Restricting the Freedom of Contract: A Fundamental Prohibition

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[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.[1]
-- Sir Henry Maine

The first principle of a civilized state is that power is legitimate only when it is under contract.[2]
-- Walter Lippmann

[F]reedom of contract is a qualified, and not an absolute, right.[3]
-- Chief Justice Charles Hughes

This article argues that the general right to contract, that is to say the ability of one to obligate himself in exchange for another's obligation in return, is a fundamental (or basic) though not all-encompassing right and one that is subject to additional legal protections especially when limitations are sought to be imposed discriminatorily or based on status rather than capacity or subject matter of the contract. While post-Lochner decisions have given states considerable leeway to regulate the scope of freedom of contract, restrictions based on status, especially the status of unauthorized immigrants, are invidious and go beyond the ambit of the type of state regulation previously permitted. This article concludes that a prohibition on the right to contract based solely on unauthorized immigration status in the United States likely violates the Civil Rights Act and the U.S. Constitution on preemption, due process and equal protection grounds, and, to the extent executed contracts are involved, on Contract

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1. HENRY SUMNER MAINE, ANCIENT LAW 165 (Ashley Montagu ed., Univ. of Ariz. Press 1986) (1861).

2. WALTER LIPPMANN, ESSAYS IN THE PUBLIC PHILOSOPHY 167 (Transaction Publishers 1989) (1955).

3. Chicago, Burlington & Quincy .R.R. Co. v. McGuire, 219 U.S. 549, 567 (1911).

Clause grounds as well. The article analyzes other circumstances in which states and the federal government have previously restricted the right to contract based on status, and finds in nearly every case that the restriction of the right to contract affected members of a suspect class based on immutable characteristics such as race, national origin, alienage, gender, or servitude. While the Supreme Court has previously concluded immigration status is not a suspect class, this article argues that states' illicit use of immigration status as a proxy for race, national origin or alienage suffices to meet the Arlington Heights test for disparate impact and therefore qualifies for strict scrutiny.

I. INTRODUCTION

The right to contract is one of those fundamental rights in our society that is frequently lauded and rightly receives primary credit for the establishment of a functional, market-based economy in which predictability is prized.[4] This right is so ingrained that whenever we do hear about infringement of the right to contract, it is usually historical, such as limitations on women's right to contract prior to the nineteenth and twentieth centuries[5] or the rights of slaves or indentured servants preceding the twentieth century.[6] In addition, the supremacy of contract in our society has evolved from solely a mercantile instrument to one that encompasses transactions that are either not commercial or only tangentially so. Common examples include child custody agreements which are essentially court-affirmed contracts, surrogacy agreements, cohabitation agreements (prenuptials without the nuptials), divorce settlements, etc.[7] Given the prevalence of contract in modern society, it is difficult to imagine how anyone could live without that right.[8]

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4. *See generally* DAVID N. MAYER, LIBERTY TO CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 1-10 (2011) (arguing for a return to the "Lochner era" of American constitutional law and the return of the fundamental right to contract).

5. *See generally* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229 (2000) (describing the genesis of women's right to contract from the Reconstruction era to its present form).

6. *See generally* Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1 (1995) (discussing the inability for slaves to contract).

7. *See* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1038-40 (1995) (discussing the economic advantages of commercial and family contracts and noting that, although still viewed unfavorably by the courts, the scope of family-based contracts has recently expanded significantly); *see also* Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J. L. & GENDER 171, 208-220 (2013) (highlighting the common use of contract law in separate and prenuptial agreements).

8. In 2011, Alabama attempted to nearly eliminate the private right to contract for unaut-

This article focuses on the larger question of the role states should play in determining the right of persons to contract and whether federal limitations should operate to curtail state action in this arena. While in some contexts states have successfully limited the right to contract based on status,[9] or capacity,[10] those limitations are an exception to the general rule of the freedom of contract. This is especially true in cases of status, whereby a state could declare a contract invalid because of *who* was entering into the contract, rather than for *what* purpose the contract was executed.

