

# Work and Employment for DACA Recipients

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## Introduction

Deferred Action for Childhood Arrivals (DACA) has brought job opportunities and a brighter future to somewhere around 700,000 undocumented immigrant youth.<sup>1</sup> Yet some contend that the employment authorization conferred upon DACA recipients renders the program illegal, because it converts it from a mere program of prosecutorial discretion into an *ultra vires* benefit.<sup>2</sup> This essay sets aside the host of other legal issues raised by DACA and focuses on the narrow question of whether the federal government exceeds its statutory authority when it confers employment authorization on DACA recipients.<sup>3</sup> There is a short answer to this question that is based on the unambiguous text of the Immigration and Nationality Act (INA), which is an emphatic no. The relevant statute defines an “unauthorized alien” for employment purposes to exclude anyone designated as authorized for employment by the agency; the agency has long designated deferred action as a category authorized

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1. Andorra Bruno, CONG. RSCH. SERV., R46764, DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA): BY THE NUMBERS 9 (2021). For a discussion of the benefits of DACA to the recipients themselves, see Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 18–20 (2016).

2. See *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1911–12 (2020) (describing the rationale of Acting DHS Secretary Elaine Duke in rescinding DACA).

3. The essay does not address the question of whether the agency’s grant of “lawful presence” causes the program to violate the Administrative Procedure Act. For a discussion of this question, compare Michael Kagan, *DAPA’s Unlawful Presence Problem*, YALE J. ON REG: NOTICE & COMMENT (Feb. 6, 2016), <https://www.yalejreg.com/nc/dapa-s-unlawful-presence-problem-by-michael-kagan>, with Anil Kalhan, *DAPA, “Lawful Presence,” and the Illusion of a Problem*, YALE J. ON REG: NOTICE & COMMENT (Feb. 12, 2016), <https://www.yalejreg.com/nc/dapa-lawful-presence-and-the-illusion-of-a-problem-by-anil-kalhan>.

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for employment, and DACA is a species of deferred action.<sup>4</sup> Yet some courts have found this answer unsatisfying, referring to the provision as a “mousehole” that pales beside the vast social and economic questions at stake in making large numbers of undocumented immigrants eligible for employment.<sup>5</sup> Federal courts in Texas have enjoined DACA and a related program called Deferred Action for Parental Accountability (DAPA) based on their inference that a purpose of the INA is to parsimoniously guard employment authorization as part of a broader scheme to enforce immigration law and protect jobs for native workers.<sup>6</sup>

Recently, the government issued a notice of proposed rulemaking that would explicitly codify employment authorization for DACA recipients.<sup>7</sup> However, DACA applicants would no longer be required under the proposed rule to seek employment authorization in conjunction with their DACA applications.<sup>8</sup> In addition, the government contends that each core facet of DACA is severable from the others, and that it can continue running the program on a piecemeal basis if a court enjoins any one of those aspects, such as employment authorization.<sup>9</sup> Thus, at the same time that the government would codify the various aspects of DACA to put them on a more secure legal footing, it would also try to de-tether them so that DACA would survive if dissected by injunction.

This new approach makes it all the more important to address the legality of employment authorization, which is vital to DACA recipients’ livelihoods and futures. This essay argues that courts are wrong to ignore the easy textual answer to the employment authorization question, and goes on to explain that the relevant text makes sense in light of the broader historical context, including a libertarian tradition for immigrant work and heavy economic dependence on it for much of United States history. The purposivist reasoning of the courts hostile to employment authorization for DACA recipients is out of step with the mainstream textualist approach to statutory interpretation. Moreover, the protectionist purpose inferred by these courts from the INA is in tension with the broader history of work by non-citizens inside the United States.

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4. 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14) (2021).

5. See *Texas v. United States* [“*Texas I*”], 809 F.3d 134, 183 (5th Cir. 2015), *as revised* (Nov. 25, 2015); *Texas v. United States* [“*Texas II*”], No. 1:18-CV-00068, 2021 WL 3025857, at \*24 n.37 (S.D. Tex. July 16, 2021) (quoting *Texas I*, 809 F.3d at 183 n.186).

