Working on Immigration: Three Models of Labor and Employment Regulation

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Working on Immigration: Three Models of Labor and Employment Regulation

Rick Su*

I. INTRODUCTION

The desire to tailor our immigration system to the economic interests of our nation is as old as its founding. Yet after more than two centuries of regulatory tinkering, we seem no closer to finding the right balance. Contemporary observers largely ascribe this failure to conflicts over immigration, from disagreements about its economic impact to differences of opinion over the importance of economic interests in immigration policymaking. This Essay offers a different explanation. Shifting the focus away from immigration conflicts, I suggest here that longstanding disagreements in the world of economic regulations—in particular, tensions over the government’s role in regulating labor conditions and employment practices—explain much of the difficulty behind formulating an economic approach to immigration. In other words, we cannot reach a political consensus on how to regulate immigration in part because we cannot agree on the role that the government should play in labor and employment regulations.

The fact is the development of labor and employment regulations in the United States is far more contested than is often portrayed in the immigration context. This is not only the case with respect to the kind of substantive policies that should be pursued but also over the basic role that the government regulations should play. As I argue in Part I, labor and employment regulations at the federal level have traditionally been divided between three different approaches to government intervention. The first sees the federal government acting at the highest level of the national economy and focusing mainly on the balance of macroeconomic forces such as the demand, supply, and flow of capital, goods, and labor. The second sees federal action at the organizational level, and primarily focuses on the bargaining process by which business and workers negotiate terms and conditions of employment. The third eschews the indirect influence of the first two models and posits that the federal government sets substantive terms of labor and employment

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directly, guaranteeing them as a matter of individual right. The intent here is not to show these to be independent and isolated approaches; U.S. economic policy has always included aspects of all three. Nevertheless, as political and ideological frameworks, they offer insights into how economic regulations pertaining to labor and employment have developed at the federal level, including those regulations pertaining to immigration.

Indeed, as I argue in Parts II and III, these three approaches have not only shaped the historical development of our nation’s immigration laws but also continue to divide efforts toward comprehensive reform today. At the most basic level, foregrounding the contested history of labor and employment regulations in this manner offers a conceptual lens for understanding the different ways the immigration regulations have evolved, from early efforts to tax and control the importation of immigrant labor to later initiatives aimed at specifying the terms of immigrant employment or whether they can work at all. These competing approaches also shed light on how immigration regulations have been implemented as an administrative matter, including the different times when the U.S. Departments of Treasury, Labor, and Justice were delegated primary responsibility.1

After outlining this history in Part II, Part III turns to today’s immigration debates. Here, I argue that labor and employment regulations—from those designed to raise the minimum wage to those that seek to foster union organizing—offer many ways for influencing the flow of immigration and fine-tuning its many effects on the American economy and its workers. That we cannot agree on how these and other economic regulations can be used to reach an immigration compromise, however, reflects more the ongoing disagreements that we have about the federal government’s role in regulating labor and employment conditions. From this perspective, today’s immigration debates may simply be a small part of a much larger debate over the role of economic regulations more generally. Indeed, it may be that the future of immigration regulations, not unlike its past, will ultimately depend on how the economic debate over labor and employment regulations is resolved.

II. COMPETING APPROACHES TO LABOR AND EMPLOYMENT REGULATIONS

The 1930s and 1940s was a pivotal time for economic regulations at the federal level. Indeed, it was during this period that Congress passed three landmark pieces of economic legislation concerning labor conditions and employment practices within the United States. The first was the National Labor Relations Act of 1935, which formalized the collective bargaining process between workers and employers.2 The second was the Fair Labor

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Standards Act of 1938, which established a federal minimum wage and a forty-hour workweek.\(^3\) The third was the Employment Act of 1946, which, along with its amendment in 1978, committed the federal government to ensuring “maximum employment, production, and purchasing power” through the use of trade, fiscal, and monetary policies.\(^4\)

It is easy to assume that these three laws constitute a concerted federal effort addressing labor and employment in the United States. All three were crafted in response to the economic collapse of the Great Depression; all three had roots in the New Deal. At the same time, there are important differences between them as well. Each envisions government intervention at a different level in the national economy. Each adheres to a different view about what kind of employment terms the government should set, if any. Indeed, underneath their similarities, I suggest that these laws actually reflect three distinct regulatory approaches to how the federal government has sought to regulate labor conditions and employment practices. I describe the approaches they represent in more detail here and show how much of the rich history and contested development of labor and employment regulations can be seen as a struggle between these three views about the role of government intervention in our domestic economy.

