Getting to Work: Why Nobody Cares About E-Verify (And Why They Should)

Juliet P. Stumpf*

Employment is traditionally conceptualized as a private contract between employer and employee. The Immigration Reform and Control Act of 1986 (IRCA), which prohibited employers from knowingly hiring employees not authorized to work and required employers to request evidence of work authorization, introduced the government into this private relationship as an immigration enforcer and recast the employer as an immigration law gatekeeper. Today, comprehensive immigration reform initiatives propose to implement a nationwide system called E-Verify through which employers check employees' work authorization via on-line government databases. E-Verify unveils how the employment verification laws establish U.S. employees as a class circumscribed by government authorization to work. More than IRCA, it increases the presence of government in the establishment of the employment relationship for all employees, regardless of citizenship status. E-Verify represents a contemporary example of a recurring phenomenon in U.S. immigration law: the imposition of immigration enforcement costs on the U.S. population as a whole. In pursuit of enforcement goals, E-Verify impacts significant individual interests. It does so by creating a very small risk per individual of a harmful error, but aggregates that risk across the working population. That small population-wide risk is paired with greater risks that the harmful error will fall on a minority of the population, unsettling the workplace's potential for democratic integration.

* Professor of Law, Lewis & Clark Law School. This Article was inspired by a talk given at Lewis & Clark Law School by Bruce Friedman, Senior Policy Advisor, Office for Civil Rights & Civil Liberties of the Department of Homeland Security. I am grateful for helpful comments and conversations to Tino Cuéllar, Bruce Friedman, Pratheepan Gulasekaram, Mary Holland, Margaret Hu, Jeffrey Kahn, Stephen Lee, Matthew Lister, Jayesh Rathod, Jenny Roberts, David Rubenstein, Rick Su, and Michele Waslin, as well as to participants at the UC Irvine Symposium "Persistent Puzzles in Immigration Law," Santa Clara Law School's Social Justice Workshop, the 2011 Emerging Immigration Law Scholars and Teachers Conference, and the Washburn University School of Law Symposium "Breaching Borders-State Encroachment into the Federal Domain." James Bartholomew, Angie Ferrer, Hoshihito Kondo, and Melanie Rose provided invaluable research assistance. Special thanks to Eric, Liam, and Kai.

I. INTRODUCTION

Work is both venerated and despised. Capitalist and socialist systems concern themselves with who controls the means of production, the fruits of labor, and the regulation of the workplace. Paid work generates the income employees use to sustain themselves and their family, obtain goods, and support pastimes. Work also has social and personal meaning: it can communicate social status, enmesh employees in social networks, inspire, demoralize, degrade, bore, and frustrate. Work can be transformational,[1] virtuous,[2] or exploitative.[3] In some

1. *See generally* VIRGINIA WOOLF, A ROOM OF ONE'S OWN (Houghton Mifflin Harcourt 2005) (1929).

2. *See* MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS 64 (1989) ("The sweat of hard work is not to be displayed. It is much more graceful to appear favored by the gods."); *see also* H.R. REP. NO. 104-651, at 3 (1996) ("[T]he values of work and family . . . form the foundation of America's communities."), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2184. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L.

settings (Washington, D.C., notoriously so; Portland, Oregon, reputedly not[4]), what work we do defines who we are. "What do you do?" asks for much less than the sum total of the activities you might be engaged in, and also more. It asks where you work, at what, for whom, perhaps when and how, and what that means for how you and the questioner will relate to one another after you've answered. The workplace has been hailed—cautiously—as "the single most promising arena of racial integration" in American society.[5] All of this, however, depends upon access to work. This Article is about how immigration law is changing the way Americans gain access to the workplace. It is about the borderline between employment and exclusion from the workplace.

Most of us tend to think of employment as a private agreement between employer and employee.[6] The Immigration Reform and Control Act of 1986 (IRCA) introduced immigration enforcement into this private relationship, requiring employers to ask new employees to present documents showing identity and authorization to work in the United States.[7] IRCA is an immigration law, targeted at and primarily affecting noncitizens. Yet IRCA, together with E-Verify, an electronic system that uses online government databases to carry out IRCA's directive, places burdens on all U.S. employees, including U.S. citizens. E-Verify electronically compares the documents every new employee presents to an employer with information in the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases in order to identify employees who lack work authorization. This Article explores the implications of a strategy that engages the U.S. workplace and its inhabitants in the law enforcement quest to target noncitizens present unlawfully.[8]

E-Verify is poised for nationwide implementation. It has been a cornerstone of major immigration reform initiatives.[9] In May 2011, the Supreme Court opened

---

No. 104-193, §§ 817, 852.

3. *See* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 8–9 (1992).

4. *Portlandia*: *Farm* (Broadway Video Entertainment broadcast Jan. 21, 2011), *available at* http://www.ifc.com/videos/portlandia-portland-dream-of-the-90s.php ("Portland is a city where young people go to retire.").

5. CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 9 (2003).

6. *E.g.*, *Employment*, WIKIPEDIA (Oct. 8, 2011, 1:42 PM), http://en.wikipedia.org/wiki/Employment ("Employment is a contract between two parties, one being the employer and the other being the employee.") (citing BLACK'S LAW DICTIONARY 471 (5th ed. 1979)).

7. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(b), 100 Stat. 3359, 3365–68 (codified at 8 U.S.C. § 1324a(b) (2006)). *But cf. infra* notes 36–51 and accompanying text (noting that immigration laws aimed at the workplace existed prior to 1986, but targeted employees based on race or employers based on employment sector).

8. *See* Immigration Reform and Control Act §§ 3360–69.

9. *E.g.*, THE WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM 21–22 (May 2011), http://www.whitehouse.gov/sites/default/files/rss_viewer/immigration_blueprint.pdf (proposing phasing in mandatory use of E-Verify while strengthening some employee protections);

the door for states to mandate that employers use the E-Verify system, with restriction or revocation of the employer's business license as the sanction for failure to comply.[10] The federal government requires most of its contractors to use the system and nearly twenty states mandate that some or all of its employers use E-Verify.[11]

Most scholarship on E-Verify has been devoted to its effect on noncitizens and minorities: critiquing whether it works as intended,[12] increases discrimination,[13] opens the door to state regulation of immigration,[14] or disrupts

---

S. 1639, 110th Cong. § 302 (2007) (proposing implementation schedule for national use of E-Verify by all employers); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (passed by Senate, May 25, 2006).

10. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985–87 (2011).

11. *See Table: States Requiring E-Verify*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/?tabid=13127#10 (last updated Nov. 4, 2011).

12. *See* Danielle M. Kidd, Note, *E-Verify: Promoting Accountability and Transparency in Federal Procurement through Electronic Employment Verification*, 40 PUB. CONT. L.J. 829 (2011) (analyzing the costs and benefits of the E-Verify program and concluding that its benefits outweigh the costs); Carl Wohlleben, Note, *E-Verify, A Piece of the Puzzle Not a Brick in the Wall: Why All U.S. Employers Should Be Made to Use E-Verify, Just Not Yet*, 36 RUTGERS COMPUTER & TECH. L.J. 137, 141 (2009) (describing flaws in E-Verify and government attempts to improve the system); *see also* Amy Peck, *E-Verify: The Good, The Bad and the Unresolved*, NEBRASKA LAWYER, Apr. 2011, at 15 (explaining that tentative nonconfirmations and erroneous information are "still a way of life" when using E-Verify).

13. *See* WESTAT CORP., FINDINGS OF THE E-VERIFY PROGRAM EVALUATION, REPORT SUBMITTED TO U.S. DEPARTMENT OF HOMELAND SECURITY 235, 242, 250 (Dec. 2009), *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf [hereinafter WESTAT REPORT] (assessing the rates of discrimination by employers); *see also* Matthew C. Arentsen, Comment, Chamber of Commerce v. Edmondson*: Employment Authorization Laws, States' Rights, and Federal Preemption—An Informed Approach*, 88 DENV. U. L. REV. 375, 390–92 (2011) (contending that state-mandated participation in E-Verify will not increase employment discrimination); Kati L. Griffith, *Discovering 'Immployment' Law: The Constitutionality of Subfederal Immigration Regulation at Work*, 29 YALE L. & POL'Y REV. 389, 417 (2011) (explaining that subfederal laws expanding IRCA and mandating E-Verify "encourage employment discrimination because they place extra burdens on employers and expand the use of E-Verify beyond what IRCA requires"); Kidd, *supra* note 12, at 841–43 (arguing that E-Verify will not change the potential for discrimination); Darcy M. Pottle, Note, *Federal Employer Sanctions as Immigration Federalism*, 16 MICH. J. RACE & L. 99, 116-19 (2010) (outlining the E-Verify program and noting that E-Verify's "false negatives disproportionately affect persons born outside of the United States") (quoting *Problems in the Current Employment Verification and Worksite Enforcement System:Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec. and Int'l Law of the H. Comm.on the Judiciary*, 110th Cong. 58 (2007) (testimony of Marc Rosenblum, Dept. of Political Science, University of New Orleans)).

14. *See generally* Arentsen, *supra* note 13 (analyzing appellate decisions weighing preemption challenges to state laws that mandate employer participation in the federal E-Verify program); Naomi Barrowclough, *E-Verify: Long Awaited 'Magic Bullet' or Weak Attempt to Substitute Technology for Comprehensive Reform?*, 62 RUTGERS L. REV. 791, 798–805 (2010) (evaluating the question of nationalizing E-Verify in light of state integration or rejection of E-Verify); Rachel Feller, *Preempting State E-Verify Regulations: A Case Study of Arizona's Improper Legislation in the Field of "Immigration-Related Employment Practices,"* 84 WASH. L. REV. 289 (2009) (arguing that Congress created and occupied a new field of immigration-related employment practices that preempts state regulation); Mark S. Grube, Note, *Preemption of Local Regulations Beyond* Lozano v. City of Hazleton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 418–22 (2010) (analyzing E-Verify's procedures and enforcement in the context of conflict preemption); Kris W. Kobach, *Reinforcing the Rule of Law:*

labor and employment protections for undocumented workers.[15] This Article takes a different path. It engages E-Verify as a contemporary example of a recurring phenomenon in U.S. immigration law—the imposition of immigration enforcement costs on the U.S. population as a whole. E-Verify is an immigration enforcement program that will mandate participation from most of the working population in the United States. Broad implementation of E-Verify may impose actual and potential harms on that larger population through error, misuse, discriminatory effect, or a decrease in individual autonomy.

