment authorization is a proxy for documented immigration status. Assuming this framework, courts have developed doctrines that provide protections for immigrant workers. If a worker is both an employee and has employment authorization, employment laws protect her, for

[62] *See* I.N.A. § 274; 8 U.S.C. § 1324a.
[63] I.N.A. § 274; 8 U.S.C. § 1324a.
[64] See USCIS Form I-9, *available at* http://www.uscis.gov/sites/default/files/files/form/i-9.pdf.
[65] I.N.A. § 274A; 8 U.S.C. § 1324b
[66] I.N.A. § 274; 8 U.S.C. § 1324a.
[67] I.N.A. §274A; 8 U.S.C. § 1324b.
[68] See, INA § 274A(a)(3).
[69] See text, Section II, *supra.* The justices in *United States v. Texas* asked questions during oral argument about the scope of anti-discrimination provisions in 42 U.S.C. § 1981, and whether that provision covered undocumented individuals after the passage of the employer sanctions provisions in IRCA.

the most part. If a worker was an employee but did not have legal immigration status, courts mediated the perceived tensions between immigration law's enforcement goal and employment law's goal of protecting workers and held employers liable for employment violations to the extent possible without interfering with immigration law. The Supreme Court adopted this posture in *Sure-Tan v. NLRB*,[70] holding that immigrant workers are protected under employment statutes, but that their right to be reinstated depended on proving they had employment authorization. In *De Canas v. Bica*,[71] the Court held that immigrant workers are protected under federal law, but were also subject to state regulation as long as Congress had not preempted the forms of regulation the states imposed. In *Espinoza v. Farah Mfg.*,[72] the Court held that alienage was not a protected category deserving of strict scrutiny, but confirmed that immigrant workers could seek the protection of national origin anti-discrimination principles on a showing that alienage was a proxy for national origin discrimination. Finally, in *Hoffman Plastic Compounds v. NLRB*,[73] the Court held that immigrant workers could reap the benefits of employment law protections, but receiving full protection was conditioned upon establishing legal immigration status. In each of these cases, the Court assumed that employment authorization signaled some form of lawful status.

Even as the Court has struggled to mediate the tensions between the purposes of employment law and immigration law, specific legislation in various areas of law has created a patchwork of anti-discrimination protections for noncitizens. First, the Immigration and Nationality Act itself protects against immigration-related discrimination against certain categories of noncitizens. Second, Title VII protects immigrants who are discriminated against because of their national origin, sex, color, race or religion. Third, 42 U.S.C. § 1981 protects immigrants from alienage discrimination. While these laws hold the promise of protection for the employment-authorized undocumented worker, they have not been interpreted to provide full protection.

1. The Anti-Discrimination Protections of the Immigration and Nationality Act

The Immigration and Nationality Act includes an anti-discrimination provision that protects workers against certain forms of discrimination.[74] The purpose of the provision was to prevent discrimination by employers as they verified whether an applicant was eligible for work. The provision prohibits: 1) discrimination on the basis of citizenship status in hiring, firing, or recruitment or

[70] 467 U.S. 883 (1984).
[71] 424 U.S. 351 (1976).
[72] 414 U.S. 86 (1973).
[73] 535 U.S. 137 (2002).
[74] I.N.A. § 274B, 8 U.S.C. § 1324b.

referral for a fee,[75] 2) discrimination on the basis of national origin in hiring, firing, or recruitment or referral for a fee,[76] 3) document abuse by establishment of unfair documentary practices during the verification of employment eligibility,[77] and 4) retaliation or intimidation.[78]

The statute specifically states that U.S. citizens, recent permanent residents, temporary residents, asylees and refugees are all protected from citizenship status discrimination. The statute does not expressly contemplate the employment-authorized undocumented worker category. The Office of Special Counsel for Immigration-Related Unfair Employment Practices of the Department of Justice (OSC), charged with enforcing the anti-discrimination provisions, takes the position that the category is not protected from discrimination based on citizenship status.[79]

The OSC does take the position that an employment-authorized undocumented worker is protected from document abuse when an employer seeks different documentation based on citizenship status.[80] Employers are prohibited from requiring different documents than the statute requires to verify employment eligibility. In a sense, Form I-9, which all employees must sign before they start working, acknowledges that this liminal category should also be protected from discrimination by requiring proof of employment authorization rather than proof of legal immigration status.[81]

Finally, the immigration statute protects those who file charges, cooperate with an OSC investigation, who complain of unfair documentary practices, or who assert their rights under the INA's anti-discrimination provision from intimidation, threats, coercion, and retaliation.[82]

It is not clear from the statute whether Congress contemplated a distinction between employment authorization and legal status. Even if it did, however, it remains less than clear from a plain reading of the statute and the OSC's interpretation of it whether the statute itself limits the scope of other

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[75] *Id*. This section of the provision protects citizens, lawful permanent residents, and asylees and refugees.
[76] Id.
[77] *See*, USCIS Form I-9. Employers must complete Form I-9 to verify employment authorization.
[78] Id.
[79] *See*, Seema Nanda, Letter to David R. Burton, General Counsel, National Small Business Association, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/09/27/161.PDF
[80] *See*, OFFICE OF SPECIAL COUNSEL, FACT SHEET: DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) RECIPIENTS: LEARN ABOUT YOUR RIGHT TO WORK!, *available at* https://www.justice.gov/sites/default/files/crt/legacy/2014/03/05/DACA_English2.pdf.
[81] While legal immigration status for the most part indicates employment authorization, employment authorization does not necessarily indicate legal immigration status.
[82] U.S. DEPARTMENT OF JUSTICE, TYPES OF DISCRIMINATION, *available at* http://www.justice.gov/crt/about/osc/htm/Webtypes2005.php (last visited March 26, 2016).

nondiscrimination provisions such as those found in Title VII or 42 U.S.C. § 1981. I will review the limitations in their traditional interpretations next.

2. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 protects workers facing discrimination based on race, color, national origin, religion, and sex.[83] These protections extend to all workers whether documented or not. The Supreme Court held in *Espinoza v. Farah Mfg.* that Title VII of the Civil Rights Act of 1964 does not, however, specifically protect against alienage discrimination.[84] The Court considered alienage discrimination separate and distinct from the national origin discrimination covered by the Act and alleged in the litigation. The Court concluded that Title VII "prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[85]

3. 42 USC § 1981

The Civil Rights Acts of 1866 and 1870 enforced the Fourteenth Amendment. The provisions prohibiting alienage non-discrimination were eventually codified at 42 U.S.C. § 1981. That provision states:

> All *persons* within the jurisdiction of the United States shall have the same right in every State and Territory 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 persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, licenses, and exactions of every kind, and to no other.[86]

It is unclear whether this provision protects against alienage discrimination in private employment.[87] Section 1981 covers discrimination against all "persons," but the Supreme Court originally held that the Section only prohibits race discrimination by private entities, and that alienage discrimination is limited to public entities.[88] The Civil Rights Act of 1991 amended § 1981 to apply to private discrimination, and lower courts have concluded that § 1981 now applies to

[83] The Equal Rights Act, The Age Discrimination in Employment Act and the Pregnancy Discrimination Act were all modeled on Title VII and these anti-discrimination statutes also protect workers from age- and sex-based discrimination regardless of the employee's immigration status.
[84] Espinoza v. Farah Mfg., 414 U.S. 86 (1973).
[85] Espinoza v. Farah Mfg., 414 U.S. at 92.
[86] 42 U.S.C. § 1981.
[87] Compare Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998) with Duane v. GEICO, 37 F. 3d 1036 (4th Cir. 1994).
[88] Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948) (CA law barring issuance of fishing licenses to those ineligible for citizenship held invalid).

alienage discrimination by private parties.[89] Arguably, employees who lack both work authorization and documented immigration status should be protected as "persons," under § 1981, but employers have vigorously contested this reading.[90]

In sum, there is little indication of a broad-based equal protection basis for protecting undocumented noncitizens, whether or not they are employment-authorized.[91] I argue below that fusing the structuralist principles with the grounds for non-discrimination theories provides a theory of protection for noncitizens in the workplace, including those who are undocumented.