\(A.\) The Macroeconomic Approach to Labor and Employment

One way in which labor conditions and employment practices have historically been addressed at the federal level is through policies focused on the macroeconomic conditions in which they arise. These include fiscal and monetary policies designed to foster economic growth or achieve “full employment.” It also includes trade and immigration policies designed to manage the flow of capital, goods, and labor across our borders. Focused as it is on these policies, the macroeconomic approach envisions the federal government acting primarily at the highest levels of the national economy. Moreover, rather than seeking to influence domestic labor conditions and employment practices directly, it sees the federal government’s role primarily in setting the ideal economic conditions in which the optimal negotiations can be reached in a competitive labor market.

The macroeconomic approach reflects some of the oldest economic regulations at the federal level. This approach is also featured in some of the most prominent economic policies of recent years. For most of the nineteenth century, the federal government not only relied on the imposition of different tariffs on imports and exports as its main source of income, but these tariffs also constituted an important means of directing the financial futures of

different sectors of the U.S. economy. At the same time, foreign policies in the early years of this republic focused on reaching trade deals to become “most-favored nations” with trade partners, just as negotiations over free trade agreements occupy much of foreign affairs today. With the expansion of the federal tax base and the establishment of the Federal Reserve in the early twentieth century, fiscal and monetary policies have become more prominent as a means of addressing imbalances in the national economy. Yet, while the tools of economic regulations have expanded, more traditional tools of macroeconomic regulations are still politically relevant. Indeed, as we will explore in more detail later, because of their impact on the domestic supply of labor, immigration policies have long been viewed as a means by which macroeconomic conditions can be regulated.

There is a lot of appeal to looking at the federal government’s role in economic regulations from this perspective. First, it draws directly upon many of the powers explicitly delegated to the federal government as a constitutional matter—from jurisdiction over foreign affairs and international commerce to its interest over territorial sovereignty and the national economy. Second, given the scale of these regulatory measures, it seems to fit well with the institutional capacities of the federal government. To be sure, as a means of affecting labor and employment conditions on the ground, the macroeconomic approach is the most indirect. Yet, it also adheres to a very coherent view about the federal government’s role in this regard: the federal focus should be on establishing the ideal market conditions in which more specific terms of labor conditions and employment practices can be optimally resolved by market dynamics and private bargaining.

B. The Labor Question and Government Facilitated Self-Regulation

Regulation directed at macroeconomic conditions is not the only way that the federal government has sought to shape labor conditions and employment practices in the United States. Another approach sees the government more actively involved at an intermediate level of the national economy—namely, the institutional relationship between labor and capital. Like the macroeconomic approach, the substantive terms of employment are still understood to be the product of private contractual negotiations between economic actors. Nevertheless, rather than merely addressing the economic conditions in which such negotiations take place, this approach imagines a much more active role for the federal government in ensuring that the bargaining process itself is fair and balanced. Marc Eisner refers to this

6. See Lovett, supra note 5, at 41, 79–82.
process-oriented approach as "government supervised self-regulation." And in the context of labor and employment, it is most strongly associated with federal efforts to structure and supervise collective bargaining between large firms and labor unions.

Industrialization at the turn of the twentieth century radically transformed the economic structure of American society. It is no wonder then that, with its onset, the focus of economic regulations at the federal level shifted as well. The rise of wage labor raised questions about the freedom and efficiencies of the private labor market. Moreover, with increasing growth and consolidation of firms in various industries, workers began looking for ways to increase their collective influence by forming and acting through ever larger labor organizations. All the while, the "labor question" became a central focus in economic policymaking. When the federal government enacted the National Labor Relations Act in 1935, the labor movement was already in full swing. Nevertheless, the passage of this law turned the collective bargaining process into a formal government policy involving regulatory mandates and administrative oversight. Employers were required by the law to negotiate in good faith. Unions gained formal recognition by following certain procedures. And with the establishment of the National Labor Relations Board, the federal government became an integral part of the contractual bargaining process by which labor conditions and employment practices were set. Of course, the federal stance on union organizing and collective bargaining would change many times in the subsequent decades. Nevertheless, for most of the twentieth century, the relationship between firms and labor organizations was a central part of federal economic policymaking.