Alabama's Hammon-Beason Alabama Taxpayer and Citizen Protection Act, HB 56, provides that a contract is void based on the immigration status of one of the parties.[11] This article focuses on only two sections of the law[12]

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horized immigrants. ALA. CODE § 31-13-26 (LexisNexis Supp. 2012) (restricting the private right to contract except in the limited context of necessities).

9. Such as when a foreign corporation is not registered in the state. *E.g.* ARIZ. REV. STAT. ANN. § 10-1501(A) (2012), NEB. REV. STAT. § 21-20,168(1) (2012), ALA. CODE § 10A-2-15.01 (2012).

10. The traditional grounds are mental illness, intoxication or infirmity. *E.g.* , ALA. CODE § 8-1-170 (2012) (voiding contracts of insane persons and exceptions), CAL. CIV. CODE § 38 (West 2012) (voiding contracts of persons without understanding); Matz v. Martinson, 149 N.W. 370 (Minn. 1914) (allowing for voidability of contracts if entered into by an intoxicated party that was unable to comprehend its terms).

11. The Hammon-Beason bill was passed and signed into law on June 9, 2011. The Hammon-Beason law purports, as is clearly stated in its legislative findings, to negatively affect immigrants in a myriad of ways including: expanding the sphere in which law enforcement can stop immigrants, eliminating the receipt of public benefits including the ability to attend public post-secondary institutions, the mandatory ascertainment of immigration status of all public school children, restricting the ability to rent property, directing the mandatory use of E-Verify, and restricting the ability to contract to "discourage illegal immigration." ALA. CODE § 31-13-2 et seq. (LexisNexis Supp. 2012). The law was specifically crafted to curtail unauthorized immigration. *See* ALA. CODE § 31-13-2 (LexisNexis Supp. 2012). While the legislative findings themselves never specifically mention the limit on contract, they do focus on the following:

> The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama. . . The State of Alabama also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

ALA. CODE § 31-13-2 (LexisNexis Supp. 2012). Sections 27 and 30 make more explicit the attack on the right to contract. ALA. CODE §§ 31-13-26, 31-13-29 (LexisNexis Supp. 2012). The law was noted as one of the most draconian anti-immigrant laws in the country, and was quickly challenged and partially enjoined. *See* Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 7 (2011); *see also* ACLU, Preliminary Analysis of HB 56 "Alabama Taxpayer and Citizen Protection Act," available at https://www.aclu.org/files/assets/prelimanalysis_alabama_hb56_0.pdf. While the district and appellate courts initially denied the injunction as to the sections regarding the right to contract, United States v. Alabama, 813 F. Supp. 2d 1282, 1345, 1349-51 (N.D. Ala. 2011); United States v. Alabama, 443 F. App'x. 411, 420 (11th Cir. 2011), the Eleventh Circuit eventually reversed its preliminary decision and enjoined those sections as well. Order enjoining Alabama's enforcement of Sections 27 and 30 of HB 56, United States v. Alabama, No. 11-14532-

which strike at the heart of the viability of an individual's existence in a modern society by eliminating his right to contract.[13] Even without discussing work authorization or the ability to obtain employment, eliminating the basic right to contract would likely have rapid, severe consequences as individuals find their ability to contract for necessities nonexistent. Under the Hammon-Beason Act, housing agreements (in excess of one night), transportation agreements, airfare or vehicle purchase agreements (other than a contract to return the immigrant to his country of origin), service agreements, purchase agreements, etc. would all be subject to nullification.[14]

This article argues that the general right to contract, that is to say the ability of one to obligate himself in exchange for another's obligation in return, is a fundamental (or basic) though not all-encompassing right and one that is subject to additional legal protections especially when limitations are sought to be imposed based on status rather than capacity or subject matter of the contract.[15] The more difficult question then becomes the determination of legitimate versus illegitimate restrictions on the right to contract when the restrictions are based on status. This article concludes that restrictions on the right to contract based solely on status should generally not be upheld, on multiple legal grounds.