In the next section, I defend the President's executive authority and challenge reliance solely on structuralist principles (such as separation of powers) to determine the answer. I then provide a legal framework that brings together structuralist analysis with equality principles to provide a more historically accurate basis for protecting aliens against discrimination in the workplace.

IV. Employment Authorization and Executive Authority: The Structuralist Lens

The structuralist articulation of the problem with the employment-authorized undocumented worker was reflected in the state of Texas' legal challenge to the President's authority, and in the justices' concerns expressed during oral argument. Instead of the rights under employment law that should logically follow from work authorization, employers argue that workers who are undocumented under immigration law cannot share fully in workplace rights.

A. *Hoffman* as the Doctrinal Archetype: What the Arguments Look Like Without the Infusion of Rights Principles

To date, courts have not directly address the tensions between immigration enforcement and employment law's anti-discrimination protections in a

[89] 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law"). See e.g., Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998) (holding that 42 U.S.C. § 1981 applies to public and private alienage discrimination); Duane v. GEICO, 37 F.3d 1036 (4th Cir. 1994); see also, Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 Kansas L. Rev. 457 (2001), for a description of the statute's origins, the scope of its protection, and the lack of clarity in the doctrine; Rachel Bloomekatz, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. Rev. 1963, 1997-2002 (2007) (describing the obstacles to applying alienage discrimination to the private workplace).

[90] *See*, Motomura, *The Rights of Others*, *supra* note 10 at 1728; *See also*, Juarez v. Northwestern Mutual Life Ins. Co., 14-cv-5107 (S.D.N.Y.).

[91] One clear exception is the Court's pronouncement in *Plyler v. Doe* that undocumented immigrants were protected even if undocumented, under equal protection principles. *Plyler v. Doe*, 457 U.S. 202 (1982); *see also*, Hiroshi Motomura, *The Rights of Others*, *supra* note 10 at 1736–38.

comprehensive manner. Instead, there is a patchwork of principles that remain silo-ed and stilted.[92] In the immigration context, the President's authority is balanced against that of Congress, with only a limited role for the states, and even less of a role for the adjudication of rights principles.[93] In the employment context, courts balance employment law purposes against the development of a worksite enforcement scheme. The Supreme Court's decision in *Hoffman Plastic Compounds v. NLRB*[94] is an example of the silo-ed approach to the rights of undocumented workers.

In *Hoffman,* the Supreme Court held that undocumented workers did not have the same remedies for unfair labor practices as their co-workers with legal status.[95] The Court noted that if government agencies provided undocumented workers with all remedies available to citizens (or those with legal status), it would undermine the employment sanctions and verification system that Congress established to deter undocumented immigration.[96] The Court portrayed immigration and employment law policies as creating a fundamental tension.[97] With regard to a specific question in issue, the Court held that the NLRB could not seek back pay remedies for undocumented workers who suffered unfair labor practices, because those workers were not permitted to work.[98] Other remedies for injuries caused to undocumented workers were protected, but the back pay issue highlighted the tensions between immigration policies and labor policies. In the end, the Court interpreted the immigration statute as giving priority to congressional intent to enforce immigration laws through workplace regulation over the rights of all workers to be protected from unfair labor practices.[99]

The Court's construction of membership in the workplace restricted the benefits available to those who violate immigration laws.[100] The consequence for crossing the border without authorization, in other words, is unequal rights-

[92] *See* text, section III.B., *supra.*
[93] *See* Stephen Legomsky, *Immigration Law and the Principle of Congressional Plenary Power*, 1984 SUPREME COURT REVIEW 255-258 (1984) (describing the nature and power of the plenary power doctrine in the immigration context); Arizona v. United States 132 S. Ct. 2492, 2498 (2012). ("the federal power to determine immigration policy is well settled.")
[94] Hoffman Plastic Compounds v. NLRB, 535 U.S. 137 (2002).
[95] Hoffman Plastic Compounds v. NLRB, 535 U.S. at 159-61.
[96] Hoffman Plastic Compounds v. NLRB, 535 U.S. at 149-50 (2002).
[97] Under the employment law doctrines, all workers have rights in the workplace regardless of immigration status.
[98] Hoffman Plastic Compounds v. NLRB, 535 U.S. at 140 (2002).
[99] Hoffman Plastic Compounds, 535 U.S. at 140 (2002). The premise that immigrant workers are full members in the workplace regardless immigration status has been challenged repeatedly since then, yet courts continue to interpret employment statutes to provide protection to immigrants in their roles as workers. *See, e.g.*, Flores v. Albertson's, 2003 WL 24216269 (C.D. Cal. 2003); Rivera v. Nibco, 364 F.3d 1057 (2004).
[100] See, Keith Parmeter, *Redefining the Rights of Undocumented Workers,* 58 AM. U. L. REV. 1361, 1401 (2009).

protection in the workplace.[101] The Department of Homeland Security, in this narrative, becomes the enforcer of a system in which the world is divided into those who deserve full workplace protections and those who do not. Those who do not are defined statically by their initial unlawful entry (or their initial violation of immigration law). The role of the Court is to define the scope of rights available to noncitizens based on unlawful status that distinguishes membership and non-membership.[102] The Court in this case placed great emphasis on the purpose of the statute to keep undocumented noncitizens out of the workplace, and as a result, defined their workplace rights based on their undocumented immigration status.

B. The Employment-Authorized Undocumented Worker Under DACA/DAPA: What the Arguments Look Like When Rights Principles are Infused

Under the Obama administration, the Department of Homeland Security responded to *Hoffman* by re-asserting the executive branch's authority to determine who should be deported, but also who might be permitted to remain and have authorization to work. The President has asserted such authority – historically and post-*Hoffman* –by issuing employment authorization to undocumented workers who do not fit into any category of legal or impending legal status.[103] In other words, the agency's response turns the *Hoffman* Court's definition of membership based on adherence to immigration laws on its head. The DHS has used the employment verification system to confer employment authorization, which in itself constitutes a form of legal status by providing membership in the workplace. Membership does not confer employment authorization; rather, employment authorization confers membership, at least in the workplace. Under this approach, membership is not defined only by an individual's form of entry into the country. This construction shifts the meaning of membership in the workplace for the employment-authorized undocumented worker. What was before considered a benefit –work authorization –is now the focal point for identifying who belongs in the workplace. It is the beginning of an acknowledgement that a noncitizen can have multiple and intersectional identities depending on the context. This paradigm reversal has the potential to effect a revolutionary shift in the discourse about immigrants' rights in the workplace, but it faces strong structural challenges that the administration exceeded its authority under the immigration statutes to create this new liminal status.

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[101] *Id.*
[102] *Id.*
[103] Presidents have exercised their authority to grant employment authorization to liminal categories of immigrants pursuant to congressional delegation under I.N.A. § 274A(h)(3) and its implementing regulation, 8 C.F.R. 274a.12(c)(1)-(25). See also, United States v. Texas, Petitioners' Merits Brief at 6, 15-674 (March 2016) (hereinafter, "Petitioners' Merits Brief").

The federal government argued in *United States v. Texas* that the DHS had long asserted the authority to grant employment authorization through a proper delegation from Congress.[104] This authority preceded the DACA/DAPA executive action by decades.[105] At the same time, Congress allowed the executive branch to determine the categories of individuals who would receive deferred action, *for its convenience.*[106] Congress granted the agency this broad authority precisely to enable the agency to create what is now the vast and largely expanded infrastructure for worksite enforcement. If Congress had not vested the agency with flexibility in creating the categories for proper employment authorization, the carefully-created compromises in the employer sanctions provisions would not have been sustainable.