All of this contributed to a unique perspective on how issues of labor and employment should be regulated as a matter of governmental policymaking. Managing the balance of power between labor and unions, and facilitating their private negotiations at the bargaining table, became in essence the focus of federal policy. The goal was to first incentivize employers and workers to regulate themselves, and they did so by facilitating the process by which the two most interested parties would keep each other in check. Indeed, it was largely through private negotiations between large firms and unions that some of the most important matters of domestic economic policy were developed in the mid-twentieth century: from wage and working conditions on the one hand

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10. See id. at 20–21.
13. Id. § 159(a).
14. Id. § 153.
to the provision of health insurance and retirement security on the other.\textsuperscript{15} Moreover, with plenty of avenues for self-help, enforcement of agreed-upon accords in most instances did not depend on the will or resources of governmental actors.

\textbf{C. Substantive Regulations as Individual Rights}

The two approaches discussed thus far largely rely on contractual bargaining as the means for establishing substantive terms of employment, though each seek to enhance that process in a different way. But if the aim is to move toward certain labor conditions and employment practices, would it not be easier if the government simply mandated those directly as a matter of regulation? This sentiment underlies a third approach to economic regulations regarding labor and employment—one in which political negotiations and agency calculations replace private bargaining as the means by which substantive terms of employment are set. Not only does this envision the government engaging in substantive regulations, it also sees the government guaranteeing these to workers as individual rights. As such, it can be argued that this approach sees government intervention at the lowest level of the national economy.

Direct efforts to regulate the terms and conditions of employment also have a long history. As the famous \textit{Lochner v. New York}\textsuperscript{16} decision illustrates, governmental efforts to establish what would normally be contractually negotiated terms—like working hours—had not always been readily accepted.\textsuperscript{17} By the time the federal government enacted the Fair Labor and Standards Act in 1938, however, such laws were becoming increasingly commonplace. The substantive approach to labor and employment regulations truly blossomed, however, in the 1960s and 1970s. Partly in response to growing disillusionment with labor unions and collective bargaining, and partly due to the broad political mobilization of the civil rights movement, these decades witnessed a dramatic expansion of direct federal intervention in the labor and employment market.\textsuperscript{18} Title VII of the Civil Rights Act of 1964 made it illegal for employers to discriminate on the basis of race, religion, and gender, which would later be expanded to include age, disability, and parental status.\textsuperscript{19} The establishment of the Occupational Safety and Health Administration in 1971 made working conditions and the availability of safety equipment a regulatory standard to be set and enforced by a federal agency.\textsuperscript{20} The passage of the Employee

\begin{footnotes}
\footnote{15. See LICHTENSTEIN, supra note 11, at 127.}
\footnote{16. 198 U.S. 45 (1905).}
\footnote{17. See generally id.}
\footnote{18. See LICHTENSTEIN, supra note 11, at 191–92.}
\end{footnotes}
Retirement Income Security Act of 1974 introduced government regulations and oversight into the operation of private retirement plans created by firms and unions.21

The substantive approach not only imagines a more direct role for governmental intervention in setting substantive terms of employment, but it also encourages the issue to be thought of differently in a number of ways. First, it shifts the locus of the labor issue away from the market and the bargaining table and toward judicial hearings and the political process. Second, it frames the underlying problems less as a matter of economic structure or organizational relations and more as an issue of individual rights. Workers are thus empowered to seek redress in court or through administrative procedures. Yet it also means that they are more reliant on political will and governmental resources. In addition, because rights are often in conflict, rights consciousness has also led to increasing political competition between different segments of workers. As the fight over affirmative action shows, the rights of certain workers to racial equality are often set against the rights of others arguing the same.22

III. COMPETING APPROACHES TO IMMIGRATION REGULATIONS

We have looked at three different ways that issues of labor and employment have been regulated at the federal level. How have these affected the development of our immigration system? This Part suggests that the three approaches outlined above have played an influential role in shaping our nation’s immigration laws. They have also framed the political discourse on immigration in a number of interesting ways.