6. *Texas I*, 809 F.3d at 180–81; *Texas II*, 2021 WL 3025857 at \*29–31.

7. Department of Homeland Security, United States Citizenship and Immigration Services, Deferred Action for Childhood Arrivals, Notice of Proposed Rulemaking, 86 Fed. Reg. 53,736, 53,756–60, 53,770, 53,772, 53,773 (Sept. 28, 2021) (creating a specific regulatory provision allowing DACA recipients to seek employment authorization, specifying that employment authorization will automatically terminate upon termination of a grant of DACA, eliminating the previous requirement that DACA applicants seek employment authorization, and including a severability section stating that DACA will stand if any of its three major components, including employment authorization, are held to be illegal).

8. *Id.* at 53815.

9. *Id.* at 53816.

## I. The Agency's Authority to Regulate Immigrant Employment

President Obama created DACA in 2013 as an exercise of prosecutorial discretion after a decade of congressional near misses at passing some version of the DREAM Act, which would have created a pathway to citizenship for those brought to the United States at a young age.<sup>10</sup> DACA is a deportation forbearance policy for persons who might well qualify for status if the DREAM Act eventually passes, and who comprise a highly sympathetic group regardless of whether legislation ultimately passes. According to the government, DACA is not an immigration status; it is “deferred action,” or a decision, in other words, to defer removal.<sup>11</sup> However, it also has come with employment authorization and persons with DACA are considered lawfully present for certain collateral purposes.<sup>12</sup>

The Supreme Court has yet to address the questions of whether DACA is legal or whether offering employment authorization to DACA recipients contributes to its possible illegality. In its 2020 decision, *Department of Homeland Security v. Regents of the University of California*, the Supreme Court found that the Trump Administration's rescission of DACA violated the Administrative Procedure Act (APA) because it failed to segregate the issues of granting a deportation forbearance from the benefits associated with DACA, like a grant of lawful presence and employment authorization.<sup>13</sup> In essence, the majority assumed for the sake of argument that a prior Fifth Circuit analysis was correct that grants of employment authorization and lawful presence convert a prosecutorial-discretion program into a benefit program that is “‘manifestly contrary’ to the INA.”<sup>14</sup> Assuming that to be the case, the Court held that the government should have considered eliminating lawful presence and employment authorization while keeping the deportation

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10. See generally Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 94–96 (2016).

11. *Id.*

12. Wadhia, *supra* note 1 at 6–7.

13. *Regents*, 140 S. Ct. at 1912.

14. See *id.* at 1911–12; *Texas I*, 809 F.3d at 182. The Supreme Court noted that in rescinding DACA, the Acting Secretary of DHS was bound by the Attorney General's conclusion that the program was unlawful because “[t]he same statutory provision that establishes the Secretary of Homeland Security's authority to administer and enforce immigration laws limits that authority, specifying that, with respect to ‘all questions of law,’ the determinations of the Attorney General ‘shall be controlling.’” *Regents*, 140 S. Ct. at 1910 (citing 8 U.S.C. § 1103(a)(1)). The Attorney General had stated that DACA was unlawful for the same reasons that the Fifth Circuit had found DAPA unlawful. *Id.* at 1911. Since the respondents in *Regents* had not addressed how 8 U.S.C. § 1103(a)(1) impacted the reviewability of the Attorney General's legal conclusions concerning DACA, the court did not review those conclusions, but instead essentially took them as a given, and proceeded to consider whether the rescission nonetheless violated the APA because the agency had overlooked important considerations. *Id.* at 1910–15.

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forbearance aspect of the program.<sup>15</sup> The government violated the APA by failing to consider this and other ways to address DACA, particularly given the enormous reliance interests at stake.