Congress granted the executive branch the authority and discretion to provide employment authorization to certain classes of noncitizens. INA § 274A(h)(3) defines an "unauthorized alien" for employment purposes:

> As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.[107]

The clear meaning of this language is to give the Attorney General discretion to authorize employment under the Act. IRCA provides specific guidance to the agency about its power to determine who is eligible for work, and yet it is silent on the question of how any status other than "lawfully admitted for permanent residence" should be considered. Instead, the Act provides that "[t]he Attorney General shall, not later than the first day of the seventh month beginning after the date of enactment of this Act, first issue, on an interim or other basis, such regulations as may be necessary in order to implement this section [which included INA § 274A]."[108]

The Attorney General acted pursuant to this power, issuing regulations governing the types of individuals who were employment authorized by virtue of their immigration status as well as those eligible to apply for employment authorization subject to agency approval. Among those authorized to apply for employment authorization subject to agency discretion were individuals with deferred action.[109]

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[104] United States v. Texas, Petitioners' Reply Brief on Writ of Certiorari at 10-11 (January 2016).
[105] Petitioners' Merits Brief at I.
[106] United States v. Texas, Petitioner for Writ of Certiorari at 4-5 (November 2015).
[107] I.N.A. § 274A(h)(3).
[108] Immigration Reform and Control Act, P.L. 99-603, sec. 101(n)(2).
[109] See 8 CFR 274a.12(c)(14).

It is important to remember that employment authorization provisions were developed as a comprehensive worksite enforcement scheme aimed at punishing *employers* for hiring unauthorized workers, and not to punish undocumented employees.[110] The goal was to eliminate a motivation to immigrate without documents, and not to punish those who already had entered the country. Congress regarded employment authorization as a means to provide a safe harbor for employers who were wary of the potential for liability. Employers fought very hard to ensure that they were not converted into private immigration enforcement officers. Employers, as well as Congress, therefore, sought to leave discretion to the agency to make decisions granting employment authorization, especially in those cases in which immigration status itself did not automatically confer employment authorization. The agency's regulations, implemented in 8 C.F.R. 274a.12(c), list at least twenty-five such situations.[111] Employment authorization, therefore, has become a critical element in the enforcement scheme designed to protect employers by providing a safe harbor. That the challenge to President Obama's executive actions has challenged the legitimacy of employment authorization some 30 years after implementation should cause both employers and workers great concern.

If employment authorization is well grounded in law, it is equally the case that alienage discrimination principles are necessary. Here, rights principles are central to congressional purpose. Congress understood that without civil rights protections, employers would have an incentive to avoid sanctions simply by not hiring employees who looked foreign.[112] IRCA's civil rights provision became part of the grand bargain between Congress and employers in the implementation of worksite immigration enforcement. Under the IRCA alienage discrimination provision, an employer cannot discriminate against an employment-authorized worker on the basis of alienage. As described earlier, the Department of Justice typically has utilized the citizenship status provision to charge employers with discrimination when they seek different qualifications or create additional requirements for naturalized or dual citizens.[113]

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[110] *See*, Arizona v. United States, 132 S. Ct. 2492 (2012) (concluding that the Immigration Reform and Control Act's employer sanctions provisions reflected congressional purpose to punish employers and not employees for unauthorized work).

[111] 8 C.F.R. 274a.12(c)(1)-(25).

[112] H.R. Conf. Report No. 1000, 99th Cong. 1st Sess. (1985); see also, *Motomura, The Rights of Others, supra* note 10 at 1728 (arguing that protections for undocumented workers are indirect, taking the form of protections for citizens).

[113] Recent Office of Special Counsel settlement announcements illustrate examples of citizenship status discrimination. *See, e.g.*, City of Eugene Police Department Settlement Agreement (Department of Justice alleged that employer's requirement of citizenship at hiring differed from Oregon law requiring citizenship within 18 months of hiring) available at http://www.justice.gov/crt/file/778296/download; Acountemps Settlement Agreement (Department of Justice alleged that employer refused to refer for hiring a naturalized citizen because she was not native-born), available at http://www.justice.gov/sites/default/files/crt/legacy/2015/07/07/Accountemps.pdf; Data Entry Company Settlement Agreement (Department of Justice alleged employer discriminated based on

Because IRCA defines "an unauthorized alien" to exclude persons with work authorization pursuant to executive action, this provision implies that authorized employment is more relevant than actual immigration status in the workplace. The President's act of de-linking immigration status and employment authorization underscores the importance of this anti-discrimination subsection of the employer sanctions provisions. Viewed through this lens, the executive actions are faithful to the IRCA's twin purposes of identifying employers who take advantage of unauthorized work and of prohibiting employment discrimination based on alienage and national origin. The provision giving the Attorney General the ability to authorize employment[114] was put in place alongside the safe harbors in the employer sanctions provisions to ensure that employers did not discriminate and then claim that they did not have the capacity to distinguish between employment-authorized and unauthorized workers.

When Congress implemented IRCA, it defined "unauthorized alien" specifically in the statute to give the agency the flexibility to monitor, regulate and control that universe. Employment authorization does not provide any of the benefits that the Court of Appeals opinion in *United States v. Texas* imagined, including lawful status. The point of President Obama's executive actions was to de-couple employment authorization from lawful immigration status.[115] Just as Congress intended, the immigration agency is exercising flexible authority to authorize employment as it sees fit, in order to achieve the goal of rendering the employer accountable for unauthorized work under transparent conditions.

While the IRCA was comprehensive in its reach, legalizing some undocumented workers and establishing the regulatory system for penalizing future entrants, it delegated to the executive branch the authority to round out, implement and enforce what was to become the federal government's worksite immigration enforcement scheme. Structuralist theories such as the de facto delegation doctrine posit that the President has the authority to make decisions like this at the interstices of the statutory text.[116] Scholars have recognized that

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the employee's dual citizenship status), available at http://www.justice.gov/sites/default/files/crt/legacy/2015/05/29/TDEC.pdf; La Farine Bakery Settlement Agreement (Department of Justice alleged that employer refused to accept work authorization documents of noncitizen, in violation of citizenship status provisions), available at http://www.justice.gov/sites/default/files/crt/legacy/2014/12/04/LaFarine.pdf.

[114] I.N.A. § 274A(h)(3).

[115] The states and the lower courts have used "lawful presence" and "lawful status" interchangeably in their discussions of the effects of the President's proposed plans on immigration status. Lawful presence is not defined in the Immigration and Nationality Act, but it is defined in regulations implementing the Social Security Act. The lawful presence requirement was added to the Social Security Act by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-93), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208). The regulations implementing the requirement define several categories of lawful presence, including deferred action. 8 C.F.R. § 103.12.

[116] *Id.*

worksite enforcement is largely a regulatory affair,[117] because there simply is no law of the undocumented worker.[118] Instead, a two-pronged regulatory scheme draws on historical principles and precedent to punish employers who violate the statute and to protect undocumented immigrant workers from discrimination.

The next section of this article discusses the history of alienage discrimination and provides support outside of the structuralist lens for a doctrine expansive enough to protect the category of the employment-authorized undocumented worker.

V. Equal Protection for the Foreign-Born: The Development of Alienage Nondiscrimination Principles

Although extending protections to noncitizens that are on a par with citizenship rights is deeply contested, at important points in our history it has been accepted as necessary.[119] There is no firm historical basis for different rights being conferred based on subcategories of immigration status. As early as the Civil Rights Acts of 1866 and 1870, the protections provided to persons were not contingent on those persons having a pathway to citizenship. Just the opposite was the case. Bias against immigrants was the motivation for the prohibition of alienage discrimination, and during our history Congress has sought to prevent such forms of discrimination. It is only recently that the alienage discrimination category has been diminished in our jurisprudence, relegating relief to the protections against national origin discrimination.[120] This section revives the viability of alienage discrimination for the ever-increasing liminal categories under immigration law by returning to first principles. The meaning of equal protection and due process under the Fourteenth Amendment has evolved, and this has implications for the protection of noncitizens.