With E-Verify, that threat is multifold. First, prior to their E-Verify database check, all work-authorized employees will face a risk of finding themselves erroneously barred from employment that is different in nature from the risk under the current I-9 Form-based system. The second risk is that government agencies whose databases E-Verify relies on may use their new access to employment information in undesirable, liberty-constraining ways. E-Verify introduces the Department of Homeland Security, an agency with a national security and law enforcement agenda, into the employment process as a decision maker. That raises concerns that the agency may use the information about employees that E-Verify receives for its own primary mission.

These risks are universal. They are faced by all employees, regardless of citizenship or immigration status. Added to these individual risks are structural risks. Widespread use of E-Verify may change the nature of the workplace in unexpected and uncomfortable ways.

Understanding the impact of E-Verify on the mainstream U.S. employee is important for three reasons. First, it has the potential to change the current discourse on immigration enforcement and reform by changing public perspectives on modern immigration enforcement strategies. When immigration enforcement affects citizens, even in small ways, citizens have reason to pay attention to issues that affect noncitizens. Policymakers considering expansion of E-Verify and courts considering challenges to it must take into account the liberty interests of the ordinary citizen.

What States Can and Should Do to Reduce Illegal Immigration, 22 GEO. IMMIGR. L.J. 459, 471–74 (2008) (advocating state implementation of mandatory E-Verify use laws); Jaime Walter, Comment, *Congressional Preemption of Work-Authorization Verification Laws: A Narrower Approach to Defining the Scope of Preemption*, 45 U.S.F. L. REV. 289 (2010) (arguing that local statutes mandating work-authorization verification should succumb to field preemption).

15. *See* David Bacon & Bill Ong Hing, *The Rise and Fall of Employer Sanctions*, 38 FORDHAM URB. L.J. 77, 87–89, 91–92 (2010) (describing barriers to worker organizing and assertion of employment protections resulting from IRCA's employer sanctions provisions and SSA database checks); Griffith, *supra* note 13, at 392, 441–49 (considering "the preemptive force of two baseline federal employment laws: the Fair Labor Standards Act of 1938 (FLSA) and Title VII of the Civil Rights Act of 1964"); Lora L. Ries, *B-Verify: Transforming E-Verify into a Biometric Employment Verification System*, 3 ALB. GOV'T L. REV. 271, 285–86 (2010) (analyzing the E-Verify system's potential for employer misuse).

Second, protecting the interests of the majority can enhance protection of minority interests when those interests overlap.[16] If the liberty interests of mainstream U.S. employees converge with those of noncitizens or employees of color, interest-convergence theory suggests that courts will pay more attention to those interests.[17] If E-Verify, in its mission to deter employment of undocumented workers, interferes with the ability of mainstream employees to get and keep jobs or otherwise diminishes the quality of the work experience, mainstream employees begin to share a common interest with undocumented workers or employees of color who experience discrimination. That common interest, held by a large majority, will attract the attention of both courts and policymakers.

Finally, examining the interplay between the impact of E-Verify on mainstream employees and undocumented workers sheds light on how E-Verify could fundamentally change the nature of the workplace. E-Verify's growing implementation expands the regulation of employees by federal agencies, law enforcement, and state actors. E-Verify introduces the DHS, an agency with a mission very different from labor regulation, into the establishment of the employment relationship. It creates room for states to play a larger role in immigration enforcement and employment when they mandate that employers use the E-Verify system and place state sanctions on failure to comply.

This Article explores the concern that policymakers and courts at the national or the state level will ignore or, at best, discount these diffuse, unquantifiable risks. Failing to understand how E-Verify could affect the liberty interests of employees will impoverish the discussion about whether to implement E-Verify on a national level. Added to this is the strong perception that E-Verify is purely an immigration enforcement program, despite its application to all employees. These barriers raise the likelihood that diffuse liberty interests will be traded away by policymakers for what are perceived as more concrete benefits in the form of stronger immigration enforcement and deterrence of unlawful migration.

Part II of this Article lays out a history of employment law as a backdrop for IRCA and E-Verify. It briefly describes the E-Verify system and locates it in a uniquely delicate moment: the inception of employment. Part III describes the challenge for democratic institutions of properly evaluating the nationwide adoption of a program that has benefits for a majority but disproportionately burdens a minority. It lays out several critiques of the E-Verify system. Part IV

16. Derrick Bell, Brown v. Board of Education*: Reliving and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 22 (2004) (describing the interest-convergence theory).

17. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1728 (2010) (explaining several ways in which unauthorized migrants may assert "oblique versions of rights that U.S. citizens or lawful permanent residents can exercise in the same settings").

analyzes the increased role that E-Verify establishes for the federal and state governments in the creation of the employment relationship and the ways that E-Verify changes the relationship between employers, employees, and applicants. It evaluates whether the majoritarian interest in greater liberty has the potential to collaterally protect the interests of the more vulnerable minority of employees who will suffer the greatest harms[18] upon the national application of E-Verify.

II. CROSSING THE BORDERLINE: ACCESS TO WORK

E-Verify and the employer sanctions laws represent the coming together of two historical approaches to employment. The first is the traditional conception of at-will employment operating within a relatively private employer-employee relationship. Coexisting with the at-will tradition is the history of government restrictions on access to the workplace for noncitizens, women, and ethnic and racial minorities. This Part will illustrate how IRCA's employer sanctions provisions and E-Verify straddle these approaches, applying to the mainstream U.S. workforce the enforcement tools shaped through government efforts to restrict access to employment on the basis of race, ethnicity, gender, and citizenship status.

A. Two Employment Histories

1. At-Will Employment

The traditional history of employment law in the United States traces the establishment of a powerful form of private contract as the mainstay of the employment relationship. The foundation of U.S. employment law has been the doctrine of at-will employment, which theorizes a private agreement between two relatively equal parties from which either party may withdraw at any time and for any reason.[19]

---

18. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."); *see also* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 914, 959 (2007) (applying this theory to cultural defense claims of minority and immigrant defendants and concluding that these defendants are "more likely to receive accommodation when there is convergence between [American] cultural norms and [their] cultural norms").

19. Plona v. United Parcel Serv., Inc., 558 F.3d 478, 481 (6th Cir. 2009) ("[T]he employment-at-will doctrine . . . permits an employer to terminate an at-will employment relationship 'for any cause, at any time whatsoever, even if done in gross or reckless disregard of [an] employee's rights.'" (quoting Painter v. Graley, 639 N.E.2d 51, 55 (Ohio 1994))); Johnson v. Delchamps, Inc., 897 F.2d 808, 810 (5th Cir. 1990) (stating that under the employment-at-will doctrine "both employers and employees are free to end the employment relationship at any time, and for any reason, without liability"); Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 350–51 (2008) (describing at-will employment); *see also* Julie C. Suk, *Discrimination*

The development of the at-will doctrine during the Industrial Revolution originally endowed employees with the freedom to quit.[20] Over time, however, the at-will doctrine came to entrench an employer's freedom to fire its employees. Scholars have roundly critiqued the imprimatur that the at-will doctrine places on discharge without good cause because it tips the balance of power heavily in favor of the employer.[21]

At-will employment relies on the relative absence of public regulation of hiring and firing. Judicial forbearance, in the absence of a clear statement, from enforcing contracts that restrict firing an employee exemplifies this reluctance to govern the employment relationship.[22] When law does act affirmatively to regulate employment, it is often characterized as an intrusion. For example, employment discrimination law emerged as an inroad into at-will employment, prohibiting employers from relying on race or membership in other protected classes when taking adverse employment actions.[23]

---

at Will: Job Security Protections and Equal Employment Opportunity in Conflict, 60 STAN. L. REV. 73, 78–80 (2007) (describing at-will employment and exceptions to the general rule).

20. *See* Katherine V.W. Stone, *Dismissal Law in the United States: The Past and Present of At-Will Employment,* INT'L COLLABORATIVE ON SOC. EUR. 2–4 (forthcoming 2012), *available at* http://ssrn.com/abstract=1342667 (describing the inception of the at-will doctrine during the Industrial Revolution as a move away from the "entire-contract doctrine" which penalized agricultural employees who left employment prior to the end of the harvest).

21. *E.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406 (1967) ("It is the fear of being discharged which above all else renders the great majority of employees vulnerable to employer coercion."); Marion Crain, *Arm's-Length Intimacy: Employment As Relationship,* 35 WASH. U. J.L. & POL'Y 163, 166 (2011) (reasoning that "the vast majority of individual workers lack the bargaining leverage or knowledge of their rights necessary to protect their investment by negotiating for job security"); *contra* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (advocating for repeal of discrimination laws in favor of a return to freedom of contract and individual autonomy). *See also* James E. Macdonald & Caryn L. Beck-Dudley, *A Natural Law Defense to the Employment Law Question: A Response to Richard Epstein*, 38 AM. BUS. L.J. 363, 367, 375 (2001) (listing sources taking both sides of the question).

22. *See* Ziegler v. Findlay Indus., Inc., 464 F. Supp. 2d 733, 742 (N.D. Ohio 2006) (explaining that "the mere inclusion of a . . . term [of years]" in an employment contract is not enough to overcome the "strong presumption of at-will employment unless the terms of the contract clearly indicate otherwise" (citing Henkel v. Educ. Research Council, 344 N.E.2d 118 (Ohio 1976))).

23. *See* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1655 (1996) (explaining that "[t]he employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all—has been drastically cut back in the last sixty years" and that the "at-will rule now coexists with numerous important exceptions—statutory and common law, state and federal—that prohibit . . . discrimination based on race, sex, age, or other characteristics."); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers,* 3 U. PA. J. LAB. & EMP. L. 65, 66 (2000) (noting that at-will employment is a "fundamental assumption [that] has shaped our labor law"); *see also* Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine,* 37 AM. BUS. L.J. 653 (2000) (arguing that the expansion of modern tort law is gradually eviscerating at-will employment in America).

2. Coerced Labor and Barriers to Work

Despite the rise in prominence of the at-will doctrine, U.S. law has always closely regulated access to work.[24] Juxtaposed with the at-will realm of employment law were laws that channeled employment by means of racial, ethnic, gender-based, and citizenship status restrictions. Regulation of employment in the United States has tended to take the form either of requiring work or of denying entry to the workplace. In perspective, then, the at-will realm of freedom from government regulation of employment turned out to be a space bounded by legal restrictions and obligations that were racial, ethnic, and gendered. It also was, and remains, tightly bounded by citizenship and immigration law.