Despite *Regents* and the support of the Biden Administration, today DACA just clings to existence. Judge Hanen of the Southern District of Texas enjoined the program in July 2021 but stayed his decision in part while the government appeals and simultaneously works on a draft regulation.<sup>16</sup> Judge Hanen first held that the government violated the APA by failing to go through a notice and comment rulemaking process—a defect that he acknowledged may be cured by an imminent proposal for a DACA regulation.<sup>17</sup> However, in addition to this procedural APA violation, Judge Hanen ruled in the states’ favor on a substantive APA claim that DACA is in fundamental tension with central principles set out in the INA.<sup>18</sup> One of these, according to Judge Hanen, is that “[t]he INA provides a comprehensive statutory scheme for the allocation of work authorization.”<sup>19</sup>

This is incorrect. First, a regulation has been in place since 1981 authorizing employment for deferred action recipients, and DACA is a type of deferred action.<sup>20</sup> This regulation predated Congress saying anything significant about immigrant employment, which it did not do until 1986 when it passed the Immigration Reform and Control Act (IRCA).<sup>21</sup> Second, with IRCA, Congress granted authority to the agency to offer employment authorization to whomever it wants, ratifying the agency’s preexisting practice of granting it to persons with deferred action. According to the INA as amended by IRCA, an “unauthorized alien” for purposes of employment is a noncitizen who is neither a Lawful Permanent Resident nor “authorized to be . . . employed by this chapter *or by the Attorney General.*”<sup>22</sup> In other words, Congress explicitly granted authority to the Attorney General to give employment authorization to categories of persons unmentioned in the statute. After passage of the Homeland Security Act of 2002, this function was transferred to United States Citizenship and Immigration Services (USCIS), the component of the

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15. *Regents*, 140 S. Ct. at 1912.

16. *Texas II*, 2021 WL 3025857 at \*42.

17. *Id.* at \*23.

18. *Id.* at \*24–32.

19. *Id.* at \*29.

20. See Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, at 25,081 (May 5, 1981) (codified at 8 C.F.R. pt. 109). Today the regulation allowing for employment authorization for persons with deferred action is 8 C.F.R. § 274a.12(c)(14) (2021) (“An alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, [may be able to obtain work authorization upon application] if the alien establishes an economic necessity for employment.”)

21. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 115, 274A, 100 Stat. 3359, 3360, 3384.

22. 8 U.S.C. § 1324a(h)(3) (emphasis added); see generally Wadhia, *supra* note 1, at 5.

Department of Homeland Security (DHS) that has inherited authority over employment authorization.<sup>23</sup>

It may seem hard to understand at first glance why Congress would draft an exception that seemingly swallowed its other rules about immigrant employment, but that is exactly what the statute says. Under the plain wording of the statute, USCIS can grant employment authorization to new categories of individuals, or even dole it out to individual undocumented immigrants on a case-by-case basis. Although this reading may be jarring to those with a certain view of immigration enforcement, the broader historical context offers clarity.

#### A. *The Tradition of Work as a Natural Right*

The regulation of immigrant employment with IRCA in 1986 is a relatively recent development in the history of immigrant work in the United States. In order to understand why it came as late as it did, it is first necessary to address a crucial semantic distinction. The INA regulates the “employment” of non-citizens, and USCIS grants an “employment authorization document” to persons who qualify for one under the agency’s regulations and policies.<sup>24</sup> “Employ” means to hire a person and “employment” is central to the modern capitalist system, with its focus on the corporation and economies of scale. “Work,” in contrast, has a broader and more basic meaning—one that hearkens back to the nation’s individualistic, agricultural, and entrepreneurial roots.<sup>25</sup> Historically, people in this country have long worked for themselves, on farms or in small businesses. The founders were steeped in the philosophies of John

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23. Prior to enactment of the Homeland Security Act, the Attorney General delegated most powers to the Commissioner of the Immigration and Naturalization Service. 8 C.F.R. § 2.1 (2001). The Homeland Security Act transferred the Commissioner’s power to adjudication immigration applications, like applications for employment authorization documents, to the Bureau of Citizenship and Immigration Services, which has since been renamed as United States Citizenship and Immigration Services (USCIS). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat 2135 (2002).