Applying the foregoing analysis in the context of the Hammon-Beason Act, this article argues that a prohibition on the right to contract based solely on unauthorized immigration status in the United States likely violates the Civil Rights Act and the U.S. Constitution on preemption, due process and equal protection grounds, and, as originally conceived, on Contract Clause grounds as well. In addition, giving judicial imprimatur to a legal framework which would eliminate a fundamental right of a vulnerable class of individuals would further harm and destabilize that group and exacerbate underlying racial tensions which are not dissimilar to those experienced during the civil rights struggle, which eventually culminated in the Civil Rights Era of the 1960s.

CC (11th Cir., Mar. 8, 2012).

12. ALA. CODE §§ 31-13-26, 31-13-29 (LexisNexis Supp. 2012).

13. *Id.*

14. The law would allow for contracts for lodging for one night, the purchase of food, medical services, legal fees and transportation to the country of origin. H.B. 658, 2012 Leg. Reg. Sess. (Ala. 2012).

15. This Article does not discuss the ability of states to regulate the subject matter of contracts as their ability to do so has long been evident in the field of public policy. States may, without question, declare void contracts entered into for an illegal purpose or regarding an illegal subject, strike down restrictive covenants based on improper geographic scope, duration or subject matter, or even contracts freely entered into which are against the general public policies of the state. The key difference between this power and the right to contract discussed is the state purporting to hold invalid a contract based on the identity of one of the parties rather than the purpose of the contract.

II. CONTRACT AS A FUNDAMENTAL RIGHT

Throughout this article I will refer to status versus capacity. Status, as defined by Black's Law Dictionary, has a variety of meanings which can include a person's legal condition,[16] a person's capacity and incapacity,[17] or "a person's legal condition . . . imposed by the law without the person's consent, as opposed to a condition that the person has acquired by agreement."[18] It is this last definition of status that this paper focuses on. Perhaps tellingly, the example provided by Black's for that definition is "the status of a slave."[19] In prior generations, individuals prevented from contract on the basis of status alone have been so treated due to race, gender, religion, national origin, etc.[20] It seems unlikely that it is mere coincidence that many of those denied the right to contract are the same groups that largely comprise our suspect classes under the law of equal protection. In fact, status is now generally only used

> . . . in English Law, in connection . . . with those comparatively few classes of persons in the community who, by reason of their conspicuous differences from normal persons, and the fact that by no decision of their own can they get rid of these differences, require separate consideration in an account of the law.[21]

In contrast, when this Article mentions capacity, it uses the term apply-

16. Examples would be the status of "landowner" or "trustee." BLACK'S LAW DICTIONARY 1542 (9th ed. 2009).

17. Examples here include minors, or mentally disabled individuals. BLACK'S LAW DICTIONARY 235 (9th ed. 2009).

18. BLACK'S LAW DICTIONARY 1542 (9th ed. 2009).

19. Id. According to historians, the word "status" initially was only a descriptive term that noted an individual's position before the law. EDWARD JENKS, THE BOOK OF ENGLISH LAW 109 (P.B. Fairest ed., 6th ed. 1967). "Therefore, every person (except slaves, who were not regarded as persons, for legal purposes) had a status," even though that trend gradually decreased to a very few discrete categories. *Id.*

20. *See* GEORGE JAMES BAYLES, WOMAN AND THE LAW 14-15 (New York 1901) (describing laws prohibiting miscegenation while noting that individuals in states with those laws would deemed to lack the lawful ability to marry based on race). *E.g.*, MASS. CONST. of 1780, Pt. 1, Art. 3 (identifying any "demonination of Christians" as being entitled to equal protection of the law); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE U.S. § 8.1, at 498-502 (2nd ed. 1987) (discussing the limitations of women to contract), James A. Frechter, *Alien Landownership In The United States: A Matter Of State Control*, 14 BROOK. J. INT'L L. 147 (1988) (reviewing state laws in the United States which disallowed aliens from purchasing land).