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[117] *See generally, e.g.,* Adam Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 Sup. Ct. Rev. 31 (2013); Adam Cox and Cristina Rodriguez, *The President and Immigration Law*, 119 Yale Law Journal 458 (2009); Adam Cox and Cristina Rodriguez, *The President and Immigration Law Redux*, 125 Yale Law Journal 104 (2015); Adam Cox, *Immigration Law's Organizing Principles*, University of 157 Pennsylvania L. Rev. 341 (2008); Adam Cox and Eric Posner, *Second-Order Structuring of Immigration Law*, 59 STANFORD L. REV. 809, 845-49 (2007); Pratheepan Gulasakaram and David Rubenstein, *Immigration Exceptionalism(s)* (on file with author); Kerry Abrams, Plenary Power Preemption, 99 Virginia L. Rev. 601 (2013); David S. Rubenstein, *Black Box Immigration Federalism*, 114 Michigan L. Rev. 983 (2016).

[118] Cox and Rodriguez, *The President and Immigration Law Redux*, supra note 117 at 162-63; see also Kati Griffith, *Discovering 'Immployment Law': The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y L. REV. 389, 393 (2011*)* (coining the phrase 'immployment law' to describe the preemption framework protecting workers at the intersection of immigration and employment law).

[119] See Cong. Globe, 41st Cong., 2d Sess. 323 (1870) (introduction of S.365 by Senator William Morris Stewart, which proposed to expand protections of the Civil Rights Act of 1866 to aliens).

[120] See e.g., EEOC GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION, *available at* http://www.eeoc.gov/policy/docs/national-origin.html.

A. The Thirteenth Amendment, Alienage Protection and Alienage-Based Forms of Servitude

At the time of the debates over whether citizens or persons should be protected under the Thirteenth and Fourteenth Amendments and their enforcing legislation, debates were also raging about the scope of rights and protections available to noncitizens subject to various forms of servitude, especially Chinese immigrants.[121] Debates that led to the enactment of the Thirteenth Amendment focused on federal power to control state and private actions. At the time, Congress focused on abolishing slavery, peonage, involuntary or indentured servitude and similar alienage-based forms of forced labor.[122] Historians agree, for example, that peonage and the coolie system of indentured servitude were widespread at the time, and on the minds of legislators debating the Thirteenth Amendment.[123] The Supreme Court affirmed the application of the Thirteenth Amendment to peonage and the coolie system in *The Slaughterhouse Cases.*[124] The Thirteenth, Fourteenth and Fifteenth Amendments addressed traditional notions of slavery, but the Thirteenth Amendment "forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."[125] The Court reiterated its interpretation of the broad scope slavery in *Robertson v. Baldwin*, noting that,

> The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" were said in the Slaughterhouse cases, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name.[126]

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[121] NAJIA AARIM-HERIOT, CHINESE IMMIGRANTS, AFRICAN AMERICANS, AND RACIAL ANXIETY IN THE UNITED STATES, 1848-82, 110-111, 117 (2003).
[122] *Id.* at 110.
[123] *See, e.g.,* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws,* 3 ASIAN AMERICAN LAW JOURNAL 55, 72 (1996).
[124] In Re Slaughter-House Cases, 83 U.S. 36, 72 (1872).
[125] *Id.*
[126] *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897) (holding that the Thirteenth Amendments does not apply to seamen contracts).

It follows that the protections of the Thirteenth Amendment have never been limited to citizens.[127] Even before the passage of the Thirteenth Amendment, Congress had passed legislation prohibiting the coolie trade, in part because it was akin to slavery.[128] The choice to protect persons rather than just citizens was a conscious choice. Admittedly, efforts had long been underway to eliminate the migration flow from China to the United States by excluding Chinese immigrants entirely.[129] The ban was rationalized by assertions that the Chinese laborers coming to the United States were not interested in either citizenship or assimilation.[130] Nonetheless, the debates surrounding the abolition of slavery included protection for those who were already in the United States under some form of involuntary labor contract.[131]

B. *Dred Scott*, Citizenship Status, and the Civil Rights Act of 1866

Although the Thirteenth Amendment and its enacting statute, the Civil Rights Act of 1866, clearly abolished slavery, they did not answer the question of whether foreign-born status mattered in the distribution of rights and protections. The Supreme Court's *Dred Scott* case, decided before the passage of the Thirteenth Amendment, established the baseline assumption that free Blacks and Whites did not share the same civil, social and political rights, and also that citizenship status was relevant in the distribution of the privileges of citizenship.[132] The Supreme Court held that an African American man born in the United States, suing for his freedom in a state where he was considered a free man, was nonetheless the property of another, and not a U.S. citizen.[133] The Court went on to declare that as a native-born noncitizen, Dred Scott could not claim the privileges of citizens (all of whom were white under the then-current definition of citizenship).[134] The dissent excoriated the majority opinion, arguing that nothing in the Constitution or in Congressional action gave rise to a category such as the native-born noncitizen.[135] One was either a citizen or an alien, the dissent noted, and even then, one need not hold any form of citizenship status to enjoy the commonly accepted privileges of citizenship.[136] The dissent's arguments reflected the thinking of the Radical Republicans of the time that formal citizenship (open

[127] *See* Torok, *supra* note 123 at 73.
[128] An Act to Prohibit the Coolie Trade by American Citizens in American Vessels, 12 Stat. 340 (1862); *see also*, Cong. Globe, 37 Cong., 2nd Sess. 556 (1862) (Senate Report noting that the coolie trade was a species of slavery).
[129] *See* CHARLES MCCLAIN, *supra* note 20 at 10-11 (1994) (noting that calls for Chinese exclusion, occurring as early as 1852, were made in the name of protecting Chinese victims of involuntary labor contracting or coolie trade agreements).
[130] *Id.*
[131] *Id.*
[132] Dred *Scott v. Sanford*, 60 U.S. 393 (1857).
[133] *Dred Scott*, 60 U.S. at 406-07.
[134] *Dred Scott*, 60 U.S. at 417.
[135] *Dred Scott*, 60 U.S. 393 at 588.
[136] *Dred Scott*, 60 U.S. 393 at 582-84.

only to whites) was not the only status to which rights attached.[137] The competing arguments in Dred Scott formed the background of the debates that led to passage of the Fourteenth Amendment and the Civil Rights Act of 1866.

C. The Burlingame Treaty and the Civil Rights Act of 1870: The Genesis of 42 U.S.C. § 1981

After several years of courts stripping rights and privileges from the Chinese immigrant community – most notably testimonial rights and privileges in court –the United States entered into a treaty agreement with China to guarantee that Chinese immigrants would be protected in the United States.[138] The Burlingame Treaty, negotiated in 1868 and ratified soon after, included two provisions that were intended to provide relief from discrimination to Chinese immigrants. The first recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively for purposes of curiosity, of trade, or as permanent residents."[139] A second provision stated that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."[140] The same month that the Burlingame Treaty was signed, Congress passed the Equal Protection Clause, which forbade the states from denying the equal protection of the laws to any persons within their jurisdiction. The general consensus was that the Equal Protection Clause, reaffirming the provisions of the Burlingame Treaty, applied to Chinese immigrants, whether or not they were native-born.[141]

The question remained whether the Civil Rights Act of 1866 protected only citizens and against race discrimination. The Fourteenth Amendment was much broader, but only protected persons against discrimination by a state. By the time Congress debated the terms of the Civil Rights Act of 1870, advocates for the Chinese advanced two primary complaints: 1) Chinese were unfairly singled out for mining taxes and commutation taxes, and 2) Chinese were still not allowed to testify in courts, thereby jeopardizing their properties and their lives.[142] As the push for anti-immigration legislation mounted to severely limit the Chinese population in the United States, Senator William Morris Stewart, who had prosecuted cases in which Chinese were held not able to testify, offered a bill that would expand the scope of the Civil Rights Act of 1866 to protect all persons, not

[137] For an analysis of the meaning of the Citizenship Clause that eventually ended up in the Fourteenth Amendment, see Mark Shawhan, *By Virtue of Being Born Here: Birthright Citizenship and the Civil Rights Act of 1866*, 15 HARVARD LATINO LAW REVIEW 1 (2012).
[138] Burlingame Treaty of 1868.
[139] MCCLAIN, *supra* note 20 at 30.
[140] Id.
[141] AARIM-HERIOT, *supra* note 121 at 117.
[142] MCCLAIN, *supra* note 20 at 30.

just citizens.[143] His initial bill made it clear that he sought the protection of the Chinese population.[144]