24. See 8 U.S.C. § 1324a (unlawful employment of aliens); 8 C.F.R. § 274a.12 (Classes of aliens authorized to accept employment); *Form I-765, Application for Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-765> [<https://perma.cc/4979-MB57>].

25. The relevant meaning of “employ” is “(1) to use or engage the services of (2): to provide with a job that pays wages or a salary.” *Merriam Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/employ>. “Work” has a long and nuanced definition. It can be used as a noun, verb, or adjective. As an intransitive verb, one definition of “work” is “a: to perform work or fulfill duties regularly for wages or salary // works in publishing b: to perform or carry through a task requiring sustained effort or continuous repeated operations // worked all day over a hot stove c: to exert oneself physically or mentally especially in sustained effort for a purpose or under compulsion or necessity.” *Merriam Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/work>. As a noun, “work” can mean “1: activity in which one exerts strength or faculties to do or perform something: a: activity that a person engages in regularly to earn a livelihood // people looking for work b: a specific task, duty, function, or assignment often being a part or phase of some larger activity c: sustained physical or mental effort to overcome obstacles and achieve an objective or result.” *Id.*

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Locke and Adam Smith, who considered labor the foundation for property rights, central to individual liberty.<sup>26</sup> Their vision of a new Republic was built on the Lockean premise that individuals have a right to work in order to feed themselves and their families.<sup>27</sup> This philosophy informed a well-established jurisprudence concerning an immigrant “right to work” that both pre- and post-dated the *Lochner* era.<sup>28</sup> During a period dating from the late nineteenth to mid-twentieth century, courts regularly struck down state legislation restricting non-citizens’ ability to work based on various theories that were loosely connected by language concerning universal natural rights.<sup>29</sup>

During this period when courts were striking down state regulations on immigrant work, the federal government had the ability to bar the entry of foreign “contract labor” if there were enough native workers to fill the job.<sup>30</sup> Beginning in the late nineteenth century, the United States regulated the admission of immigrants to protect the labor market. However, once non-citizens arrived in the United States, their ability to work was entitled to constitutional protection. This constitutional distinction between the treatment of non-citizens seeking admission and those already present was consistent with a broader trend that continues to this day. Courts regularly defer to the federal government’s regulation of the admission of non-citizens while more closely scrutinizing state infringements on the constitutional rights of non-citizens once they are present.<sup>31</sup>

Part of the reason that the regulation of immigrant employment came as late as it did was that the regulation was built on a libertarian tradition of protecting the right to work of immigrant workers, at least once they had arrived here. This ideological foundation for immigrant work was fed by and in turn nourished the nation’s massive economic dependence on immigrant labor.<sup>32</sup> Populist pressures occasionally resulted in reform, such as the Contract Labor Law of 1885, but up until the late twentieth century, these reforms impacted only the criteria for admission, and left in place an essentially *laissez-faire* right of undocumented immigrants to work within the interior.<sup>33</sup>

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26. See Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIG. L.J. 243, 279–80 (2017).

27. For example, Jefferson’s vision of Democracy was deeply tied to the notion of independent “yeoman farmers” who cared about the country because they cared about their own land and the work they had done to improve it. See Lisi Krall, *Thomas Jefferson’s Agrarian Vision and the Changing Nature of Property*, 36 J. ECON. ISSUES 131, 131–32 (2002).

28. Heeren, *supra* note 26, at 252.

29. *Id.*

30. Contract Labor Law of 1885, ch. 164, 23 Stat. 332 (amended 1887).

31. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255–56.

32. Kitty Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform and Control Act of 1986*, 11 LAW & POL’Y 18, 19–21 (1989).

33. *Id.* at 21.