A. The Macroeconomic Approach to Immigration Regulations

Given that the vast majority of immigrants arrive in the United States looking for work, it makes sense that immigration regulations are often looked to as a way of managing the U.S. labor market. Moreover, while there are many disagreements about whether the federal government can or should actively intervene in labor market conditions generally, its power and responsibility to control immigration is largely uncontested. Because of this, federal immigration regulations are most commonly seen as part of a broader effort to manage the macroeconomic conditions of our national economy. Not unlike goods and capital, immigrants are understood in this respect to be one of the many variables that affect the national balance of our labor market.

It should be no surprise then that, for much of the nineteenth century, immigrants were regulated as an article of commerce.\textsuperscript{23} Early border regulations at the state and federal level largely paralleled the tariff system by seeking to control immigration flows through the amount of taxes and bonds to be assessed per head upon entry.\textsuperscript{24} Bilateral agreements between the United States and other nations also served as a common means for regulating the numbers and types of immigrants that entered.\textsuperscript{25} All of this affected the judicial and political framing of immigration as a regulatory issue. It was the reason why the U.S. Supreme Court initially justified federal jurisdiction over immigration as part of its delegated power over international commerce and foreign affairs.\textsuperscript{26} It is also part of the reason that the bureaucratic administration of the earliest immigration regulations at the federal level were delegated to the Treasury Department—the executive agency foremost responsible for managing the national capital supply and the collection of duties on foreign imports.\textsuperscript{27}

The immigration system today is more complex than in those earlier years. Yet the macroeconomic approach continues to be an important framework. At the most basic level this is because much of the immigration flows that we receive today—both legal and illegal—can be traced back to trade policies like the North American Free Trade Agreement in 1994.\textsuperscript{28} At the same time, our immigration system has begun experimenting with different ways of importing immigrant labor as a temporary economic supplement without necessarily going as far as to accept them as potential or future citizens. In response to the labor shortage that arose in the agricultural sector after immigration was dramatically curtailed in the 1920s, the federal government quickly negotiated a series of guestworker programs with foreign nations, most notably the “Bracero” program with Mexico.\textsuperscript{29} Today, our immigration system makes important distinctions between a growing number of temporary visa holders, mostly in the United States for work-related reasons, and the permanent legal residents that are legally recognized as immigrants with a path to citizenship.\textsuperscript{30} There are even some who see the

\begin{enumerate}
\item \textsuperscript{23} See Henderson v. Mayor of New York, 92 U.S. 259, 270–71 (1875).
\item \textsuperscript{24} See Head Money Cases, 112 U.S. 580 (1884) (overturning state head taxes of immigrants); Vincent J. Cannato, American Passage: The History of Ellis Island 13, 46, 69, 103, 182 (2009) (describing the institution of a federal head tax and the many times it was raised as a means of discouraging immigration).
\item \textsuperscript{25} See Angela M. Banks, The Trouble with Treaties: Immigration and Judicial Law, 98 St. John’s L. Rev. 1219, 1224–27 (2010).
\item \textsuperscript{26} See Chy Lung v. Freeman, 92 U.S. 275, 280 (1875); Henderson, 92 U.S. at 270.
\item \textsuperscript{27} Christina A. Ziegler-McPherson, Immigrants in Hoboken: One Way Ticket, 1845–1985, at 69 (2011).
\item \textsuperscript{28} See, e.g., Douglas S. Massey et al., Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration 48–49 (2003).
\item \textsuperscript{29} See generally Deborah Cohen, Braceros: Migrant Citizens and Transnational Subjects in the Postwar United States and Mexico (2011).
\item \textsuperscript{30} See 8 U.S.C. § 1101(a)(15)(H), (J), (L), (O) (2006).
\end{enumerate}
proliferation of undocumented immigration not as a failure in immigration enforcement, but rather as a concession to the robust demand for flexible, cheap, and unskilled labor that was not being met by domestic workers.\textsuperscript{31} To be sure, the fact that guestworkers and undocumented immigrants often prove to be more permanent than their status would suggest complicates the flexibility of immigrant labor. Many now feel, however, that the solution is to go even further in reorienting our immigration system to address the aggregate imbalances in our domestic labor market.