> We are inviting to our shores, or allowing them to come, Asiatics .... It is as solemn a duty as can be devolved upon the Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens . . . [W]e will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and the same laws that other men are.[145]

To be clear, Senator Stewart was not a supporter of full integration of the Chinese community. To the contrary, he –and many of his colleagues who supported equal protection for aliens –was opposed to the suffrage or the naturalization of Chinese. While Stewart and his colleagues perceived a distinction between equal treatment and the privilege to vote, they nonetheless understood that the Chinese community deserved equal protection of the laws regardless of their inability to participate fully in the polity.[146]

Congressman Stewart's provision, with minor changes, became sections 16 and 17 of the Civil Rights Act of 1870, the implementing legislation of the Fourteenth Amendment. As noted historian Charles McClain suggests, "while the overriding purpose of that act was to protect black voters in the South in the exercise of the franchise and other civil rights, no one in Congress could have had any doubt that Section 16 [of the Civil Rights Act] was aimed at securing the rights of the Chinese."[147]

The text of Sections 16 and 17 of the Act, both of which protect aliens, state as follows:

> [Section 16]: [A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States

[143] S.365, Cong. Globe, 41st Cong., 2d Sess. 323 (1870).
[144] McClain, *supra* note 20 at 38; S. 365, 41st Cong., 2d Sess., Cong. Globe (1869-70), p. 1536 (stating "That all persons within the jurisdiction of the United States, Indians not taxed or 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, regulations, 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.").
[145] MCCLAIN, *supra* note 20 at 39; S. 810, 41st Cong., 2d Sess., Cong. Globe (1869), p. 3658.
[146] AARIM-HERIOT, *supra* note 121 at 110, 117.
[147] MCCLAIN, *supra* note 20 at 40.

> 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 punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. …[148]
>
> [Section 17]: And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[149]

Section 16 of the Act expanded the realm of protection to persons (as opposed to just citizens). Legal scholar Lucas Guttentag notes that "the effect of Section 16 was to prohibit discrimination both on the basis of alienage (persons versus white *citizens*) and on the basis of race (persons versus *white* citizens)."[150]

Despite passage of the Civil Rights Act of 1870, state and local authorities refused to give effect to its provisions. To the contrary, they enacted laws and ordinances designed to single out Chinese seeking to earn a living. In San Francisco, for example, local officials considered several ordinances affecting the Chinese population: one imposing a tax on laundries, another requiring that prison inmates have their hair shaved off (widely considered a humiliation for Chinese men, who wore their hair in a queue), and a third requiring coroner's approval to dis-inter bodies before they were sent back to China.[151] The California legislature passed a constitutional amendment affecting the employment rights of Chinese.[152] Among other anti-Chinese measures, article XIX of the amendments prohibited corporations from employing Chinese and forbade their work on any public works.[153] The California legislature soon thereafter made it a crime for a corporation to hire Chinese.[154] These historical battles over the extent to which

[148] Civil Rights Act of 1870, § 16.
[149] Civil Rights Act of 1870, § 17.
[150] Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption*, 8 DUKE JOURNAL OF CONSTITUTIONAL LAW AND PUBLIC POLICY 1,17 (2013) (arguing that the Civil Rights Act of 1870 embedded an immigrant equality principle that survives today and that goes beyond the traditional immigration control principles that govern federal preemption analysis.
[151] MCCLAIN, *supra* note 20 at 82.
[152] *Id.*
[153] *Id*.
[154] MCCLAIN, *supra* note 20 at 86.

Chinese immigrants should be incorporated into the polity were mostly framed in structuralist terms, and provide the background for contemporary debates.

B. Contemporary Use of the Alienage Non-Discrimination Provisions

Section 16 of the Civil Rights Act of 1870 was codified at 42 USC § 1981, what we recognize today as the alienage nondiscrimination provision of the civil rights statutes.[155] The language of the statute has remained the same, but the Civil Rights Act of 1991 resolved that 42 USC § 1981 applied to private discrimination.[156] Subsequently, the statute has been applied in alienage discrimination employment cases in which immigrants have some form of status.[157]

After the passage of the Immigration Reform and Control Act of 1986, and the entry of immigration regulation into the workplace, however, 42 U.S.C. § 1981 has been used less effectively to challenge discrimination against undocumented workers.

At the same time that IRCA specified that only documented categories of immigrants would have protection against citizenship status discrimination, it remained silent about the scope of coverage for other sorts of workplace discrimination, including national origin discrimination in hiring, firing, or recruitment or referral for a fee; document abuse; and retaliation or intimidation. Arguably, 42 USC § 1981 fills this apparent void. Although the concepts of national origin and alienage are intertwined in our history, and might have similar historical roots, they are distinct and protect against distinct wrongs. Discrimination based on citizenship status may sometimes be more insidious because it is more effective. It feeds on insecurity about loss of sovereignty and generalized anxiety over what it means to be an American, and therefore seems more acceptable, even natural. In comparison, protections against national origin discrimination have both expanded and contracted. Contemporary doctrine holds that anti-discrimination laws require strict scrutiny to protect against workplace practices that discriminate based on alienage only when they mask a bias premised on national origin. But nation origin discrimination does not seem to protect against alienage discrimination when the root of the discrimination is based in anti-foreign sentiments. These distinctions make alienage nondiscrimination principles even more salient for the contemporary dilemma of the employment-authorized undocumented worker.

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[155] See Guttentag, *supra* note 150 at 24-26 for a description of the recodification of section 16 of the Civil Rights Act of 1870.

[156] 42 U.S.C. § 1981(c).

[157] *See*, Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998); *cf.*, Duane v. GEICO, 37 F. 3d 1036 (4th Cir. 1994). Because the Supreme Court has not ruled definitively on the issue, it remains uncertain. Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U. S. C. § 1981*, 49 U. KAN. L. REV. 457, 471 (2001).

VI. Fusing Structuralism, Equality, Due Process and Alienage: The Cases

It is easy to lose sight of the rights-based roots of structuralist arguments.[158] This is especially the case in immigration law, where exceptionalism based on plenary power doctrines has historically trumped rights-based arguments.[159] To date it has been true in immigrant employment law, where equal protection and due process principles of alienage nondiscrimination law is secondary to structuralist principles that govern which branch of government can regulate immigrants. [160] There is an important model for how we can move forward from the piecemeal and contradictory approaches in a holistic manner. In its recent cases dealing with discrimination against same-sex couples,[161] The Supreme Court has developed a response to this impasse that offers a way of conceptualizing the principles as not just intertwined but entirely compatible with a historical expectation that traditionally subordinated groups –such as noncitizens –be protected against misapplication of structuralist arguments that would continue to subordinate them. In fashioning the jurisprudence to combat discrimination against same-sex couples, the Supreme Court has been cognizant of grassroot efforts grounded in the demand for equal protection of the law. Similar grassroot efforts by immigrant rights groups are now organizing. For example, immigrant rights groups have coalesced and organized seeking protections for so-called Dreamers –immigrants who arrived in the United States without legal status when they were children. It was these efforts that motivated the Obama administration to create the initial DACA program in 2012.The time appears ripe to consider the same-sex cases as a template for how we can address the employment authorized undocumented immigrant.

A. Structuralism, Equality and Due Process: the Interlocking Gears

During the oral argument in *United States v. Texas*, Justice Anthony Kennedy focused on separation of powers arguments, asking whether executive authority could extend beyond a clear congressional purpose to limit the employment benefits available to undocumented noncitizens. Although he did not consider the potential application of alienage nondiscrimination principles to an employment-authorized undocumented worker, Justice Kennedy's jurisprudence in other areas of immigration law and in the same-sex marriage cases reveals an emerging legal framework in which structuralist principles reaffirm the rights principles that protect vulnerable populations. This legal framework was also

[158] *See e.g.*, Gulasakaram and Rubenstein, *supra* note 117 at 49-50; Motomura, *The Rights of Others*, *supra* note 10 at 1736-38; Guttentag, *supra* note 150.
[159] Gulasakaram and Rubenstein, *supra* note 117 at 30-32.
[160] *See* Hoffman Plastic Compounds, 535 U.S. at 140 (2002)
[161] *See e.g.*, United States v. Windsor, 570 U.S. __; 133 S.Ct. 2675, 2695 (2013) ; Gerken, *supra* note 12 at 588.

nascent in the historical cases establishing alienage anti-discrimination principles. Working from Justice Kennedy's opinions in *United States v. Windsor, Arizona v. United States* and his Ninth Circuit opinion in *Chadha v. United States*, I first examine how "the interlocking gears of rights and structure" operate to protect historically subordinated groups.[162] I then turn to four alienage discrimination cases, decided under 42 USC § 1981 or equal protection principles, to demonstrate more clearly how these historical cases hinted at a similar confluence of rights and structure.