*B. The Historical Origins of Regulating Immigrant Employment*

After the *Lochner* era ended, courts stopped using natural rights language to protect an immigrant right to work.<sup>34</sup> At the same time, Congress and the agency began toying with some regulation of non-citizens' employment. The INA, enacted in 1951, built upon the preexisting practice of preventing the admission of noncitizens to work in positions that could be filled by domestic workers.<sup>35</sup> However, it did nothing to prevent non-citizens from working who were present in the United States without lawful status, and employers who hired such workers faced no penalty. The INA made it illegal to “harbor transport, or conceal illegal entrants,” but an amendment named the “Texas Proviso” after the Texas growers to whom it was a concession excluded employment from the category of harboring, and was “interpreted by the INS as a virtual *carte blanche* for the employment of undocumented workers.”<sup>36</sup> After passage of the INA, the Immigration and Naturalization Service (INS) did promulgate regulations restricting employment for some temporary visa holders, or “nonimmigrants,” if they lacked permission.<sup>37</sup> Yet the INS did not appear to have a formal process for adjudicating employment authorization until 1981 when it issued the first employment authorization regulation—the one that recognized authority for employment authorization for persons with deferred action.<sup>38</sup>

Statutory authorization for this regulatory practice of restricting employment authorization did not clearly exist until 1986, when Congress enacted IRCA. When Congress did act, it ratified the agency's regulatory definition of employment authorization rather than creating a new one. This left the agency with sweeping authority over the issue, meaning that Judge Hanen's conclusion that the INA comprehensively regulates “work authorization” is incorrect. Rather, the INA gives the agency authority to regulate employment authorization via its regulations and even less formal practices.

For example, beginning in 1999, the INS began to grant deferred action on a categorical basis to petitioners for lawful permanent residency under the Violence Against Women Act while they waited for visas to become available.<sup>39</sup> The agency has likely granted deferred action to tens of thousands of such persons, and some of them have remained indefinitely in the limbo of deferred action due to strict limitations on adjusting status.<sup>40</sup>

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34. Heeren, *supra* note 26, at 256.

35. 8 U.S.C. § 1182(a)(14) (1952).

36. Calavita, *supra* note 32, at 21.

37. 8 C.F.R. § 214.2(c) (1952).

38. Employment Authorization to Aliens in the United States, 46 Fed. Reg. 25,079, 25,080–81 (May 5, 1981) (codified at 8 C.F.R. pt. 109).

39. Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1152–54 (2015).

40. *Id.* at 1154.

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In 2000, the agency began granting deferred action to applicants for a special visa for crime victims called the U visa until visas were available for them.<sup>41</sup> Due to an annual cap of 10,000 U visa grants, and yearly applications that vastly exceed that amount, the agency has recently been granting deferred action and employment authorization to thousands of U visa applicants each year.<sup>42</sup>

DACA therefore is only the latest example in a long history of employment authorization being granted to large categories of deferred action recipients. The agency has had a regulation authorizing this practice since 1981 and Congress ratified the agency's authority to do so in 1986 with the passage of IRCA. As a result, the agency did not violate the INA when it elected to grant employment authorization to DACA recipients. Nor was it required to undertake rulemaking for this aspect of the program, as a regulation already existed authorizing employment authorization for those with deferred action. However, the agency has now proposed adding a regulatory provision explicitly allowing DACA recipients to seek employment authorization.<sup>43</sup> For all the above reasons, the proposed regulation's conferral of employment authorization on DACA recipients is lawful.

### **II. The Myth of a Policy to Comprehensively Regulate Immigrant Work**

Judge Hanen also relied on the policies he discerned behind IRCA and the INA to comprehensively prohibit the “employment of illegal aliens” as a means to deter illegal immigration.<sup>44</sup> The Fifth Circuit relied on similar logic when it struck down “Deferred Action for Parental Accountability,” another Obama Administration initiative to grant deferred action to some undocumented parents of United States citizens and lawful permanent residents. According to the Fifth Circuit, “[t]he INA’s careful employment-authorization scheme ‘protect[s] against the displacement of workers in the United States,’ and a ‘primary purpose in restricting immigration is to preserve jobs for American workers.’”<sup>45</sup> The Fifth Circuit contended that the mere increase in the number of persons with employment authorization would undermine “Congress’s stated goal of closely guarding access to work authorization and preserving jobs for those lawfully in the country.”<sup>46</sup>

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41. *Id.* at 1154–55.