\textbf{B. The Labor Approach to Immigration Regulations}

Other times, however, the effect of immigration on the labor market is understood less as a macroeconomic matter but rather more specifically through the organizational lens of labor-management relations. From this perspective, what matters is not simply how immigrants contribute to the aggregate labor supply in the United States, but more probing inquiries over what kind of workers they are and how their presence affects the balance of power between employers and workers. In other words, if the development of labor and employment standards is to be pursued primarily at the bargaining table, then an important question with regard to immigration is how the availability of foreign labor might affect this process.

Indeed, as the "labor question" became more significant as an economic issue in the late nineteenth century, immigration was also increasingly being perceived through industrial labor relations. Fears that immigrants would frustrate labor organizing efforts,\textsuperscript{32} or would be prone to labor militancy,\textsuperscript{33} lay behind the passage of many of this nation's most restrictive immigration laws. As employers increasingly relied on immigrants as strike breakers, labor leaders began to cast doubt on whether immigrant labor is in fact "free labor," and pushed the federal government to reverse its policy on foreign labor recruitment.\textsuperscript{34} This led first to the enactment of the "padrone" laws of 1874, which sought to limit the power of ethnic labor brokers, followed by the Foran Act (also known as the Contract Labor Act) of 1885, which prohibited the admission of immigrants who secured employment in the United States before their arrival.\textsuperscript{35}

Similar concerns about labor can also be seen behind many of the race-based restrictions that became the basis for federal immigration policy for

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\item \textsuperscript{35} See id. at 88–90
\end{itemize}
much of the twentieth century. For example, stereotypes about Chinese laborers being racially suited to lower standards of living, and thus always willing to accept lower wages than white workers, played a big role in the enactment of federal restrictions of Chinese immigrants in 1888.36 Similar stereotypes about immigrants from eastern and southern Europe also prompted labor organizations to demand similar restrictions on the western front. In an ironic twist, employers also started to turn against immigration as well after an increase in labor agitation in immigrant-dominated industries convinced them that this new group was more prone to socialist sentiments.37 It was before the backdrop of these tensions between labor and management that the national quota restrictions of the 1920s, the most comprehensive and draconian immigration laws yet, were enacted.

The transition to a labor-oriented view of immigration is also reflected in how immigration responsibilities were administratively reorganized in the early twentieth century. After several decades in the Treasury Department, the Commissioner of Immigration was transferred to the short-lived Department of Commerce and Labor in 1903. Moreover, when this department was split in 1913 into one in charge of commerce and another labor, immigration responsibilities were allocated to the newly created Department of Labor as part of its general mission to “foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment.”38

Though much has changed, the labor-oriented approach continues to be a visible issue in today’s immigration debates. On the one hand, basic questions about how immigration and labor laws are connected continue to be at the heart of many of today’s legal controversies. For example, in Hoffman Plastic Compounds v. NLRB,39 the National Labor Relations Board argued that awarding back pay to undocumented immigrants who had been terminated for engaging in union activity not only did not conflict with federal immigration enforcement, but actually supported it by ensuring that there was no economic advantage to hiring undocumented immigrants for companies that wished to avoid a unionized workforce.40 The U.S. Supreme Court disagreed, raising questions about labor as a regulatory priority in an era of immigration enforcement.41 Although Hoffman Plastic was decided in a different regulatory climate, its views about the relationship between labor and immigration were in stark contrast to those of federal courts in the 1980s,
revealing tensions behind how the relationship between labor and immigration laws is perceived.42

On the other hand, spurred in part by the Hoffman decision and responding to declining union levels, labor unions are also beginning to see immigrant workers in a different light. National labor organizations like the AFL-CIO have not only stepped up efforts to recruit immigrants into their ranks, but they have also begun to take a more active stance in favor of pro-immigrant policies such as amnesty for undocumented immigrants as a means of bringing them out of the shadow economy and making them more amenable to unionizing efforts.43 Concerns that immigration enforcement is being used to frustrate or stifle union organizing efforts are increasingly being voiced today.44 And it is in the context of this debate that the labor movement is once again tied to developments in immigration and immigration policymaking.