1. The Interlocking Gears of the Same-Sex Cases

I argue that current doctrinal limits on alienage nondiscrimination principles and on the executive authority that created the employment-authorized undocumented worker are inappropriate because they perpetuate subordination of an identifiable and historically disadvantaged group by perpetuating a pattern of liminality among classes of noncitizens. The same-sex cases assume that structuralist theories operate in service of rights principles, to prevent further subordination of vulnerable populations. Sometimes the Court makes its reasoning explicit; other times the Court uses structuralist principles to do the work for equality and due process principles. By reconstructing the reasoning at work more fully, we may develop a model for broader application.

a. *United States v. Windsor*

Edith Windsor sued the federal government claiming that the federal Defense of Marriage Act violated the Due Process Clause of the Fifth Amendment because it failed to recognize same-sex unions in its definition of marriage.[163] New York, and other states, had recognized same-sex marriages as valid marriages. The Court first determined that the federal government's executive branch had standing to join in the effort to declare the statute unconstitutional, noting that the Court had previously entertained a similar issue in *Chadha v. United States*, a case challenging the congressional one-house veto in the immigration context. The Court addressed federalism concerns by agreeing that the federal government can, in limited circumstances, define marriage for certain federal purposes, it cannot do so in a manner that affects thousands of statutes and all federal regulation. More important, the Court held that the federal government cannot use its definition to target a class of persons the States have sought to protect, in an area of regulation traditionally left to the States.[164] The Court noted that the citizens of several states had recognized and allowed same-sex marriage through proper exercise of the states' sovereign authority. In so doing the states "allow[ed] for the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and

[162] Heather Gerken, *supra* note 12 at 592.
[163] United States v. Windsor, 133 S. Ct. 2675 (2013).
[164] Windsor, 133 S. Ct. at 2690 (2013).

constant interactions with each other."[165] The Court identified a dignity interest in the states' protection of same sex marriage, noting that it "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."[166] Justice Kennedy reasoned that the guarantee of equality meant that a "bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment that overrides state policy in a core area of concern.[167] This observation is important for the breadth of its reach. In *Windsor*, the Court noted that Congress had the purpose and effect of imposing a stigma on a group recognized as having rights at the state level, rendering that class of individuals unequal under federal law. This is not only a denial of equal protection, it is also a deprivation of the right to liberty of those it targets.[168] As the court notes with respect to the Due Process Clause, "the federal statute is invalid, for no legitimate purpose overcomes the purpose and effects to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[169] Once the States extend a benefit to a historically disadvantaged group the federal government cannot target that group for unequal treatment without risking violating their rights of due process and equal protection. Structuralist arguments – both separation of powers and federalism –protect the constitutional rights of the persons involved. In *Windsor*, the Court operationalized and articulated a theory for protecting historically subordinated groups by relying on both equality/due process principles and structuralist principles.[170]

b. *Obergefell v. Hodges*

James Obergefell sued the state of Michigan claiming that its Marriage Amendment, which prohibited same-sex marriage, violated the Constitution's equal protection and due process clauses. Justice Kennedy, writing for the majority, held that the right to marry is a fundamental right protected by the due process and equal protection clauses of the 14th Amendment. States must, therefore, recognize lawful same-sex marriages performed in other states. The Court noted that after much debate in the legislature, in public opinion and in the courts, states had come to different conclusions about the rights of same-sex couples to marry.[171] The Court analyzed the interest at stake as one embedded in a long-held tradition of respecting "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and

[165] Windsor, 133 S. Ct. at 2692 (2013).
[166] Windsor, 133 S. Ct. at 2693 (2013).
[167] Windsor, 133 S. Ct. at 2693 (2013).
[168] Windsor, 133 S. Ct. at 2695 (2013).
[169] Windsor, 133 S. Ct. at 2696 (2013).
[170] *See generally*, Heather Gerken, *supra* note 12; *see also*, Anthony O'Rourke, *Windsor Beyond Marriage: Due Process, Equality and Undocumented Immigration*, 55 WM & MARY L. REV. 2171 (2014); Anthony O'Rourke, *Substantive Due Process for Noncitizens: Lessons from Obergefell*, 114 MICHIGAN L. REV. FIRST IMPRESSIONS 9 (2015).
[171] Obergefell v. Hodges, 135 S. Ct. at 2597 (2015).

beliefs."[172] Importantly, in identifying a fundamental interest, the Court did not limit itself to those interests that have been historically or by tradition recognized as fundamental. Instead, it noted that history and tradition were guides with no predetermined or set boundary. The framers of the Fourteenth Amendment did not establish a predetermined scope of the rights protected:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimension, and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protection and a received legal stricture, a claim to liberty must be addressed.[173]

The Court then turned to equal protection principles, relying on precedents protecting the right to choose whom to marry on an equal footing with heterosexual couples.[174] As the Court noted, "[u]nder the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right."[175] The Court noted that the interrelationship between the Due Process and Equal Protection Clauses "furthers our understanding of what freedom is and must become." In other words, "new insights and societal understandings can reveal unjustified inequality with our most fundamental institutions that once passed unnoticed and unchallenged."[176] Thus, this case provides a framework for recognizing equal protection analysis while addressing structural concerns.

c. *Arizona v. United States*

In *Arizona v. United States*, the Court examined the relationship between the States and the federal government in determining the proper authority for the regulation of immigrants.[177] The Court held that federal law preempted Arizona's attempt to legislate immigration regulation because Congress legislated in the arena to the exclusion of the States and because the federal government is in a better position to deal with the effects of immigration regulation, especially with respect to foreign relations. The Court used principles of federalism and the preemption doctrine to arrive at its conclusion. At several points in the opinion, the Court alludes to the possibility that state regulation could conflict with the framework that Congress established for immigration regulation or with

[172] Obergefell, 135 S. Ct. at 2597 (2015).
[173] Obergefell, 135 S. Ct. at 2598 (2015).
[174] Obergefell, 135 S. Ct. at 2602 (2015).
[175] Obergefell, 135 S. Ct. at 2602 (2015).
[176] Obergefell, 135 S. Ct. at 2603 (2015).
[177] Arizona v. United States, 567 U.S. __ ; 132 S. Ct. 2492 (2012).