42. *Id.* at 1155.

43. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736, 53,740.

44. *Texas II*, 2021 WL 3025857 at \*29.

45. *Texas I*, 809 F.3d at 181–82.

46. *Id.*

As Professors Adam Cox and Cristina Rodríguez have noted, it is a dubious enterprise to try to infer any overarching policy goal from the INA, which represents a series of accretions by different congresses with conflicting priorities.<sup>47</sup> Immigration law is, as Professor Kitty Calavita says, a “patchwork fashioned out of mutually contradictory pieces,” two of the foremost of which are “the political demand for restrictions side-by-side with the economic reality of the need for immigrant labor.”<sup>48</sup> These competing demands have resulted in a Janus-faced policy concerning immigrant work. On one side, the admission of foreign labor is regulated and employers must check immigration status for employees; on the other exists a vast shadowy economy in which unauthorized work is legal and employer sanctions do not operate. This regime allows for the perpetuation of a symbolically attractive myth that unauthorized work is illegal while still serving the needs of the many economic sectors in which undocumented workers form a large share of the workforce.

It is true that IRCA sought to address illegal immigration partly by barring the employment of “unauthorized alien” workers. Yet, IRCA sought to achieve this end by regulating employers, not workers, and the agency has defined employment relatively narrowly. Under applicable regulations, employers are required to check employment authorization for “employees” but are not required to do so for “intermittent” domestic workers and “independent contractors” “who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.”<sup>49</sup> These carve-outs for independent contractors and domestic workers mirror the Texas Proviso in that they offer a significant escape valve from employer sanctions. Add to this that employer sanctions have often not been strictly enforced, and the result is a large accommodation for individuals and entities to hire undocumented workers.

IRCA also continued the INA’s approach of not significantly penalizing non-citizens who seek or secure unauthorized employment, provided they do not use false documents to do so.<sup>50</sup> While the INA has some penalties for unauthorized employment, they are limited and

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47. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 151–59 (2015).

48. Calavita, *supra* note 32, at 40.

49. See 8 C.F.R. § 274a.1(f), (h), and (j). The INS’s proposed regulations exempted “casual employment” as a domestic worker and working as an independent contractor. Immigration and Naturalization Service, Control of Employment of Aliens, 52 Fed. Reg. 8762, 8764 (1987). A definition of “independent contractor” was added to the final regulations at the behest of twenty-five businesses that commented on the regulations. Immigration and Naturalization Service, Control of Employment of Aliens, 52 Fed. Reg. 16,216-01, 16,219 (1987). Although persons and companies need not check employment authorization for independent contractors, they can be subject to liability under IRCA for hiring an independent contractor that they know is unauthorized to work. 8 U.S.C. § 1324a(a)(4).

50. See *Arizona v. United States*, 567 U.S. 387, 404–06 (2012).

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qualified by exceptions.<sup>51</sup> Moreover, those provisions that address the issue refer to unauthorized “employment” and not to “work.”<sup>52</sup> There is no provision of the INA that clearly prohibits a non-citizen without employment authorization from working as an independent contractor, from owning and operating their own business, or from farming their own land.<sup>53</sup>

This point may strike many as jarring because it runs up against the myth that unauthorized work is illegal.<sup>54</sup> Contributing to this myth are the myriad ways in which undocumented immigrants are mistreated in the workforce and the overarching paradigm of illegality popularly attributed to them.<sup>55</sup> Jobs have also become a flashpoint in an economy in which many American citizens are struggling—a theme that President Trump exploited in his campaigns.<sup>56</sup> The myth of illegal unauthorized work serves a powerful symbolic purpose in a political milieu given to regular bouts of nativism. Yet the fact remains: no statute clearly makes unauthorized work illegal, and no court has ever dispositively held as much.<sup>57</sup> Given the ability of undocumented immigrants to legally work as independent contractors or through self-employment, the Fifth Circuit’s inference of a Congressional purpose to absolutely ban them from being employed is a major stretch.