C. Substantive Approach to Immigration Regulations

Just as the macroeconomic and labor approaches have affected the development of our immigration laws, the substantive approach to labor and employment regulations has also had a tremendous impact. Rather than simply looking at how the numbers and types of immigrants can be regulated to address concerns about labor market conditions, the lesson of the substantive approach is that federal immigration regulations can and should be more specifically targeted at the employment relationship between immigrant workers and their employers. Moreover, given that these substantive regulations are often thought of from the perspective of individual or civil rights, this approach has also encouraged immigration to be thought of in the same way. Indeed, as the following shows, not only have our immigration laws increasingly turned to more direct and forceful efforts to regulate employment relations involving immigrant workers, but the political discourse against immigrants is also starting to draw upon the rhetoric of competing rights.

The fact is that some of the earliest substantive regulations of labor conditions and employment practices at the federal level were those that covered immigrant workers. As noted earlier, many guestworker programs were implemented in the United States in response to the labor shortages

42. NLRB v. Apollo Tire Co., 604 F.2d 1180, 1183 (1979) ("Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged."); NLRB v. Sure-Tan, Inc., 583 F.2d 355, 360 (1978) ("Thus by refusing to certify unions with a majority of alien members we would be giving employers an extra incentive to hire aliens and thus would be defeating the goals of the immigration laws.").


produced by the immigration restrictions of the 1920s.\textsuperscript{45} What is also interesting, however, is the extent to which substantive regulations were incorporated into their operations. For example, the largest of these guestworker arrangements—the "Bracero" program negotiated with Mexico—not only set the minimum wages that employers had to pay, but also specified many of the conditions in which the guestworkers lived and toiled.\textsuperscript{46} To be sure, these mandates were implemented in large part to ensure that guestworkers did not compete unfairly with native workers.\textsuperscript{47} Moreover, these regulations were not always effectively enforced.\textsuperscript{48} Nevertheless, as a regulatory matter, they represent not only some of the earliest and most comprehensive federal efforts to mandate terms of employment as a substantive matter, but also an innovation in how immigration policies can be designed to serve economic interests while addressing concerns about labor and employment.

The federal shift to substantive regulations of labor and employment in the 1960s and 1970s had an even more profound impact on the development of immigration laws. The abandonment of the racial quota system and the liberalization of immigration law in 1965 were part of the same civil rights movement that would later lead to the prohibition of discrimination in the employment context.\textsuperscript{49} Even more significant, however, appears to be the regulatory response to undocumented immigration that developed afterwards. Take, for example, the introduction of employer sanctions in 1986, which made it illegal for any employer to hire immigrants who were unauthorized to work in the United States and established a reporting system that required employers to screen the immigration status of all potential employees.\textsuperscript{50} This process is now a cornerstone of our immigration system (and familiar to anyone who has applied for a job). Yet it is hard to imagine it being implemented at an earlier time, before the federal government had become so deeply involved in regulating and supervising so many aspects of the employment process.

Similarly, the turn to thinking about issues of labor and employment from the perspective of rights has also had an effect on how we talk about immigration. The irony is that while the rights framework has led to a proliferation of antidiscrimination statutes protecting immigrants in the workplace,\textsuperscript{51} the rhetoric of rights is also being used against immigrants, particularly those who are unlawfully present. Immigration violations are

\begin{itemize}
\item \textsuperscript{45} See generally COHEN, supra note 29.
\item \textsuperscript{46} See id. at 22.
\item \textsuperscript{47} See id. at 22–23.
\item \textsuperscript{48} See id.
\item \textsuperscript{49} See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 169 (2006).
\item \textsuperscript{50} See generally 8 U.S.C. § 1324a (2006).
\item \textsuperscript{51} See 8 U.S.C. § 1324b(a)(1), (g)(1)(B).
\end{itemize}
traditionally considered to be civil offenses committed against our nation as a whole. Since the 1970s, however, the presence and employment of undocumented immigrants is also increasingly being portrayed as a violation of the individual rights of native and legal workers.