Coerced work hearkens as far back as the colonial era, when laws institutionalizing slavery systematized the forced migration and dehumanization of African[25] and Native American[26] peoples in order to provide labor for the project of white settlement of the new landscape. Early European migration to the United States relied heavily on indentured servitude, through which migrants paid off their passage by working under an enforceable contract for a term of years, after which they became free to contract their own labor.[27] After the Civil War, the Black Codes in most postbellum states imposed on freed blacks a legal obligation to work on pain of arrest. These laws authorized the sheriff to hire out the arrested freedman to white landowners.[28]

Denying access to the workplace was not uncommon. In 1908, the Supreme Court confirmed that states could restrict women from working in a range of occupations and conditions because the performance of the "maternal function[]"

---

24. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING 21–26 (2006) (laying out a history of restrictive federal and state immigration laws); *see, e.g.*, Coolie Trade Law, Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (1862) (barring transportation of Chinese citizens "as servants or apprentices, or to be held to service or labor").

25. *See* Rhonda V. Magee, *Slavery As Immigration?*, 44 U.S.F. L. REV. 273, 278–82 (2009); Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law,* 62 VAND. L. REV. 1353 (2009).

26. *E.g.*, Gregory Ablavsky, Comment, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1463–67 (2011) (describing the history of Native American enslavement in the colonies). *See generally* INDIAN SLAVERY IN COLONIAL AMERICA (Alan Gallay ed., 2009) (studying Indian slavery from various perspectives).

27. *See* Alfred L. Brophy, *Law and Indentured Servitude in Mid-Eighteenth Century Pennsylvania*, 28 WILLAMETTE L. REV. 69, 85–90 (1991); Bradley J. Nicholson, *Reflections on Capitalism, Property, and the Law of Slavery*, 27 OKLA. CITY U. L. REV. 151, 172–75 (2002).

28. *See, e.g.*, 1866 Va. Acts 91–92, ch. 28 (defining "vagrant" broadly to include former slaves and providing that a justice shall "order [a] vagrant to be employed in labor for any term not exceeding three months, and . . . to be hired out for the best wages that can be procured"); 1865 S.C. Acts 284–85, ch. 96–98 (1865) (declaring that a convicted vagrant may "be hired for such wages as can be obtained for his services, to any owner or lessee of a farm, for the term of hard labor to which he was sentenced"); *see* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 419 (2011) (locating the Black Codes within a larger context of involuntary labor).

made women the "object of public interest and care in order to preserve the strength and vigor of the race."[29]

More recent immigration law has its own examples of both compulsory labor and denial of access to the workplace. The Bracero Program, negotiated with Mexico in 1942, facilitated the migration of temporary Mexican contract laborers and conditioned the right to remain in the United States on continuing employment.[30] Today, the United States conditions the validity of most temporary employment visas on a continuing employment relationship.[31] When the job ends, the noncitizen becomes unlawfully present.[32] While this is a far cry from indentured servitude, the threat of deportation as a consequence of quitting or being fired introduces an element of coercion into the relationship between employer and noncitizen employee.

Immigration law has been marked not only by affirmative obligations to work, but also by government restriction on access to employment. In 1882, the first Chinese Exclusion Act imposed a ten-year ban on the immigration of Chinese laborers.[33] The 1885 Contract Labor Law denied entry to noncitizens seeking to

---

29. Muller v. Oregon, 208 U.S. 412, 421 (1907); *see also id.* at 422 (explaining that "her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man" and thus "[t]he limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all"); Alice Kessler-Harris, *Legal Theory & Gendered History,* 19 COLUM. J. GENDER & L. 125, 129–30 (2010) (locating *Muller v. Oregon* in the context of historical ideas of individual liberty and contrasting the application of liberty to men and women).

30. *See* Agreement Between the United States of America and Mexico Respecting the Temporary Migration of Mexican Agricultural Workers, Aug. 4, 1942, 56 Stat. 1759, 1768; Agreement Between the United States of America and Mexico Respecting the Recruiting of Mexican Non-Agricultural Workers, April 29, 1943, 57 Stat. 1353, 1357; *see also* CALAVITA, *supra* note 4, at 19–25 (providing historical context on the bilateral agreement on temporary migration for Mexican agricultural workers).

31. *See* Peter H. Schuck & John E. Tyler, *Making the Case for Changing U.S. Policy Regarding Highly Skilled Immigrants*, 38 FORDHAM URB. L.J. 327, 342 (2010) (noting that for H-1B visa holders, after the visa term expires "or if the worker leaves the original sponsoring employer and does not get new sponsorship, he or she must leave the country" (citing 8 U.S.C. § 1184(a), (n))).

32. *See* 8 U.S.C. § 1182(a)(9)(B) (2011) (defining "aliens unlawfully present"); *e.g.*, Tapis Int'l v. INS*,* 94 F. Supp. 2d 172, 174 (D. Mass. 2000) (pointing out that the immigration agency's denial of petition to renew temporary H-1B employment visa subjected the noncitizen employee and his wife to potential removal from the United States).

33. The Chinese Exclusion Acts include: Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (suspending immigration of Chinese laborers to the United States for ten years); Scott Act, ch. 1064, 25 Stat. 504 (1888) (repealed 1943) (prohibiting Chinese laborers from returning to the United States after departure); Geary Act, ch. 60, 27 Stat. 25 (1892) (repealed 1943) (extending the ban on Chinese laborers); McCreary Act, ch. 14, § 2, 28 Stat. 7 (1893) (repealed 1943) (defining laborers to include merchants, laundry owners, miners, and fishers); Act of Apr. 27, 1904, ch. 1630, 33 Stat. 392, 428 (repealed 1943) (reenacting and extending Acts without limitation); *see also* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600, 600–01 (repealing the Chinese Exclusion Acts).

enter the United States if they arrived having previously contracted to work.[34] For a long time, lawful admission to the United States has been predicated on a federal determination of a need for foreign labor as well as a private offer of employment.[35]

3. Regulating Access to At-Will Employment: IRCA and E-Verify

In 1986, the separate worlds of at-will employment for mainstream employees and restricted access to employment for noncitizens and other outsider groups merged. Until then, the law permitted employers to hire noncitizens unlawfully present in the United States.[36] Congress passed IRCA in 1986 as part of an overhaul of the immigration laws.[37] IRCA placed employers in the role of private immigration law screeners. It imposed on employers an obligation to request documents showing the employee's identity and authorization to work from each new hire. It also required employers to refrain from hiring applicants unable to produce those documents.[38]

For the first time, IRCA barred employers from hiring employees within the United States whom the government had not authorized to work.[39] Ten years later, Congress mandated the creation of a pilot program for electronic verification of employment eligibility, now known as E-Verify.[40]

---

34. Alien Contract Labor Law, ch. 164, 23 Stat. 332 (1885) *codified and amended by* 8 U.S.C. § 141 (1946) (repealed 1952); EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 88–89 (1981).

35. *See* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (codified at 8 U.S.C. § 1182(a)(5)) (restricting admission of certain classes of employees based on the Department of Labor's certification that there are insufficient qualified U.S. workers available to perform the job at the prevailing wage); *id.* § 203(b) (codified at 8 U.S.C. § 1153(b)) (listing preferences for employment-based permanent immigration); *id.* § 101(a)(15) (codified at 8 U.S.C. § 1101(a)(15)(H)) (listing temporary visas including those providing temporary lawful presence for work-related reasons); *see also* Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 531–41(2007) (describing the inception of employment-based restrictions on immigration and the role of labor unions in that shift). *See generally* KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820–1924 (1984) (offering a comprehensive history).

36. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §274(a), 66 Stat. 163, 228–29 (1952), *amended by* 8 U.S.C. § 1324(a) (1986) (enacting the "Texas Proviso," which exempted employment of unauthorized workers from the crime of harboring an unauthorized alien); *see also* Daniel J. Tichenor, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 194 (2002) (describing the history of employer sanctions laws).

37. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) (amending the Immigration and Nationality Act) (codified at 8 U.S.C. § 1324a); *see* Stephen Lee, *Private Immigration Screening in the Workplace,* 61 STAN. L. REV. 1103, 1105–07 (2009).

38. 8 U.S.C. § 1324a(b) (2006).

39. *Id.* § 1324a(a) (prohibiting employment of noncitizens without employment authorization); *see* Motomura, *supra* note 17, at 1760 (setting out a brief history of employer sanctions laws).

40. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, div. C, § 401(a), 110 Stat. 3009-546, 3009-655 (1996); *see also* Chamber of Commerce v. Edmondson, 594 F.3d 742, 752 (10th Cir. 2010) (describing the history of the Basic Pilot program that later became E-Verify).

IRCA imposed lawful immigration status as a new hiring criterion. While professional licensing requirements and felon disqualification laws had previously restricted access to certain professions and jobs, IRCA made a much more sweeping change. In requiring employers to verify that the government authorized the employee to work, IRCA established a permanent and public restriction on what most perceived as a private employer-employee contract. The law relocated the concept of government authorization to work from its roots in historical subordination and immigration control to the mainstream employment realm.[41]

B. Navigating E-Verify

Understanding the role of E-Verify in changing the nature of the workplace requires some knowledge of how the system works. The E-Verify system adds an electronic component to IRCA's paper-based process for verifying the work authorization of new hires by means of a federal form. In essence, the employer enters into a computer certain information from each employee's identity and work authorization documents.[42] Through the Internet, the E-Verify program attempts to match the employee's information to government databases maintained by the Social Security Administration (SSA) and DHS.[43] If there is a match, the computer informs the employer that the new hire is authorized to work.[44] If there is either no match or a mismatch between the information the employer submitted and data in the government database, the system will return a "tentative non-confirmation," also known as a "TNC."[45]

At that point, the E-Verify system relies on the employer to provide the employee with a notice of the lack of employment eligibility confirmation along with instructions to contact a government agency to address the issue.[46] If neither the SSA nor DHS can confirm the employee's authorization to work, E-Verify will issue a notice to the employer of a "final nonconfirmation."[47] E-Verify will also return a final nonconfirmation or a "DHS No Show" notice if the employee does not contact the government within eight federal work days of E-Verify's issuance

41. *See* Stone, *supra* note 20, at 6 (describing a "dual labor market, comprised of insiders—usually white, blue collar men in unionized firms—and outsiders—usually women, minorities, migrant workers and rural Americans[]" left out of the more stable employment sectors).

42. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, E-VERIFY USER MANUAL FOR EMPLOYERS, 15–17 (2011), *available at* http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf [hereinafter E-VERIFY USER MANUAL].

43. *Id.* at 4.

44. *Id.* at 22.

45. *Id.* at 25; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-146, EMPLOYMENT VERIFICATION: FEDERAL AGENCIES HAVE TAKEN STEPS TO IMPROVE E-VERIFY, BUT SIGNIFICANT CHALLENGES REMAIN 8–11 (2010) [hereinafter GAO REPORT] (detailing circumstances under which E-Verify will issue a tentative nonconfirmation in response to the information that the employer has provided).