Not only is Judge Hanen’s inference about the INA’s purpose not borne out by history, but it is also dubious on its own terms. It is perverse to expect that denying employment authorization to DACA recipients will protect American workers or jobs or do anything to prevent future illegal immigration.<sup>58</sup> First, it is important to recognize that DACA recipients are

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51. Heeren, *supra* note 26, at 267–68.

52. See 8 U.S.C. § 1182(a)(9)(B)(iii)(II) (treating employment without authorization as tantamount to unlawful presence for asylum applicants); 8 U.S.C. § 1255(c) (barring a person from adjusting status who “continues in or accepts unauthorized employment prior to filing an application for adjustment of status”).

53. Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws?*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 252 (2008); Heeren, *supra* note 26, at 266–68. *But see* *In re Garcia*, 58 Cal. 4th 440, 462, 315 P.3d 117, 131 (2014) (noting that the Department of Justice took the position that a non-citizen without employment authorization could not practice law as an independent contractor).

54. Heeren, *supra* note 26, at 266; see also Leticia M. Saucedo, *Employment Authorization, Alienage Discrimination and Executive Authority*, 38 BERKELEY J. EMP. & LAB. L. 183, 199 (2017) (“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, even in the workplace.”).

55. *Id.*

56. See Leticia M. Saucedo, *Employment Authorization and Immigration Status: The Janus-Faced Immigrant Worker*, 43 Ohio N.U. L. Rev. 471, 479 (2017).

57. See *Arizona*, 567 U.S. at 404–06 (holding that a state provision making it illegal for an “unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor” was preempted by federal law, which does not criminally punish unauthorized work).

58. Professor Shoba Sivaprasad Wadhia has broadly canvassed policy rationales for granting employment authorization to DACA recipients. See Wadhia, *supra* note 1, at 18–23. The government’s notice of proposed rulemaking concerning DACA addresses the labor market

already heavily employed and deeply enmeshed in the United States economy.<sup>59</sup> During the eight years they have had employment authorization, there has been little evidence that their employment has hurt authorized workers. To the extent that they out-competed citizens and authorized workers for jobs, it is hard to make a moral argument that this is wrong, since DACA recipients by and large have lived their lives in this country and are as much a product of and contributors to it as citizens and other authorized workers.

To take away the employment authorization that DACA recipients have held for years would surely leave many employers in the lurch and cause damage to the American economy.<sup>60</sup> It would also, as the government notes in its proposed DACA rulemaking, “produce a great deal of human suffering” to DACA holders themselves.<sup>61</sup> Would doing so open up jobs for citizens? It is possible. But it is beyond naïve to believe that it will do much to prevent illegal immigration. The idea that jealously guarding employment authorization will prevent illegal immigration and preserve jobs for citizen workers ignores realities that seem unlikely to change anytime soon. In certain sectors of the economy, such as construction, housekeeping, agricultural work, and landscaping, undocumented workers already comprise more than a fifth of all workers.<sup>62</sup> Unless Congress enacts radical change, working in one of these jobs would probably always be an option for an unauthorized worker. Alternatively, DACA recipients, who are often highly educated, could work in professional jobs that sometimes involve an independent contractor arrangement, arguably including the solo practice of law.<sup>63</sup>

Yet what all these positions have in common is that they come without the benefits that go with a formal employment relationship, including minimum wage, overtime, and unemployment insurance, as well as the protections of employment and labor laws like the Fair Labor Standards

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impacts of the new DACA rule based on available economic studies that on the whole show “little evidence that immigration significantly affects the overall employment levels of native-born workers” and a “very small” impact of immigration on the wages of native workers, with the largest impact falling on prior immigrants and high school dropouts. 86 Fed. Reg. 53736, 53801 (quoting National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* (2017), <https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration>).

59. Bill Ong Hing, *Beyond Daca-Defying Employer Sanctions Through Civil Disobedience*, 52 U.C. DAVIS L. REV. 299, 302–03 (2018).