Congressional purpose in the establishment of immigration law.[178] Just as in *Windsor*, Justice Kennedy emphasizes that structuralist theories operate in service of broader principles of governance. In this case, those principles dictate that laws be determined based on a "political will informed by searching, thoughtful, rational civic discourse."[179] The discourse, in other words, must take place through a process that, historically, Congress has determined. Although unstated in the opinion, that same process has also historically included rights and protections for the foreign-born. Thus, the Court invoked the structuralist principle of the plenary power doctrine to protect noncitizens from unequal application of state laws.

d. *Chadha v. United States*, *Ninth Circuit*

Chadha v. United States reached the Supreme Court on appeal from a Ninth circuit opinion written by then-Judge Kennedy. Justice Kennedy's opinion utilizes separation of powers principles to ensure protection of an individual noncitizen's rights to due process in immigration removal. Justice Kennedy concluded that an integrated government would best secure the liberties of persons within its jurisdiction.[180] The goal is to ensure the protection of individual liberties.[181] *Chadha*, involved the disruption of due process protections in removal proceedings by a congressional veto mechanism. The congressional one-house veto had "an indirect effect upon all aliens who must rely on an administrative application of the statute in the first place."[182] It was structurally infirm to permit Congress to exercise selective power to overturn individual executive decisions. Justice Kennedy's decision on structural grounds protected individual rights of noncitizens in removal just as the Framers intended: "Questions of constitutional power [] necessarily requires us to examine enactments from the standpoint of the framers, who were concerned that defects in formal structure be corrected before leading to real or perceived abuses of power at a later date."[183]

Justice Kennedy's opinions in these four cases demonstrate what Heather Gerken has termed "the interlocking gears of rights and structure."[184] Structural principles were invoked in the service of equality and due process principles. Sometimes the operation was explicit and sometime implicit. Yet, the results were the same: the interlocking principles created spaces in which the authority of the government to protect historically subordinated groups was upheld. We now will

[178] Arizona v. United States, 132 S. Ct. at 2504-05 (2012).
[179] Arizona v. United States, 132 S. Ct. at 2510 (2012).
[180] Chadha v. INS, 634 F.2d 408, 425 (1981)
[181] Chadha v. INS, 634 F.2d at 425 (1981).
[182] Chadha v. INS, 634 F.2d at 431 (1981).
[183] Chadha v. INS, 634 F.2d at 436 (1981).
[184] Gerken, *supra* note 12 at 592.

apply this model to alienage discrimination cases to illustrate how the interlocking gears operate in this setting.

2. The Interlocking Gears Suggested in the Alienage Discrimination Cases

Looking back through the prism of Justice Kennedy's opinions we can recognize that the seminal alienage discrimination cases acknowledge a space of regulation over immigrants that supercedes plenary power principles (by subjecting immigration exceptionalism to equal protection restrictions on federal power) as well as state efforts to subordinate noncitizens (by asserting federalism principles). The legal framework in which structuralist principles support substantive equal rights and due process protections has existed in the alienage discrimination cases but was unrecognized. In four major alienage discrimination cases the court invoked both rights and structural arguments These principles support a doctrinal basis, as recently articulated by Justice Kennedy, to bring rights and structure together to provide the content of protection for noncitizens.

a. *Yick Wo v. Hopkins*

Yick Wo mounted a due process challenge against California statutes that prohibited laundry businesses from operating in wooden structures without consent of the local board of supervisors.[185] The statute disproportionately affected most of the laundries owned by Chinese in San Francisco. Yick Wo and other Chinese were denied licenses to operate laundries, but all but one application for licenses filed by non-Chinese laundry owners were granted. Yick Wo was arrested and imprisoned for continuing to operate his business without a license. The Court framed the question in this case as one involving the equal application of laws to citizens and aliens alike. The Court analyzed the equal protection claim through the lens of federalism, juxtaposing the sovereignty of the state against "the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured" by constitutional law. The Court held that constitutional law trumps actions taken in the name of the sovereign states especially when they impinge on the liberty interests of individuals. In this case, the individuals were foreign-born and protected by federal statute. The Court noted that unequal application of a seemingly neutral law deprives an individual of his livelihood:

> For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[186]

[185] Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886).
[186] Yick Wo v. Hopkins, 118 U.S. at 370 (1886).

The Court invoked Section 1977 of the Revised Statutes (now 42 USC § 1981) to reach its conclusion that the local ordinance violated federal law in its application, which allowed for arbitrary decisions in its administration. The Court thus articulated federalism principles in light of equality and due process principles.

b. *Takahashi v. Fish and Game*

Takahashi challenged a state statute prohibiting persons ineligible for citizenship from applying for commercial fishing licenses.[187] Takahashi was ineligible for citizenship under the applicable federal immigration statute. The Court reviewed the statute from the perspectives of federalism and also equal protection and due process doctrines. Because the the restriction on fishing licenses was based on alienage discrimination, it was invalid. The Court invoked the federal government's constitutional authority over immigration regulation, noting that "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration."[188] It invoked the protections of 42 U.S.C. 1981, noting that "the protection of this section has been held to extend to aliens as well as to citizens. Consequently the section and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color."[189] The Court provided an important rationale for how its federalist analysis was consistent with its equality doctrines. The Court emphasized that the state's classification based on race and alienage was suspect because it was based on rationales and interests that were entirely different from those in operation when Congress made certain races ineligible for citizenship:

> All of the foregoing emphasized the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization."[190]

Consequently, the Court held that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[191] Again, the Court construed structuralist challenges in the light of rights-based protections.

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[187] Takahashi v. Fish & Game, 344 U.S. 410, 68 S. Ct. 1138 (1948). Initially, the state statute prohibited "alien Japanese" from applying, but the legislature changed the language to avoid a facial constitutional challenge based on alienage discrimination.
[188] Takahashi v. Fish and Game, 344 U.S. at 419; 68 S. Ct. at 1142 (1948).
[189] Takahashi v. Fish and Game, 344 U.S. at 419-420; 68 S. Ct. at 1142-43 (1948).
[190] Takahashi v. Fish and Game, 344 U.S. at 420; 68 S. Ct. at 1143 (1948).
[191] Takahashi v. Fish and Game, 344 U.S. at 420; 68 S. Ct. at 1143 (1948).

c. *Graham v. Richardson*

Graham is a prototypical case in which the Supreme Court utilizes structuralist mechanisms to enforce equality limits on state policies. Richardson challenged a provision in Arizona's welfare law that imposed residency requirements for permanent residents but not for citizens. Under the state's rules an applicant had to show either citizenship or a 15-year residency in the state to qualify for welfare benefits. The case squarely implicated the equality principles in 42 USC § 1981 and federalism principles. The Court alluded to the historically subordinated status of aliens in the United States, and it went so far as to define aliens as a prime example of a "discrete and insular" minority for which heightened scrutiny was appropriate.[192] The state invoked the "special public-interest doctrine," successful in other challenges, which holds that a state can favor citizens over aliens in the distribution of its own monies when it involves a privilege rather than a right.[193] The Court rejected the special interest doctrine because the distinction between rights and privileges was no longer valid. Having previously prohibited states from distributing benefits based on invidious classifications relating to citizenship, the Court held that states could not make distinctions between citizens and aliens.[194] This was particularly appropriate in the case of welfare benefits, because residents and citizens both contribute under the same tax provisions that fund the benefits. The Court then invoked the plenary power doctrine in support of its holding, using a structuralist argument to gird its decision. The Court noted that the federal government had broad constitutional powers to determine immigration regulation, but Congress chose not to impose burdens on noncitizens who become indigent after they arrive in the United States, presumably in recognition of the equal protection principles embedded in 42 U.S.C. § 1981. The Court emphasized that state laws "that restrict eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government."[195] Put differently, by denying equal protection of the laws to noncitizens, the state's alien residency requirements "equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."[196] In its most definitive pronouncement that classifications between citizens and noncitizens were suspect, the Court noted that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause." It tied equal protection principles to the federalism argument by noting that "a congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for

[192] Graham v. Richardson, 403 U.S. 365, 372 (1971).
[193] Graham v. Richardson, 403 U.S. at 1853 (1971).
[194] Graham v. Richardson, 403 U.S. at 1853 (1971).
[195] Graham v. Richardson, 403 U.S. at 1855 (1971).
[196] Graham v. Richardson, 403 U.S. at 1856 (1971).

federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity [in rules of naturalization under Art. 1, s. 8 of the Constitution]."[197]

d. *Plyler v. Doe*

Plyler is significant for recognizing that undocumented immigrants are within the category of alienage under the Fourteenth Amendment because they are "persons." The court used a broad definition of aliens, including undocumented children who were the subject of the state's regulation regarding public school. A Texas state statute denying public education of children who were not legally admitted into the United States violated the Equal Protection Clause of the 14th Amendment. The Court concluded that even undocumented immigrants within a state deserved the protection of the 14th Amendment as "persons," despite their undocumented status. The Court then analyzed the relationship between federal and state roles in the regulation of immigration, and concluded that the state's classification based on immigration status ran afoul of the federal government's authority over classification of immigrants. It noted that "only rarely are such matters relevant to legislation by a State." The Court signaled that part of Congress's deliberations included the presumption that all noncitizens would be treated equally with citizens under the 14th Amendment.