46. E-VERIFY USER MANUAL, *supra* note 42, at 27–38.

47. GAO REPORT, *supra* note 45, at 9.

of a tentative nonconfirmation notice to the employer.[48] There is no formal process to appeal a final nonconfirmation.[49]

Upon receiving the final nonconfirmation, the employer is expected to terminate the new hire's employment.[50] If the employer continues to employ the individual after a final nonconfirmation, the employer is presumed to be knowingly employing an undocumented worker.[51]

U.S. Citizenship and Immigration Services (USCIS), the primary agency that manages the program, characterizes E-Verify as largely voluntary.[52] The authorizing legislation describes it as a pilot program with a four-year sunset,[53] though Congress has extended that expiration date.[54] Nevertheless, mandatory participation is on the rise. While the federal government has not required private employers to participate in E-Verify, it is mandatory in federal government hiring and for most federal contractors.[55] Many states have joined Arizona in requiring employers, public and private, to use E-Verify.[56] Employers not subject to these federal and state requirements may choose whether to use E-Verify or continue to implement IRCA's paper-based employment verification requirements.

Regardless of the extent of employer choice to use E-Verify, representing E-Verify as a voluntary program is inaccurate in an important respect. Participation

---

48. E-VERIFY USER MANUAL, *supra* note 42, at 45–47.

49. *Id.* at 39.

50. GAO REPORT, *supra* note 45, at 13–14.

51. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 403(a)(4)(C)(iii), 110 Stat. 3009-546, 3009-655 to -665 (1996) ("If the person or other entity continues to employ (or to recruit or refer) an individual after receiving final nonconfirmation, a rebuttable presumption is created that the person or entity has violated [the employer sanctions provision, 8 U.S.C. § 1324a(a)(1)(A)]."); *see also* U.S. DEPARTMENT OF HOMELAND SECURITY, *The E-Verify Program For Employment Verification Memorandum of Understanding*, U.S. DEPARTMENT OF HOMELAND SECURITY 4 (2009), *available at* http://www.uscis.gov/USCIS/E-Verify/Customer %20Support/Employer%20MOU%20(September%202009).pdf [hereinafter E-VERIFY MEMORANDUM OF UNDERSTANDING] (enumerating the obligations of the Department of Homeland Security, the Social Security Administration, and the employer, and stating that "the Employer is subject to a rebuttable presumption that it has knowingly employed an unauthorized alien . . . if the Employer continues to employ an employee after receiving a final nonconfirmation"); *see also* GAO REPORT *supra* note 45, at 13–14.

52. E-VERIFY USER MANUAL, *supra* note 42, at 4; *see also* IIRIRA § 402(a) (stating that "any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that pilot program" and, "[e]xcept as specifically provided . . . , the Attorney General may not require any person or other entity to participate in a pilot program").

53. IIRIRA §§ 401–04.

54. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. No. 108-156, 117 Stat. 1944, 1944–45; Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 755, 755–56 (extending E-Verify to September 2009); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83 123 Stat. 2142 (2009) (approving three-year extension to 2012).

55. *See* GAO REPORT, *supra* note 45, at 2 (citing Federal Acquisition Regulation (FAR) subpt. 22.18).

56. *See supra* note 11 and accompanying text.

is involuntary for the population most likely to experience its shortfalls: employees. E-Verify employers must verify all new hires through the program, leaving no room for employees to opt out.

This requirement exists both to ensure that employers use E-Verify for employees with questionable work authorization and to discourage discriminatory use.[57] It prohibits employers from selectively verifying only certain employees due to an employer's suspicion, based on perceived race, ethnicity, immigration status, national origin, or any other factor, that an employee may not be eligible to work.[58] It is also meant to increase compliance with employment verification laws by making it more difficult for employers to hire employees who are not authorized to work.[59]

Nevertheless, the requirement that employers screen all new hires means that employees cannot avoid any shortcomings of the program. E-Verify has a number of safeguards to protect work-authorized employees from improper termination and discrimination. An employer is statutorily barred from firing an employee because of a tentative nonconfirmation of the employee's eligibility to work.[60] Nor may employers use the system to prescreen applicants prior to hire.[61] The law does not, however, specify any means of enforcing these safeguards.

C. The Difference E-Verify Makes

E-Verify represents a significant step beyond IRCA in entrenching immigration enforcement in the workplace. When IRCA divided U.S. employees into groups according to work authorization, it destabilized the conception of a private realm of employment contract but largely left the employer in the driver's seat in enforcing that division. IRCA imbued the employer with the gatekeeping role of screening new hires, a function previously reserved to immigration

---

57. IIRIRA § 404(d)(4) (requiring "reasonable safeguards against . . . unlawful discriminatory practices based on national origin or citizenship status").

58. *Id.* § 404(d)(4) (requiring the system to "have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including—(A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants"); E-VERIFY MEMORANDUM OF UNDERSTANDING, *supra* note 51, at 4–5.

59. IIRIRA § 404(d)(4) (requiring safeguards against discrimination); Marc R. Rosenblum, *E-Verify: Strengths, Weaknesses, and Proposals for Reform*, MIGRATION POL'Y INST., 5 (2011), *available at* http://www.migrationpolicy.org/pubs/e-verify-insight.pdf (explaining that "E-Verify strengthens immigration enforcement" by detecting the most common fraudulent identification documents).

60. IIRIRA § 403(a)(4)(B)(iii) ("In no case shall an employer terminate employment of an individual because of a failure of the individual to have identity and work eligibility confirmed under this section until a nonconfirmation becomes final. Nothing in this clause shall apply to a termination of employment for any reason other than because of such a failure."); E-VERIFY MEMORANDUM OF UNDERSTANDING, *supra* note 51, at 5.

61. E-VERIFY MEMORANDUM OF UNDERSTANDING, *supra* note 51, at 4.

enforcement officials.[62] As a result, the face of immigration enforcement in the workplace—the employer's face—remained largely private and entirely familiar. Although the existence of the legal prohibition and the threat of agency audits and raids may have influenced employer decision-making, the employer alone made the decision that mattered at the moment of hire, determining whether the work authorization documents were genuine on their face.

E-Verify, in contrast, relegated the employer to the role of copilot to immigration officials in enforcing immigration law in the workplace. E-Verify delegates to the employer the ministerial function of gathering documents from the employee, feeding the information into the agency databases, and delivering the agency's notice of failure to confirm employment eligibility. At the same time, E-Verify channels the employer's greatest power, the power to discharge, to serve the ends of immigration control.

In this way, E-Verify has made visible the Cheshire Cat of government control over work authorization. E-Verify unveils the way that the employment verification laws articulated a government power to endow employees with permission to work. Like the Cheshire Cat, this power remains present even when out of sight.[63] By making each new hire contingent on an individualized inquiry to agency databases, E-Verify reveals U.S. employees to themselves as a class circumscribed by government authorization to work.

III. THE BENEFITS AND FLAWS OF E-VERIFY

This Part examines the impact of E-Verify on mainstream employees. It begins by evaluating the benefits that E-Verify proffers to civil society in the United States. It then evaluates two central flaws: the failure to verify the employment eligibility of a proportion of employees who are authorized to work, and the disparate impact of E-Verify errors on noncitizens of color, women, and naturalized citizens. E-Verify offers some benefits to the majority at a small risk per capita of some loss of liberty and a higher risk to certain minority employees of experiencing greater individual losses.

A. Benefits of E-Verify

In passing IRCA's employer sanctions provisions and mandating the development of E-Verify, Congress intended to confer on U.S. society a more effective form of immigration control and also reduce discrimination based on

62. Jeffrey Manns, *Private Monitoring of Gatekeepers: The Case of Immigration Enforcement*, 2006 U. ILL. L. REV. 887, 940–41 (2006) (outlining the gatekeeping function that IRCA placed on employers and noting that both employers and undocumented employees have incentives to subvert good-faith compliance with employment verification programs).

63. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 72–73 (S. MICHELLE WIGGINS illust., 1983).

perceptions of foreign appearance and accent.[64] An effective employment eligibility verification regime would identify employees who were not authorized to work while accurately confirming the employment eligibility of U.S. citizens and work-authorized noncitizens.

1. Identifying Undocumented Employees

The USCIS website advertises E-Verify as a more accurate and efficient way for employers to determine the eligibility of their employees to work in the United States and "the best way employers can ensure a legal workforce."[65] A fully work-authorized workforce would reduce the perceived need for workplace raids involving armed immigration agents, mass arrests, and criminal and civil prosecutions.[66] It would also relieve the downward pressure on employee protections that the existence and availability of a malleable supply of undocumented employees creates.

E-Verify's capacity to affect these benefits by identifying employees who lack work authorization has attracted frequent critique.[67] In a nutshell, the system oververifies by confirming as eligible for employment numerous employees who are not. Between April and June of 2008, E-Verify confirmed as work-authorized approximately 54% of employees who in fact were not authorized to work, or 5.8% of the workers screened.[68] E-Verify is currently unable to detect when an employee uses valid documents that are stolen or borrowed, or when an employer uses a work-authorized employee's documents to verify another employee with questionable work eligibility.[69]

---

64. IIRIRA § 403 (setting out pilot program purpose and requirements); § 404(d)(4) (requiring "reasonable safeguards against . . . unlawful discriminatory practices based on national origin or citizenship status").

65. *E-Verify*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.dhs.gov/e-verify (last visited Nov. 15, 2011); *see also* Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 157 (2008) (asserting that E-Verify will cause undocumented immigrants to "self-deport").

66. Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1091, 1098–100 (2008) (noting that some companies decided to use E-Verify to avoid immigration raids, yet warrants for immigration raids "are often issued based on flawed information contained in databases" that underlie E-Verify); Kevin R. Lashus et. al., *Fear the ICE Man: Lessons from the Swift Raids to Warm You Up—The New Government Perspective on Employer Sanctions*, 32 NOVA L. REV. 391, 398–401 (2008) (evaluating the belief that E-Verify participation will reduce the prevalence of ICE workplace raids and concluding that E-Verify may increase the likelihood of raids).

67. *See e.g.,* Pottle, *supra* note 13, at 117–20 (critiquing the efficacy of the system's ability to identify undocumented new hires and describing other scholarly critiques).

68. WESTAT REPORT, *supra* note 13; *accord* Rosenblum, *supra* note 59, at 6 (citing *id.*); GAO REPORT, *supra* note 45, at 3 (stating that "E-Verify could not detect identity fraud in the majority of cases where unauthorized workers presented their employers with valid documents that were stolen or borrowed" (citing WESTAT REPORT, *supra* note 14)).