60. *Id.* at 302.

61. Deferred Action for Childhood Arrivals, 86 Fed. Reg. at 53,736, 53,811.

62. Nicole Prchal Svajlenka, *Protecting Undocumented Workers on the Pandemic’s Front Lines*, CENTER FOR AMERICAN PROGRESS tbl. 2 (Dec. 2, 2020, 9:04 AM), <https://www.americanprogress.org/issues/immigration/reports/2020/12/02/493307/protecting-undocumented-workers-pandemics-front-lines> [<https://perma.cc/MRC5-5ABR>].

63. See *In re Garcia*, 58 Cal. 4th 440, 462, 315 P.3d 117, 131 (2014) (noting a disagreement between the briefs filed by the Committee and Petitioner and the amicus brief filed by the Department of Justice on the question of whether an undocumented immigrant without employment authorization “could lawfully practice law in this country as an ‘independent contractor,’ for example, as a sole practitioner.”)

## Work and Employment for DACA Recipients

Act, National Labor Relations Act, Occupational Safety and Health Act, Family Medical Leave Act, and Title VII of the Civil Rights Act.<sup>64</sup> Denying employment authorization to DACA recipients will not prevent them from legally working; it will instead prevent them from being formally employed, and one of the main consequences of this is to deny them access to workplace protections and benefits enjoyed by other American workers.<sup>65</sup> Given that DACA recipients have commonly spent much of their lives in the United States, they deserve these protections. Moreover, assuring broad access to them inures to the benefit of all American workers, since it prevents a “race to the bottom” as employers seek to farm out work to independent contractors.<sup>66</sup>

### Conclusion

The text of the INA and its longstanding regulations authorize the government to grant employment authorization to deferred action recipients. Yet the Fifth Circuit in *Texas I* and the District Court in *Texas II* divined proof of the opposite in their visions of immigration policy. The history described in this essay is presented to refute these courts’ view of policies surrounding immigrant work. However, under a textualist interpretation, the simple language of the statute should dispositively clarify that the provision of employment authorization to those with deferred action is not contrary to the INA, and thus does not support a substantive APA claim against DACA. That leaves, then, the question of whether the grant of lawful presence for certain collateral purposes flies so far in the face of the INA as to render the program unlawful—a topic beyond the scope of this essay. Other scholars have debated the unlawful presence question, and the government’s notice of proposed rulemaking for DACA addresses it at length.<sup>67</sup> The government also takes the position that if any one of the three principal aspects of the program—deportation forbearance, employment authorization, and lawful presence—are held to be unlawful, the remaining aspects are severable.<sup>68</sup> This means that a court could find the provision of lawful presence to be contrary to the INA yet uphold the deportation forbearance and employment authorization aspects of the program.

With Congress deadlocked on immigration reform, the stakes for DACA recipients and the country as a whole are profound. DACA recipients have a legal right to work in many ways in the United States even

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64. Heeren, *supra* note 26, at 269–71.

65. *Id.*

66. See Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 214 (2007); Saucedo, *supra* note 56, at 480.

67. See Kagan, *supra* note 3; Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736, 53,760–62.

68. Deferred Action for Childhood Arrivals, 86 Fed. Reg. at 53,772

without employment authorization. Yet without employment authorization, they will be confined to precarious work without access to protections and benefits that their classmates and colleagues enjoy. Cutting DACA recipients off from formal employment and the protections and benefits that go with it will do little or nothing to prevent illegal immigration or serve any other policy goals that can purportedly be inferred from the contradictory INA. There is little justification for enacting this sort of caste system, and it would likely seem antithetical to the founders who believed in a natural right to work to feed oneself and support one's family. This same conception of individual autonomy and personal responsibility should resonate with many conservative thinkers today, and offers a counterweight to the policy justifications cited by some courts for finding employment authorization for deferred action recipients unlawful. Yet at the end of the day, the plain text of the statute itself should validate the hard work that DACA recipients have been doing for themselves and the country.