It makes sense then that there have been so many efforts in recent decades to create a private cause of action for aggrieved employees to sue employers suspected of hiring undocumented immigrants. For example, in Lopez v. Arrowhead Ranches, native and legal immigrant workers asserted a right to file suit against their employer for hiring undocumented immigrants on the basis of both federal immigration and civil rights laws. Similar sentiment also led Congress to briefly consider creating an administrative process whereby employees affected by the hiring of undocumented immigrants could file claims against their employer. Neither of these efforts succeeded. Nevertheless, support for a private cause of action seems to be gaining. Many of the controversial state immigration laws that have been enacted specifically create a cause of action allowing workers to sue their current or former employer for hiring undocumented immigrants. What is interesting is that these and other legal efforts not only draw upon processes provided in employment regulations like Title VII’s prohibition against racial discrimination in hiring, but they also rely heavily on the rhetoric of rights to frame the issue of undocumented immigration.

IV. COMPETING APPROACHES TO IMMIGRATION REFORM

There continue to be fierce disagreements over the proper role of government regulations with respect to labor conditions and employment practices. We see it in the debates about the federal fiscal, monetary, and trade policies in the aftermath of the great recession. We also see it in recent battles over the future of labor unions and collective bargaining. We have also seen how these different approaches offer a useful framework for understanding the development of our immigration laws. I argue here that these competing views also continue to play an important role. Indeed, it may be one of the key reasons why an immigration compromise proves to be so elusive. In other words, what the immigration debate needs the most might actually be a serious conversation about labor and employment.

Take, for example, the matter of wages. The impact of immigration on the wages of native workers has long been one of the most contentious issues

52. 523 F.2d 924 (1975).
53. Id.
55. See, e.g., ARIZ. REV. STAT. ANN. § 23-212(B) (2011) (providing a process for individuals to file complaints against businesses); 2009 Miss. Laws 312 (creating a private cause of action for legal U.S. residents laid off and replaced by unauthorized workers); 2008 Utah Laws 26 (creating a cause of action against an employer for discharging a lawful employee while retaining an undocumented worker in the same job category).
in the immigration debates. With the recent economic recession and growing concerns about income inequality, the wage effects of immigration seem all the more important today. To be sure, there is actually very little consensus on how immigration affects wage levels in our complex and dynamic economy. Much depends on whether we believe immigrants compete directly with native workers in the mainstream labor market or whether we believe them to occupy a separate economic niche (i.e., doing jobs that Americans will not do). There are also differences whether we focus on the aggregate effect on wages across the board or zero-in on a particular group of American workers. But even if we can come to an agreement about how immigration affects wage levels in the United States, how should we go about using regulation to correct that? It is division with respect to regulatory approaches, I argue, around which much of the political paralysis surrounding immigration is centered.

For some, tight immigration regulation coupled with strict enforcement is the best way to address the wage impacts of immigration. There is, of course, no simpler maxim in macroeconomics than the inverse correlation of supply and prices: given constant demand, increase in supply leads prices to fall and vice versa. In the labor context, high wages in a particular sector may reflect a low supply of needed workers. Conversely, low or falling wages suggest the opposite: an increase or oversupply of labor. Thus, for some, the fact that wages are either too high or too low is merely a reflection of imbalances in the labor market. One way to address it, then, is to adjust immigration levels to ensure that immigrants will not crowd out native workers in areas where the labor supply is high and demand is low, but will be welcomed into the country to work in sectors where the opposite is true. From this perspective, immigration controls are an important means by which wage levels in the United States are managed. Thus, if we are concerned about wages, we should look carefully at how many and what kind of immigrants the current immigration system allows to join the U.S. labor market.

For others, however, the preferred way to address the relationship between immigration and wages is flipped. Under this view, regulations that intervene to set wages directly are not only a better way of dealing with concerns about wage levels, but also provide a more productive way of addressing immigration. As noted earlier, many provisions of our immigration laws already require employers to pay certain immigrant workers the "prevailing wage." Moreover, given that most of the concerns about the wage effects of immigration are at the low end of the economic spectrum, many have suggested increasing the federal minimum wage as a good way of

forestalling downward pressures. On the one hand, it can be argued that this is a more efficient way of backstopping the decline of wages among low- or non-skilled native workers than costly immigration enforcement initiatives like border fences or mass deportation. On the other hand, for those primarily interested in immigration enforcement, it can be argued that raising the minimum wage in this manner would also reduce the demand for low-skilled immigrant labor by eliminating the cost advantage that they traditionally offered over native workers. In other words, if employers encourage undocumented immigration by preferring immigrant workers who they can pay less, then ensuring that they cannot pay less should reduce the demand for undocumented workers. To the extent that it does not, it would reveal that depressing wages is not a major problem of undocumented immigration.