69. Rosenblum, *supra* note 59, at 5; GAO REPORT, *supra* note 45, at 3.

To date, most proposals to increase the effectiveness of E-Verify and maximize the intended benefit of a fully work-authorized workforce also marginally increase burdens on U.S. employees. Some have suggested the use of biometric data to allow the computer to match each individual employee with the information on her documents and in government databases.[70] The biometric approach, at its simplest, would use photographs, fingerprints, retinal data, DNA, or some combination of that data, to match the individual with the information in the system.[71] Another approach would allow work-authorized employees to lock their Social Security number within the E-Verify system to prevent fraudulent use of that number.[72] Whether these burdens are justified depends on how heavy the costs are to U.S. employees as well as whether E-Verify can realize its other promised benefits.

Moreover, E-Verify will succeed only by requiring or inspiring employers to cooperate with its mandates. Employers may, through error or intent, undermine E-Verify's goals by declining to discharge identified undocumented employees or by failing to check all new employees through the system.[73] USCIS has taken some measures to prevent this, including hiring monitoring and compliance staff and initiating the development of data analysis programs to detect employer fraud and noncompliance.[74] If employers fail to terminate employees who receive a final nonconfirmation of their authorization to work, enforcement lies with Immigration and Customs Enforcement (ICE).[75]

A full evaluation of the success of these compliance efforts is beyond the scope of this article, but a few stumbling blocks are of note. First, the role of the employer as immigration enforcer will at times conflict with the profit-driven

---

70. GAO REPORT, *supra* note 45, at 24 (describing the proposal as well as concerns about design costs, equipment costs and access to the technology for employers, and privacy and civil liberties of employees); Ries, *supra* note 15, at 271, 273 ("A biometric employment eligibility verification system can shift much of the burden and decision making from the employers to the federal government, creating a simpler and more accurate system for employers to use, while also eliminating the discrimination issues that emerged over the past two decades.").

71. *See* Ries, *supra* note 15, at 303.

72. GAO REPORT, *supra* note 45, at 23.

73. *See* Manns, *supra* note 62, at 967 ("[E]mployers could simply choose not to use the databases, ignore the databases' negative responses, or tacitly or explicitly ask prospective employees to come up with other identity information . . . when there are doubts about the authenticity of identification materials. Employers might have incentives to serve merely as gatekeepers of their own self-interest in detecting potential violators, so that the information of undocumented aliens would not be processed into the verification system. So long as employers stand to gain from employing undocumented aliens and face a low risk of direct monitoring of noncompliance, they can be expected to continue to subvert their duties.").

74. *See* GAO REPORT, *supra* note 45, at 24–29 (detailing attempts to improve employer compliance); s*ee also* Manns, *supra* note 62, at 944–60 (proposing private monitoring of the employer's compliance with its immigration gatekeeping duty).

75. Memorandum of Agreement between U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, and U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, Regarding E-Verify Program Information Sharing 2–3 (2008).

interest of employers when that interest favors hiring undocumented employees.[76] Second, the enforcement history of the employer sanctions laws prior to E-Verify generated criticism that it was insufficient and underprioritized, and it is unclear how that would change with a nationalized E-Verify.[77] Finally, in its current embodiment, participation in E-Verify is voluntary for most private employers. The success of the program depends on whether employers perceive a benefit to using E-Verify and continue to use it. If USCIS too readily reports to ICE its suspicions about noncompliant employers, it may chill the participation of employers unwilling to expose themselves to the enforcement arm of immigration control and who are unlikely to attract ICE's attention otherwise. To the extent that USCIS wants the program to succeed, it may lean toward conservatively reporting suspicions of employer misuse.

2. Reducing Discrimination

There is some evidence that E-Verify reduces conscious discrimination against employees based on citizenship status, ethnicity, or national origin. E-Verify usually provides an answer to the question of whether a new employee is authorized to work. That answer appeases the uncertainty that some employers have felt about hiring employees whose ethnicity or noncitizen status they associated with unauthorized migration. According to a 2009 government-commissioned study, more employers said that using E-Verify increased their willingness to hire noncitizens than said using E-Verify made them less willing to hire noncitizens.[78] Presumably, that greater willingness could lead to lower levels of discrimination on the basis of both citizenship status and ethnicity.[79]

B. E-Verify and Its Flaws

E-Verify's most acclaimed advantages are also the source of its greatest flaws. In the course of identifying employees without work authorization, E-Verify erroneously identifies employees as not authorized to work in ways that create disparate impacts on employees.

---

76. *See* Lee, *supra* note 37, at 1107.

77. *See* Immigration Reform and Control Act of 1986, *infra* note 7; *see also* Lee, *supra* note 37, at 1103 (explaining why some level of cooperation between employer and immigration enforcement officials benefits both, in that the relationship between employer and DHS "can often be highly collaborative and mutually beneficial, where the DHS overlooks employer indiscretions in exchange for help identifying potentially removable immigrants"). In 2008, ICE conducted 503 employer payroll audits. *See* Rosenblum, *supra* note 68, at 10 n.41 (citing *ICE Worksite Enforcement—Up to the Job?: Hearing Before the Subcomm. on Immigr. Pol'y and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 83 (2011) (statement of Kumar Kibble, Deputy Director, U.S. Immigration and Customs Enforcement, Department of Homeland Security)). In 2010, that number increased to 3,500. *Id.*

78. WESTAT REPORT, *supra* note 13, at 254.

79. *See* JUDITH GANS, UDALL CTR. FOR STUD. IN PUB. POL'Y, ARIZONA'S ECONOMY AND THE LEGAL ARIZONA WORKERS ACT 15 (2008) (reasoning that the Westat findings suggest a net reduction in citizenship status discrimination) (citing WESTAT REPORT, *supra* note 13).

1. Underverification

E-Verify underverifies. Database inadequacies and user error create erroneous failures to confirm a small percentage of employees who are work authorized. In 2009, 2.6% of employees screened generated a tentative nonconfirmation response. Of the total number of tentative nonconfirmations, between 22% and 95% were erroneous.[80] The reasons for these errors range from naming inconsistencies in employee documents (as when an employee's name is recorded differently on one authorizing document than another), to data entry error by the employer, to inaccuracies in the SSA and DHS databases themselves.[81]

Erroneous tentative nonconfirmations add uncertainty to the hiring process for both employers and employees. They may also lead to erroneous final nonconfirmations. The uncertainty that a tentative nonconfirmation introduces to the hiring process may lead some employers to use the system to unlawfully prescreen employees and then fail to inform the employee of the tentative nonconfirmation notice. E-Verify will then communicate that the employee is not authorized to work.[82]

Even if employees are informed of the result, they may not take timely action to contact SSA or DHS to correct their documents or the information in the government databases.[83] When they do, the process may take considerable time, require the employee to incur costs, and the employee may encounter bureaucratic barriers, including receiving a final nonconfirmation if the employee contacted the agency but failed to specify that the contact related to a nonconfirmation notice.[84] Without an appeal process, the employee may experience job loss with no formal avenue for redress.

One could see this as a fundamentally empirical problem with an empirical solution, namely, making E-Verify more accurate. This would entail improving database management to reduce errors in the immigration and citizenship status database and making technological changes to render the system more discerning of lawful employees.[85]

---

80. *See* Rosenblum, *supra* note 59, at 7 (reporting a modeled estimate of a 22% erroneous TNC rate nationwide and a survey-response-based finding of a 95% erroneous TNC rate in Los Angeles County) (citing WESTAT REPORT, *supra* note 13).

81. *See* Rosenblum, *supra* note 59, at 6–7; GAO REPORT, *supra* note 45, at 2–3, 19.

82. *See* Rosenblum, *supra* note 59, at 6; GAO REPORT, *supra* note 45, at 7–14.

83. *See* Rosenblum, *supra* note 59, at 6; GAO REPORT, *supra* note 46, at 16.

84. *See* GAO REPORT, *supra* note 45, at 34–38 ("[I]f there is an error in a DHS database, individuals face formidable challenges in getting the inaccuracy or inconsistency corrected because, among other things, they have little information about what database led to the decision."); *see also id.* at 34 (explaining that database errors require the employee to file a Privacy Act request to uncover the error, and "DHS processes Privacy Act and Freedom of Information Act requests in the same manner, and the average response time for these requests in fiscal year 2009 was approximately 104 days").

85. *Id.* at 17–19.

Even if more can be done to decrease erroneous failures to confirm work authorization due to system inaccuracies, many errors originate outside of government agencies. Increased accuracy requires reducing employer errors in using the system. A more daunting project is to motivate work-authorized U.S. employees to ensure the government has accurate information about them.[86] As with any human system, complete accuracy is impossible.

2. Discrimination

Assuming that E-Verify works well enough to have a substantial impact on unauthorized employment, it remains open to criticism that it may cause or exacerbate discrimination. Others have painstakingly detailed the concern that E-Verify increases discrimination against people of color, women, and work-authorized noncitizens beyond that resulting from IRCA's implementation.[87] Discrimination may manifest as an unintentional effect of errors in using E-Verify or as purposeful discriminatory misuse of the system.

Erroneous failures to confirm the work authorization of work-authorized employees disparately impact women and minorities. Errors in the database resulting from misspellings of names, name-order reversals, or name changes during naturalization tend to fall more heavily on employees of color and those with diverse cultural backgrounds.[88] Errors due to name changes resulting from marriage or divorce disparately impact women.[89]

E-Verify errors more heavily impact noncitizens and foreign-born U.S. citizens than native-born U.S. citizens. DHS, which maintains information about the citizenship status of noncitizens and administers naturalization, generates more inaccurate failures to confirm work authorization than the SSA, which verifies the employment eligibility of most native-born U.S. citizens whose citizenship status is much more stable.[90]

---

86. *See id.* at 20–21 (noting early efforts to educate employers and employees in order to improve error and correction rates).

87. *E.g.*, Griffith, *supra* note 13, at 424–26; Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 116 (2009); Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 923–24, 935–36 (2011); Rosenblum, *supra* note 59, at 7.

88. Rosenblum, *supra* note 59, at 7–8; GAO REPORT, *supra* note 45, at 19 ("[I]ndividuals from certain cultural groups, such as those of Hispanic or Arab origin, may have multiple surnames that are recorded differently on their naturalization documents than on their Social Security cards. Such names could be recorded in a different order on the two documents, or one document may contain all the surnames while the other document may contain an abbreviated version of the surnames.").

89. *See* GAO REPORT, *supra* note 45, at 19.