B. Back to the Future A New/Old Paradigm for Immigration Cases

The alienage cases demonstrate that the plenary power doctrine operates within a spectrum that ranges from complete federal power to shared power with the states. In this murky arena –where states' rights to govern themselves confronts federal immigration regulation –that courts have read structuralist principles in light of applicable rights discourse. Although muted, and perhaps now forgotten, when states have attempted to withhold equal protection on the basis of alienage the Court has regarded this as "an impermissible encroachment on the federal immigration power, implicating the same national sovereignty issues at play in the plenary power context."[198] Historically, courts have utilized structuralist principles to operationalize equal protection principles. In the immigration context, a combination of plenary power and preemption principles relieve the Court of finding discriminatory intent, as is typically required under equal protection analysis.[199] Although strategically wise to focus on structuralist

[197] Graham v. Richardson, 403 U.S. at 1857 (1971).
[198] Kerry Abrams, *supra* note _ at 619.
[199] *See,* Washington v. Davis, 426 U.S. 229, 240, 96 S. Ct. 2040, 2048 (1976); Motomura, *The Rights of Others*, *supra* note 10 at 1743 ("[P]reemption offers a middle ground in constitutional challenges to subfederal laws. It leaves intact the likely rejection of equal protection claims, which under prevailing doctrine would require either extending the antidiscrimination norm in Graham from lawful permanent residents to unauthorized migrants, or relaxing the requirements for proving unlawful discrimination on the basis of race or ethnicity. At the same time, preemption avoids relegating unauthorized migrants to a zone without constitutional protections.").

concerns, the result has been to leave behind the rights analysis. Plenary power and preemption principles avoid individual rights-based constitutional issues by substituting the debate with one over institutional competence.[200]

The deviation from ordinary approaches to constitutional challenges has sometimes resulted in the Court failing to enforce equal protection principles because it is limited to a structuralist framework. This leads to a kind of immigration law exceptionalism, in which ordinary constitutional doctrine becomes muddied. Such was the case in *Arizona v. Whiting*, where the Court held that IRCA does not preempt state efforts to threaten businesses with license revocation for hiring undocumented workers because IRCA specifically exempted business license regulation from its scope. Justice Breyer's dissent highlights the equal protection principles that should subtend this preemption analysis, noting that "the state statute seriously threatens the federal Act's anti-discriminatory objectives by radically skewing the relevant penalties." He predicted that the statute "will lead [lawful]employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination." The courts and commentators have debated the scope of protection for noncitizens, especially today when Congress is unable to pass a comprehensive immigration reform package. By turning to the history of alienage discrimination cases, and to the example of recent same-sex marriage cases, we can understand how alienage discrimination cases can better be resolved.

We can draw a legal framework from these lines of cases that protect undocumented immigrants in the workplace despite their immigration status. First, the cases signal that courts have and should scrutinize government actions that target the liberty interests of historically subordinated groups. Second, the cases illustrate that Congress recognized early an important interest in equal protection of the laws for noncitizens, and that this protection was premised on the character of aliens as an historically subordinated population. Third, the cases indicate the courts have and should utilize structuralist principles as a means of protecting vulnerable populations from further subordination. To the extent that the challenges to President Obama's proposed immigration programs are based on a motivation to further subordinate noncitizens, the Court should scrutinize these motivations. Separation of powers and federalism principles can meld with rights principles by upholding the authority of the executive as not impinging on the states' sovereignty interests nor Congress's authority.

The recent same-sex marriage cases provide a model for reaching the historical alienage discrimination cases, and the resulting legal framework protecting against alienage discrimination will not be bound by the restrictive Title VII frameworks. The fact that undocumented immigrants exist in the

[200] Motomura, *The Rights of Others*, *supra* note 10 at 1745.

workplace, whether legally authorized or not, requires that we develop such a framework.

Untethered from traditional Title VII doctrines, the alienage anti-discrimination framework could include several forms of court scrutiny. A legal framework that balances rights with structuralist concerns will require courts to scrutinize the purposes of state, federal and even private action. Such scrutiny will entertain evidence of the subordination of historically disadvantaged groups, and will consider this history in the context of the purpose of immigration law to enforce legitimate categories of immigration status and to pursue other purposes of immigration law, including humanitarian purposes.

The legal framework will balance immigration law's purpose with the purpose of employment law to protect against an inherent inequality of bargaining power. Under this analysis, the scales will tip in favor of the employment-authorized undocumented worker whenever there is evidence that an employer's actions are motivated by alienage discrimination or other exploitative motivations that violate equal protection and due process norms.

As this Article's survey of recent and historical cases demonstrates, a pattern has emerged in the Court's jurisprudence: the protection of historically subordinated groups, including noncitizens, employs both structural arguments and rights principles together, with structuralism operating in the service of equal protection of the laws. Viewed through this lens, the increasing number of liminal categories of noncitizens and the authority to provide benefits based on those categories inevitably require an analysis of rights in terms of equal protection and due process. If liminal categories are used to extend protection to a historically subordinated group, they should be upheld. The executive branch's expansion of the employment-authorized undocumented worker category should stand unless it fails to ensure equal protection. Similarly, when states challenge these liminal categories their structuralist arguments should be scrutinized to ensure that they are not motivated by a purpose to undermine rights. Structuralist arguments will be essential to the Court reaching its conclusions, but the structuralist arguments rest on the substantive rights at stake. Admittedly, the Court has not always embraced this paradigm openly, especially when the use of the underlying equality principles might be politically unpalatable. For too long, in such cases the Court has resorted to structuralism without content to reach its decision, betraying the heritage of the alienage nondiscrimination principle.[201]

VII. Conclusion

[201] *See e.g.*, Arizona v. United States, 567 U.S. __ ; 132 S. Ct. 2492 (2012); Guttentag, *supra* note 150.

Ruben Juarez embodies the paradox of liminal categories such as the employment-authorized undocumented worker. He is legitimately in the workplace and he is illegitimate everywhere else in the legal sphere. The paradox has highlighted the unresolved tensions at the intersections of immigration law and employment law. The open questions are many: Can an employer refuse to hire the employment authorized undocumented worker on the basis that the worker remains undocumented under immigration law? Can an employer be subject to discrimination claims under 42 U.S.C. § 1981 for refusing to hire an employment-authorized undocumented worker? Does the statutory scheme resolve the issues surrounding the employment-authorized undocumented worker, or is there an overriding principle that girds the designation and its consequences?

This Article has proposed a legal framework that emerges from a historical commitment of Congress and the courts to protect noncitizens from alienage discrimination, both in public and in the workplace. It incorporates principles from past alienage discrimination cases and recent same-sex marriage cases, namely that structuralist principles should operate in the service of rights principles. The framework of analysis has been effective in protecting same-sex couples. It was also effective in past alienage discrimination cases. It is time to revive the principle and deploy it at the intersection of employment and immigration law. To that end, structuralist arguments should be scrutinized to determine whether their application would further subordinate a historically disadvantaged group. The traditional paradigms of protection as they are interpreted today must be replaced by a workplace protection framework that recognizes a distinction between a noncitizen's employment authorization and her undocumented immigration status. Borrowing from the alienage discrimination and same-sex marriage cases, I have sketched a framework that remains true to our history and aspirations and meets this goal. Its elements include an acknowledgment throughout history that noncitizens deserve equal protection of the laws; a purpose to protect historically disadvantaged groups; and scrutiny of the motivations behind structuralist arguments.

Although the rights of the foreign-born worker were lost in the structuralist focus of the litigation arising out of DACA and DAPA, we should not lose sight of the basic principle that noncitizens have equal protection guarantees in spite of congressional efforts to strengthen immigration enforcement in the workplace. In a series of cases the Supreme Court has hinted, perhaps unwittingly, that equality and due process principles can work in tandem with structuralist principles to protect discrete minorities. It is time to make good on this implicit promise. Noncitizens in liminal immigration categories like Ruben Juarez have waited too long.