Another perspective on the issue of immigration and wages, however, posits that the integration of immigrant workers into the mainstream labor market—no matter how they came to be a part of the American workforce—is the most effective way to ensure that domestic wage levels are not distorted by immigration. To be sure, integration in this manner may require immigration controls in some cases to prevent oversaturation in particular labor markets. It may also benefit from some substantive worker protections. But by themselves, some argue, these regulations are not enough. Indeed, they may even be counterproductive. Under this view, rather than seeking to disable immigrant workers in the interest of protecting native workers, we should instead be seeking to empower immigrant workers so that they can negotiate the labor market in the same way as native workers. At the most basic level, what this means is that we should be wary of regulations that set immigrant workers apart from native workers: visa restrictions that make it impracticable for some immigrants to change jobs, illegal status that renders others permanently vulnerable to reporting and thus beholden to the good graces of their employers, and contract labor status that makes it impossible for them to organize. Though designed in part to protect native workers, these regulations also encourage the development of a bifurcated labor market in which immigrant workers may actually be preferred by employers precisely because they do not have the same power or freedom to demand higher wages or better working conditions. At a deeper level, however, integration may also require more legal support for the organizing and mobilization of workers more generally, especially in low-wage sectors where they are the most vulnerable.

To the extent that the impact of immigration on wages is a concern, these proposals illustrate the wealth of options that are available for dealing with this issue. Yet, given the extent to which these different proposals

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59. See COHEN, supra note 29, at 166.
Washburn Law Journal

coincide with the competing views about the government’s role in labor and employment regulations outlined above, it is no surprise that the availability of these options does not necessarily help us reach a political consensus on immigration. While some are willing to go to great lengths to restrict immigration as a means of protecting wages, they may simultaneously believe that it is not the government’s role to regulate those wages directly for fear of the greater dangers that this would impose on the economy. Similarly, while some may believe that immigration controls of some sort are necessary in order not to dilute the collective power of workers to negotiate good wages on their own, they may nevertheless believe that doing so in a way that bifurcates the U.S. labor market is too heavy a cost for achieving those ends. What is important to point out here is that although these beliefs translate into different immigration policies, the difference between them is not rooted in the conventional debate about immigration. Rather, it is embedded in a larger debate about the wisdom and effectiveness of different government interventions in labor market conditions and employment practices.

Wages is not the only issue in which competing views of labor and employment regulations have an effect on how the immigration debates are framed. Similar undercurrents can also be found in the way we talk about the impact of immigration on such issues as working conditions and job security. What all this suggests, however, is the need for a serious and frank conversation about the federal role in labor and employment regulations as means toward crafting an acceptable immigration compromise. Given the contested history of labor and employment regulations at the federal level, it is not likely that this conversation will be any easier than the one currently taking place over immigration. Yet, as the foregoing shows, it is also a mistake to assume that more emphasis on the immigration side of the equation will ultimately prove to be more productive.

V. CONCLUSION

Immigration is a complex policy issue. It is complex in part because we see its regulation as an important tool in economic policymaking more generally. This Essay has focused on one aspect of economic policymaking in the United States: the history and development of labor and employment regulations. It has argued that federal regulations of labor conditions and employment practices have historically oscillated between three distinct approaches. Each sees the government intervening at a different level of the national economy. Each sees a more or less direct role for the government with regard to substantive terms of employment. This Essay has argued that these competing approaches have not only shaped the development of U.S. immigration policy over the years, but also continue to be a major, if often overlooked, divide in today’s immigration debates.
There is no easy way to reconcile the different ways that labor conditions and employment practices can be regulated. Yet foregrounding this effort might be an important step in reaching a comprehensive solution to our immigration problems. At the most basic level, we should recognize that there are many different ways that labor and employment regulations can address many of the underlying concerns surrounding immigration. Even more important, it may be that much of the controversy over immigration is actually a proxy battle over the condition of workers more generally in our economic system. In either case, I argue, it is important not to overlook the rich history and contested development of labor and employment regulations in the context of immigration.