90. *See id.* at 8–11 (describing how E-Verify queries government databases); WESTAT REPORT, *supra* note 13, at 208–12 (setting out error rates that differed depending on whether the employee was a native born U.S. citizen (0.1%), lawful permanent resident (1.0%), foreign born U.S. citizen (3.2%), or lawful nonimmigrant, such as a temporary visa holder (5.3%)); Rosenblum, *supra* note 59, at 7, 19 nn.26–27 (explaining the difference between SSA and DHS error rates and noting

Intentional discrimination through misuse of the E-Verify system is also possible. Employers may purposefully discriminate by unlawfully using E-Verify to either selectively screen only new hires who they suspect of being unauthorized, or to prescreen applicants and then fail to hire or notify those who receive tentative nonconfirmations. Employers who rely on unauthorized employees could choose not to use E-Verify for that class of workers, or (for the truly brazen) use E-Verify to discover which applicants receive tentative nonconfirmations and then hire them, discriminating against those who are work-authorized.[91]

These avenues of discrimination lead to a larger harm. Cynthia Estlund has posited that the workplace is one of the most racially integrated places in most employees' lives and can therefore act, even in a limited way, as a place where democratic integration can occur.[92] Immigration and national security are two areas where government actions based on ethnicity and "otherness" are most visible. If they come to have a greater presence in the workplace, there are two potential effects. First, when E-Verify's errors fall more heavily on noncitizens or employees of color, they can exacerbate employer and coworker perceptions that employees of color have a precarious or partial status in the United States and by extension in the workplace.[93] Second, it will become more difficult to distinguish when an employer's discriminatory acts arise from ordinary bias and when those acts arise from a desire to comply with the employer's immigration enforcement duties.

3. Affirmative Misuse

Looking beyond the direct impact of E-Verify on screened employees, E-Verify has also inspired concerns that it will become a vehicle for employers to misuse the system to gain unfair advantage over employees as a group. This concern about employer misuse of their immigration screening power echoes longstanding critiques of IRCA's employment verification requirements.[94] The

---

that the SSA database is more accurate because of the agency's longstanding effort to register U.S. citizen children with the SSA at birth).

91. GAO REPORT, *supra* note 45, at 30, 41; Rosenblum, *supra* note 5968, at 7, 11.

92. *See* ESTLUND, *supra* note 5, at 64–69, 134–39.

93. *E.g.*, Leticia M. Saucedo*, Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345 (2009) (exploring alternative discrimination theories and applying them to the low-wage immigrant workplace where immigrant workers are perceived as less entitled to work).

94. *E.g.*, Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 540 (2007) (laying out the ways in which "sanctions rendered undocumented immigrants more vulnerable, less likely to report violations of minimum wage and other workplace standards, cheaper, and increasingly resistant to organizing efforts" and stating that sanctions "increased the appeal of undocumented workers to unscrupulous employers and gave employers a way to derail organizing campaigns in immigrant-heavy workplaces"); Lee, *supra* note 37, at 1103, 1138 (2009) ("[E]mployers should be punished for using their screening authority beyond the scope of its intended use, which often means employers using reporting and the threat of reporting to avoid liability for labor and employment

employer sanctions laws gave employers two new government-sanctioned powers over employees, with the threat of government enforcement behind them. The first was the power to solicit certain information from employees about their citizenship or immigration status and to demand evidence in the form of government-issued documents.

The second was the power to take adverse employment action against employees based on their response, such as requiring further evidence of work authorization or terminating employees who did not provide any or adequate documentation. Critics charged that this acquisition of power and the lack of an effective scheme to combat discrimination or deter misuse undermined workplace protections for undocumented workers and therefore for all employees.[95]

If E-Verify assists ill-intentioned employers to disrupt labor organizing, depress wages, and circumvent other employment protections, there is a tension between its immigration enforcement goal and existing workplace protections for employees. Stephen Lee has framed this tension as a problem of "mission mismatch."[96] Immigration agencies and employers have different missions, one that is enforcement-driven and the other profit-driven. By passing the employer sanctions laws, Congress essentially tasked employers with an immigration enforcement role in much the way Congress empowers and directs agencies to take on and fulfill an executive role. This created a danger, however, that employers would use their immigration powers for their private interest in increasing profits. Those new powers changed the balance of power between employer and employee, creating opportunities to decrease wages and other benefits.[97]

E-Verify has the potential to exacerbate this problem. That potential is limited because, in the event of a raid or audit, E-Verify reduces the unscrupulous employer's ability to claim uncertainty about the lawful status of its employees. However, E-Verify provides employers with more information about who on

---

violations."); *see* Kitty Calavita, *Employer Sanctions Violations: Toward A Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1052 (1990) ("[U]ndocumented workers are particularly prevalent in industries where competition is intense."); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 821–24 (2008) (describing documented increases in discrimination resulting from IRCA's employer sanctions provisions). For comprehensive analyses of the employer sanctions laws, see Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (1988) (describing the history and consequences of employer sanctions), Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003), Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001), and Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004).

95. *See* Gordon, *supra* note 94 at 540; Lee, *supra* note 37 at 1103, 1138; Pham, *supra* note 94 at 821–24.

96. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089 (2011).

97. *See e.g.*, Gordon, *supra* note 94 at 539–40.

their workforce is unauthorized to work, without actually forcing employers to fire them.[98] As a result, the system shifts the already contested balance of power between employer and employee in ways that may enable undertrained or unscrupulous employers to misuse the greater information that the system provides about individual employees.[99] In other words, E-Verify gives the employer a choice. It can pursue the immigration mission or misuse the information to ensure a more compliant, less costly workforce.

Addressing this kind of employer misuse is challenging. The Equal Employment Opportunity Commission, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, and private lawsuits enforce the antidiscrimination laws, including Title VII and the citizenship status and national origin discrimination protections of IRCA.[100] However, those statutes require a showing that the employer used E-Verify to discriminate because of race, ethnicity, national origin, or citizenship status, and in the case of citizenship status, that the discrimination was intentional.[101]

At present, there is no effective avenue to protect employees from employer misuse of E-Verify. As the Government Accountability Office reported, the immigration agency is "not in the position to determine whether employers carry out activities required by E-Verify, such as posting notice of their participation in the E-Verify program, providing employees the letter informing them of TNC findings, or referring employees to the appropriate agency to resolve" a tentative nonconfirmation.[102] Employers are not supposed to take adverse actions in response to a tentative failure to confirm work eligibility, but immigration officials are "generally not in the position to determine whether employers engage in

98. Rosenblum, *supra* note 59 at 14; Fernando Lozano & Todd Sørensen, *The Labor Market Effects of Immigration Reform,* 4 POLICY MATTERS 5–6 (2011) (summarizing quantitative literature exploring employer exploitation of undocumented employees and undertaking an economic study of the difference in wages resulting from IRCA's legalization program).

99. Rosenblum, *supra* note 59, at 14 (noting that E-Verify does not require employers to hire legal workers, and in fact gives them a "better tool to distinguish between legal and unauthorized workers").

100. 42 U.S.C. § 2000e (2006); 8 U.S.C. § 1324b (2006); *see* Kati L. Griffith, Response Essay, *ICE Was Not Meant to Be Cold: The Case for Civil Rights Monitoring of Immigration Enforcement at the Workplace*, 53 ARIZ. L. REV. 1137 (2011) (recommending that the EEOC play a role in educating the public about the civil rights of employees with respect to immigration enforcement and in monitoring immigration workplace enforcement activities); Lee, *supra* note 96 (proposing empowering the Department of Labor to play a monitoring role in immigration enforcement actions in the workplace); *see also* Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L. J. 303 (2010); Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 318–19 (2004) (advocating cooperation between the DOL, EEOC and USCIS for the protection of immigrant workers).

101. *See* 8 U.S.C. § 1324b (2006); *but cf.* STEPHEN H. LEGOMSKY & CRISTINA RODRÍGUEZ, IMMIGRATION LAW & POLICY 997 (5th ed. 2009) (critiquing the interpretation of the antidiscrimination provision as requiring intent).

102. *See* GAO REPORT, *supra* note 45, at 30.

activities prohibited by E-Verify, such as limiting the pay of or terminating employees who receive TNCs, using E-Verify to prescreen job applicants, or screening employees who are not new hires."[103] Moreover, there are no remedies under federal law for employees fired or otherwise injured due to the employer's failure to meet E-Verify's worker protection requirements.[104]

IV. E-VERIFY AND THE CHALLENGE OF DIFFUSE LIBERTY INTERESTS

Looking ahead, E-Verify will almost certainly assume center stage in comprehensive immigration reform.[105] If E-Verify comes into nationwide use, either through federal legislation or *de facto* as a result of state mandates, court challenges are on the horizon.[106] These challenges to E-Verify will take many forms: constitutional arguments, statutory interpretation of IRCA and IRRIRA among others, and challenges to agency actions. They are likely to raise both equality and due process themes, either directly as constitutional challenges or more obliquely as norms that influence statutory interpretation and guide agency discretion.[107]

This Part sketches these challenges and the major barriers to their success. It then evaluates the impact of E-Verify on the liberty interest that mainstream U.S. workers have in access to work. If immigration enforcement affects citizens in large numbers, even when the impact to each individual is small, citizens become engaged in an issue that affects noncitizens and courts may expand the horizon of their reasoning to the liberty interests of the ordinary citizen. This Part maps these mainstream interests and then circles back to analyze how those interests overlap with the interests of the employees whom E-Verify most heavily affects.

---

103. *See id.*

104. *See id.*

105. *See* Julia Preston, *Separate Bills Focus on Two Pieces of Immigration Puzzle*, N.Y. TIMES, June 16, 2011, at A22 (describing proposed legislation that would expand the use of E-Verify); Daily Comp. Pres. Docs., 2011 DCPD No. 00479, 12–13 (June 29, 2011) (President Obama expressing commitment to E-Verify in a news conference); Spencer S. Hsu, *Obama Revives Bush Idea of Using E-Verify to Catch Illegal Contract Workers*, WASH. POST, July 9, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/08/AR2009070800030.html; *see also* Hiroshi Motomura, *What Is "Comprehensive Immigration Reform"?: Taking the Long View*, 63 ARK. L. REV. 225, 227 (2010) (summarizing prior draft legislation).

106. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985–87 (2011) (upholding state law requiring Arizona employers to use E-Verify); *see id.* at 1973 (stating that "[t]he question presented is whether federal immigration law preempts" a state law that "requires that all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers," and holding that federal law did not preempt the Arizona law).

107. *See generally* Motomura, *supra* note 17 (describing indirect approaches to arguments that successfully raise the interests of migrants outside the law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (tracing the influence of "phantom" constitutional norms in statutory interpretation).

A. Equality Arguments and Interest Convergence

Challenges to E-Verify will raise the impact of the program on employees of diverse ethnicities, cultural backgrounds and citizenship status.[108] These challenges tend to take form as equality arguments or due process challenges or a combination of both, alleging that the disproportionate impact of E-Verify on protected classes of employees arbitrarily and unlawfully deprives them of their livelihood.

A response is the argument that the program reduces discrimination because when employers use E-Verify properly, screening all employees after hire, they have no need to rely inappropriately on appearance or accent. Another facet of this argument is that E-Verify protects low wage jobs often held by U.S. employees of color.[109]

Equality arguments also face the intrinsic difficulty of asserting the interests of a minority against a public good, here the underlying goal of reducing unlawful migration. By nature, democratic institutions tend to overlook minority interests. When the costs of E-Verify predictably fall more heavily on minorities, and there is a perceived benefit to the majority, democratic institutions will inherently lean toward implementing the majoritarian interest.

Arguments on behalf of discrete minority groups are at their most compelling when they draw upon the intertwined interests of mainstream U.S. workers and minority employees.[110] If the interests of the U.S. workforce dovetail with the interests of noncitizens or employees of color, courts and other policymakers are likely to exhibit greater solicitude for those interests.[111] The late Derrick Bell dubbed this "interest convergence."[112] Hiroshi Motomura has offered

---

108. *See* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 986 (9th Cir. 2008) (analyzing claims that E-Verify would increase discrimination and concluding that there was insufficient proof of heightened discrimination); *see also* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 592–93 (2009) (analyzing the *Chicanos* opinion); Shelly Chandra Patel, Note, *E-Verify: An Exceptionalist System Embedded in the Immigration Reform Battle Between Federal and State Governments*, 30 B.C. THIRD WORLD L.J. 453, 471–72 (2010) (raising concerns that E-Verify will promote the creation of a concentrated subordinated class of undocumented immigrants).

109. *See* Randall G. Shelley, Jr., *If You Want Something Done Right . . . :* Chicanos Por La Causa v. Napolitano *and the Return of Federalism to Immigration Law*, 43 AKRON L. REV. 603, 630–36 (2010) (arguing that an Arizona law mandating use of E-Verify reduced potential employer liability and benefitted citizen workers and that concerns about the law leading to discrimination were overstated and counteracted by protections built in to IRCA).

110. Bell, *supra* note 16, at 22 (describing the interest-convergence theory).

111. *See* Motomura, *supra* note 17, at 1728 (explaining several ways in which unauthorized migrants may assert "oblique versions of rights that U.S. citizens or lawful permanent residents can exercise in the same settings").

112. Bell, *supra* note 16, at 22 (positing that "the interest of blacks in achieving racial equality is accommodated only when that interest converges with the interests of whites in policy-making positions" and that this convergence "is far more important to gaining relief than is the degree of harm suffered by blacks or the character of proof offered to prove this harm").

a similar theory specific to noncitizens, demonstrating that successful legal arguments are those that line up the interests of unauthorized migrants with those of U.S. citizens and lawful immigrants.[113]

B. Evaluating the Interests of the Majority

The interests of the majority, then, can be critical to protecting the overlapping interests of a minority. Understanding these mainstream interests is a first step to resolving whether the interests of the majority of employees converge sufficiently with those employees whom E-Verify most heavily impacts. That interest convergence may inspire a higher level of protection against arbitrary deprivation of employment.

1. The Mainstream Liberty Interest in Access to Work

Together, E-Verify and IRCA constitute a grand experiment that engages the entire U.S. workforce in enforcing immigration law, while imposing some costs on that workforce. Immigration control strategies that impact those outside of the targeted group of noncitizens traditionally have been associated with U.S. borders, like the creation of a passport requirement and an inspection system for border crossings,[114] or have imposed short-term impositions on liberties, such as workplace raids or highway stops.

Assessing the legal implications of IRCA and E-Verify's inclusion of U.S. employees in modern immigration enforcement requires evaluating whether the system makes inroads on a lawfully protected interest. Courts reviewing the lawfulness of the enforcement strategy may scrutinize the benefits and costs to the majority in determining whether it imparts adequate due process, provides equal protection of the law, or constitutes a purely federal scheme that preempts state involvement.

The at-will employment doctrine undermines claims to a constitutional-style right to access the workplace. By permitting loss of employment at the irrational whim of the employer,[115] the doctrine complicates the argument that employees enjoy an entitlement to employment, a fundamental right to work. Equality arguments framed this way are anemic for another reason. In the usual course of

---

113. Motomura, *supra* note 17, at 1728 ("Unauthorized migrants can assert their rights in practical effect—albeit indirectly and incompletely—by adopting at least five general patterns . . . . All five patterns allow unauthorized migrants to assert oblique versions of rights that U.S. citizens or lawful permanent residents can exercise in the same settings.").

114. *See* Jeffrey Kahn, *How the United States Controlled International Travel Before the Age of Terrorism*, 43 CONN. L. REV. 819, 831 (2011) (tracing the history of the U.S. passport "from a diplomatic letter of introduction to a license to control mass travel").

115. B. Glenn George, *Justice in Simplicity: Perspectives on Knowledge and Access in American Employment Law*, 19 KAN. J.L. & PUB. POL'Y 383, 385 ("There is no general or universal protection for employees that prohibits unfairness or irrational whims in the workplace, unless the employer has acted with a specific motivation prohibited by statute.").

E-Verify implementation, employees are not intentionally selected for nonconfirmation of employment eligibility on the basis of a protected ground, like race or sex.

We are left to explore whether a liberty interest in access to work might spark due process protection. Here too, the lack of an entitlement to work provides slippery footing for the argument that loss of employment equates to a deprivation of a constitutionally protected right. However, borrowing from nonattainder literature on blacklists, liberty interests encompass more than the privilege to do something—a freedom to work. They also include immunity from being treated in a certain way by the government.[116]

From that viewpoint, the liberty interest here is the right not to be deprived of employment through arbitrary government action. Another way of articulating this is to say that deprivation of the freedom to engage in the lawful behavior of working requires due process of law if it is to avoid arbitrariness.[117] The wrinkle here is that government does not carry out the deprivation of employment, but rather gives to another private entity—the employer—a lawful reason to use the employer's power to discharge.

2. Aggregating the Risk of Deprivation

Evaluating whether courts or other decision makers will recognize such a deprivation depends to some extent on the likelihood of harm to mainstream employees. The risk of harm to the majority of employees as a result of large-scale implementation of E-Verify falls into two categories. First, E-Verify represents a risk of arbitrary deprivation of work. Assuming current error rates, it is certain that some harm will fall improperly on some U.S. workers.

Evaluation of E-Verify tends to consider the implications of the system *ex post,* after the database has responded to a records check on an employee. This Article takes an *ex ante* perspective, before any employee has taken the risk of submitting identity and work authorization information to the system. In contrast to the *ex post* analysis with its focus on specific harms to individuals or particular groups such as minorities, the *ex ante* perspective sheds light on the risks that national implementation of E-Verify poses to employees as a class.

The risk to any particular individual of erroneous loss of access to work is very small. As of now, only 2.6% of all new hires receive even a tentative non-confirmation of their employment status. Statistical modeling has estimated that

116. *See* Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1209, 1226 (2010) ("When a government official arbitrarily deprives someone of the freedom to engage in lawful behavior—even behavior that could be banned by a proper statute, like drinking alcohol—the deprivation should not occur without due process of law.").

117. *Id.*

between 0.6% and 1.0% (approximately 0.8%) of all E-Verify inquiries resulted in an erroneous tentative nonconfirmation.[118]

Even if the risk of error was the same on average for every new employee, and was not affected by cultural background, gender, or immigration status, an erroneous nonconfirmation from an individual point of view seems very unlikely.[119] The perception of E-Verify as an immigration program may also exaggerate that perception of negligible risk—that it is so unlikely as to be beneath notice.

Even if it were to occur, U.S. workers may feel confident that the error could be quickly corrected by contacting the appropriate government agency. Given this frame, most individual U.S. workers will have little incentive to oppose E-Verify.

Multiplied across the population of U.S. employees, however, the harm of E-Verify error becomes a large *ex post* reality for thousands of employees. Errors due to name mismatches alone (setting aside other types of errors and disregarding employer misuse of the system) currently would result in 22,512 erroneous initial failures to confirm work authorization under a national mandate.[120] U.S. citizens would account for 17,098 (76%) of those errors.[121] Assuming about 60 million queries per year, about 164,000 newly hired citizens and noncitizens would receive an erroneous tentative nonconfirmation related to a name mismatch.[122] One report estimates that at current error rates, national implementation of E-Verify would result in 600,000 U.S. workers receiving erroneous nonconfirmations per year.[123] A decision to apply E-Verify to all U.S. employees and not just new hires would multiply that number.[124]

Moreover, mandatory national use of E-Verify may increase the impact on employees. Currently the businesses that use E-Verify are disproportionately large. They are therefore more likely to have human resource departments who can acquire expertise in using the system and train the personnel responsible for implementing it. Each has signed a memorandum of understanding with the government affirmatively agreeing to follow E-Verify's procedures, which

---

118. WESTAT REPORT, *supra* note 13.

119. The risk for those with legal status may increase if E-Verify is nationally mandated, because the desirability of stolen or borrowed identity documents will also increase. If E-Verify detects that two people are using the same employment verification information, it will generate a tentative nonconfirmation for both.

120. GAO REPORT, *supra* note 45, at 19 ("According to USCIS, of 22,512 TNCs resulting from name mismatches in fiscal year 2009, approximately 76 percent, or 17,098, were for citizens, and approximately 24 percent, or 5,414, were for noncitizens.").

121. *Id.*

122. *Id.*

123. *See* Rosenblum, *supra* note 59, at 12 (citing GOVERNMENT ACCOUNTABILITY OFFICE, GAO-08-895T, EMPLOYMENT VERIFICATION: CHALLENGES EXIST IN IMPLEMENTING A MANDATORY ELECTRONIC EMPLOYMENT VERIFICATION SYSTEM 10 (June 10, 2008)); WESTAT REPORT, *supra* note 13, at 117, 157.

124. GAO REPORT, *supra* note 45, at 19.

establishes a more positive environment for employer compliance with E-Verify's procedures than a legislative decree.

3. Complicating the Risk of Deprivation

Policymakers often face the dilemma of whether to implement solutions that create some collateral harms. Raising the speed limit from fifty-five to seventy miles per hour allows many people to travel more quickly from one point to the other, but at a greater cost in road fatalities. It is tempting to frame the question of national implementation of E-Verify merely as a policy call about whether the system is accurate enough.

Two aspects of E-Verify belie the simplicity of framing the issue in that way. First, unlike a car accident, the harm results from government action itself. It results from the implementation of the E-Verify program, from errors in its databases, and from the collateral failures of employers and others. Unlike a speed limit, which manages an existing risk created by traffic, the risk of an erroneous firing results directly and solely from the government program.

Second, the challenge here for policymakers such as legislatures, agencies, and courts, is that the *ex post* nature of evaluating E-Verify's impact on U.S. workers complicates an understanding of how much harm a national mandate might create. From the *ex ante* perspective, E-Verify creates a risk to a profoundly important liberty interest in access to employment. For work-authorized employees on an individual level, however, that risk is exceedingly small. Gaining perspective on that risk requires evaluating the aggregate of those individual interests across the working population as a whole. In pursuit of immigration enforcement goals, E-Verify creates a very small risk of a significant and erroneous harm to individual interests in employment, dispersed across a majority of the population, paired with the larger risk that the harmful error will fall on a minority of the population.[125]

Courts and scholars have long noted that when a liberty interest is shared by many, the costs of organizing large, diffuse constituents can undercut the ability of that group to protect it.[126] Protecting such broadly held interests is especially difficult when the liberty is not lost, but merely threatened. It is especially

125. *See infra* notes 130–33.

126. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 151–53 (1980) (analyzing the meaning of "discrete and insular" in the *Carolene* footnote); John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 729–36 (1974) (explaining the *Carolene* footnote and the "special scrutiny accorded racial classifications"); Leslie Gentile, Note, *Giving Effect to Equal Protection:* Adarand Constructors, Inc. v. Pena, 29 AKRON L. REV. 397, 400 n.22 (1996) (summarizing the equal protection jurisprudence springing from the *Carolene* footnote).

challenging when the risk of that threat materializing is small, contingent, or distant in time.

This matters for legislatures because, as representatives of the majority, they are tasked with making decisions based on the best interest of their constituents. It matters for courts because, according to the interest-convergence theory, failure to understand the interest of the majority will lead to suboptimal outcomes for both minorities and the majority.

Although the risk to work-authorized employees is small and may seem smaller still because of the public perception of E-Verify as an immigration program, there is reason to believe that the risk of loss of access to work will impact the public response to E-Verify. Enforcing immigration law using the mainstream U.S. workforce may precipitate a shift in the public's perspectives about immigration control.

Successful efforts to change norms in U.S. civil society have done so by shifting the focus from the minority that experiences the most concentrated harms, such as smokers, to the impact on a larger group, such as non-smokers.[127] Once the public perceives a safety risk to itself, it becomes a matter of general concern. If immigration control creates a collateral risk to U.S. workers of job loss or decline in workplace protections, U.S. employees may object to having that risk imposed upon them.[128] Nor does the risk have to be large to change attitudes. Research on risk perception has established that awareness of a particular risk is enough to change attitudes even if the size of the risk is unknown.[129]

C. The Challenge of Diffuse, Contingent Harms

The risk of an erroneous failure to confirm work authorization is only one potential harm that national implementation of E-Verify raises. Other more

---

127. *See* Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL'Y 139, 172–75 (2010) (noting that "the problems that arouse the greatest concern throughout the community are often those that pose, or at least are perceived as posing, a genuine safety risk to the public at large" and using nonsmoking campaigns as an example); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem,* 67 U. CHI. L. REV. 607, 632 (2000) (constructing an incrementalist strategy of norm-changing and describing a backlash against gradual criminalization of marijuana possession in which "at the point at which the law began to be applied to white middle-class college students, members of the social mainstream began to object, triggering a self-reinforcing wave of opposition") (citing JEROME L. HIMMELSTEIN, THE STRANGE CAREER OF MARIHUANA: POLITICS AND IDEOLOGY OF DRUG CONTROL IN AMERICA 99–105 (1983)).

128. Aiken & Goldwasser, *supra* note 127, at 174 (noting that although "Americans consider it an aspect of their individual freedom to assume personal risks, they have little tolerance for risks that others impose upon them") (quoting NAT'L LIBRARY OF MED, SECONDARY SMOKING, INDIVIDUAL RIGHTS, AND PUBLIC SPACE, *available at* http://profiles.nlm.nih.gov/NN/Views/Exhibit/narrative/secondary.html).

129. Clinton M. Jenkin, *Risk Perception and Terrorism: Applying the Psychometric Paradigm*, 2 HOMELAND SECURITY AFF. 1, 1 (2006).

diffuse and indirect harms pose similar challenges for evaluating the benefits of a national E-Verify mandate.

The first of these harms is that E-Verify by its nature entails a constriction of the liberty of every U.S. employee. Outside of immigration law, one of the freedoms that U.S. citizens and permanent residents traditionally have enjoyed relates to whether and where they work. This is a freedom from arbitrary government intrusion into the creation of the employment relationship. We tend to see the employer, not the government, as the sole gatekeeper of who is hired and whether employees keep their jobs. Beyond the broad frames that wage and hour, safety, and other employment laws provide, we accept, for the most part, some level of coercion from the employer about where we work, when we work, and what we do there.[130] The idea that one must receive permission from the government to work for a particular employer, however, is not part of the national consciousness.

All that changed in 1986. When IRCA created employer sanctions and charged employers with employment eligibility verification, it transformed relatively private decision making about access to the workplace into a regime in which the government authorized employees to work. That authorization necessarily included U.S. citizens. IRCA made the access to employment of every person contingent on the permission of the U.S. government.

E-Verify takes this a step further by involving the government in each individual hire. It makes the decision of every employer to hire any employee contingent on the permission of the U.S. government. The 1986 employer sanctions laws and the expansion of E-Verify mean that the government can, in the national interest, trump an employer's choice about who to hire if that choice implicates who may enter the country and who may leave.

Few employees think of it that way. E-Verify will change that, making visible to the public IRCA's transformation of the government's role in authorizing access to work. As the computer receives and examines the employee's information, E-Verify brings DHS virtually into every workplace. It makes DHS an active participant in deciding whether employees keep their jobs.

The second of these diffuse and indirect effects of implementing E-Verify nationally is that it will normalize the role of government in using access to the workplace as a legitimate location for law enforcement. Outside of immigration enforcement, when the government steps into the workplace it is usually on the side of the employee in the form of employment discrimination laws, worker safety regulations, or labor protections. When the government-centered framework of immigration law meets up with the mainstream employee's experience of the workplace as relatively free from government coercion, the

130. This coercion is limited, of course, to the extent that employees have the freedom to quit or the bargaining power to negotiate these terms, either individually or collectively.

nature of the workplace alters. The role of government becomes very visible when employment encounters immigration enforcement.

A third effect of E-Verify is in providing a new role in immigration enforcement to a set of powerful actors: the states. The growing trend for states to require employers to use E-Verify is a pathway for states to claim a greater role in the social control of migrants through a larger presence in the creation of the employment relationship. This means that states will take a greater part in employees' access to work and in decisions about who the employer hires or retains. These laws use employment as a means of furthering other enforcement goals and perhaps reflect underlying concerns about the changing racial and ethnic demographics within and around state borders.

Fourth, Estlund's work on the democratic value of integration suggests another overlapping interest.[131] If, as she suggests, the workplace is where most American employees experience the greatest racial integration, protecting the workplace from discriminatory harms that undermine that integration becomes a mainstream value. That mainstream value lines up with the interests of minority groups. Mainstream employees and minorities have an overlapping interest in ensuring that immigration enforcement vehicles like E-Verify do not undermine the potential of the workplace for continued racial integration.

E-Verify raises a final potential harm, one that is still more difficult to evaluate because it represents a future contingency. David Cole has written about how immigration law often acts as the wedge for government curtailment of mainstream liberty.[132] The role of the agencies in charge of E-Verify is immigration enforcement, but the mission of DHS is broader than immigration. Its central focus is national security. What E-Verify provides to DHS is information about every U.S. employee who passes through the computerized system. It may be tempting, at some future point, to use that information or E-Verify's call-in apparatus for purposes beyond immigration enforcement.

These harms, even more than the *ex ante* evaluation of the empirical risk of error and the concerns about employer misuse, are unquantifiable and follow only indirectly from national implementation of E-Verify. Identifying these harms does not answer the question of whether E-Verify should remain a voluntary program or become a national mandate. They are, nonetheless, factors that should enter into the national conversation about E-Verify because they are likely to have a widespread effect on the population of U.S. employees. National implementation of E-Verify will have national impact. Naming these harms makes clear that E-Verify is not just an immigration enforcement program, but a passage through which law enforcement may permeate the workplace.

---

131. *See supra* notes 92 and accompanying text.

132. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002).

V. CONCLUSION

This Article does not answer the larger questions of whether national implementation of E-Verify is constitutional, or politically feasible, or even a good idea. Its humbler aspiration is to enable a more nuanced dialogue about the program by shifting some attention to the mainstream employees who will be the most numerous group affected by E-Verify's effort to carry out its immigration enforcement mission.

To the extent that mainstream interests differ from those of the undocumented workers that E-Verify targets or the groups that E-Verify most disparately impacts, the impact of E-Verify on the majority of employees may shed light on immigration enforcement approaches that similarly engage groups larger than the targeted group. In the same way that the prevalence of the passport for international travel and the rise of border control reimagined the U.S. geography as a space enclosed by a thickly lined boundary,[133] E-Verify and employer sanctions could transform the workplace into a conscious locus of immigration control in which the potential for unlawful status becomes forefronted among employees and employers.

As E-Verify comes into nationwide use, either by way of a federal legislative or regulatory mandate or through the expansion of state laws mandating that public and private employers use the system, it will transform the way all employees—citizens and noncitizens—perceive of their access to employment. It will enlarge mainstream understandings of who plays a role in whether someone gets a job, expanding the cast of decision makers beyond the employer. It formally redesignates the workplace as inhabited not just by employer and employees, but also by government and its concerns about immigration and national security.

E-Verify, together with IRCA, acts as a portal for governments—federal and state—to have a stronger presence at the inception of the employment relationship. At the same time, it gives employers greater powers to choose whether to use the E-Verify results only for immigration enforcement or also for their own goals. At bottom, then, it gives employers, the federal government, and the states a greater scope of power over access to employment. That creates a concomitant loss of freedom for all employees.

Work is central to belonging in our society.[134] This Article began by setting out a few of its functions: to generate income, to sustain ourselves and family,

---

133. *See* Kahn, *supra* note 114, at 841 (discussing the role of the passport in initiating controls at the U.S.-Mexico border).

134. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 101 (1991) (situating the "right to earn" as critical to the sense of belonging to American society); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making,* 35 LAW & SOC. INQUIRY 561, 591–92 (summarizing the results of a study of undocumented workers in

obtain goods, and enhance our leisure time. Work also has social and personal meaning. If it is true that work is one of the most racially integrated places in our society, and therefore has the potential to further democratic integration, then we should be very careful about how we allow the government to use the delicate moment when work begins.

California and Texas restaurants and concluding that the undocumented respondents saw their "position in the United States as based on an understanding that they will work harder and longer than other Americans").