21. EDWARD JENKS, THE BOOK OF ENGLISH LAW 109 (P.B. Fairest ed., 6th ed. 1967).

ing its standard meaning. Capacity is, generally stated, the legal ability of an individual to enter into a binding agreement.[22] Under current law, contractual incapacity generally focuses on the age of the contracting party (whether the party is a minor),[23] or potential impairment of one's mental capacity to contract.[24]

In both instances the right to contract has in the past been lawfully restricted depending on the identity of the individual as a member of a class or specific qualities of the individual. Those restrictions would seem to imply that the right to contract may not be as fundamental a right as is here suggested. Nevertheless, even if it is not deemed a fundamental right, the right to contract should be subject to additional constitutional or statutory protections because of the discriminatory and arbitrary consequences restrictions on that right impose on unauthorized immigrants. This Article agrees that freedom of contract is subject to some limitation; however, the general right of an individual to contractually obligate himself and receive corresponding obligations in return is so pervasive and necessary for our society as to make it a fundamental right, and as such, to be entitled to a significantly higher level of protection.

A. Freedom of Contract as "Fundamental"

Most people never consider the importance of the right to contract, which is essentially the ability to gain and dispose of possessions and services, alter legal relationships, and act with some guaranty as to future obligations and rights.[25] It is not until one is faced with the prospect of not having that right that its value becomes more readily apparent. To be sure, this article is not arguing for a return to *Lochnerian* jurisprudence based on a laissez faire approach to the market in which wage and hour laws, child labor laws, and the like were invalidated as impositions on the "freedom of contract."[26] Rather, the freedom to contract argued for is the basic right of

22. *See* BLACK'S LAW DICTIONARY 235 (9th ed. 2009). "The power to create or enter into a legal relation. . . the satisfaction of a legal qualification . . . that determines one's ability to . . . enter into a binding contract . . . ." *Id.*

23. RESTATEMENT (SECOND) OF CONTRACTS § 12 (1979).

24. *Id.*

25. *See* HARRY N. SCHEIBER, THE STATE AND FREEDOM OF CONTRACT 3 (1998) (noting that "[t]he institution of contract has become in modern society the principal instrument for organizing the private marketplace; indeed, it is coextensive with the market in its scope").

26. *Cf.* Lochner v. New York, 198 U.S. 45, 45 (1905) (invalidating a New York statute which limited bakers to 60 hour work weeks as a violation of the "freedom to contract"), Morehead v. New York, 298 U.S. 587 (1936) (invalidating a New York statute which created minimum wage for women and minors as a violation of the freedom to contract), *overruled in part by* Olsen v. Nebraska, 313 U.S. 236 (1941).

an individual to enter into agreements that gain or dispose of possessions, services or otherwise alter legal relationships. As Justice Thompson noted in 1827, the obligation of contract "springs from a higher source: from those great principles of universal law, which are binding on societies of men as well as on individuals."[27]

The jurisprudential growth of the right of contract the past three centuries has steadily shifted the focus of common law rights from property to contract in areas as diverse as real property, personal property, labor, and legal status.[28] Coupled with that growth, governments have faced a continual tension, especially in the context of labor rights, between employers and the government with regard to worker protections and wage requirements.[29] In England, this tension resulted in many worker protection laws concerning hours, wages and actions[30] coexisting with the judicial pronouncement that "[p]ublic policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts . . . shall be held sacred."[31] It is this tension and potential misnomer of freedom of contract that has troubled legal scholars, philosophers, and economists alike.[32] Freedom of contract has, at some times meant both the ability of the empowered class to economically advantage themselves through the strength of their superior bargaining position and the economic insecurities of the working class;[33] at other times, for example, during the abolitionist movement, freedom to contract has meant the basic right of humans to be able to contract and receive benefits for the services they render.[34]

The tension most important for this article is that between the right of

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27. Ogden v. Saunders, 25 U.S. 213, 222 (1827).

28. *See* John v. Orth, *Contract and the Common Law, in* THE STATE AND FREEDOM OF CONTRACT 62-64 (Harry N. Schreiber, ed., 1998).

29. *Id.* at 50-56.

30. *Id.* (citing laws regulating wages for weavers, tailors, silk weaver, hatters, papermakers, vat men, and dry workers).

31. Printing and Numerical Registering Co. v. Sampson, [1875] L.R.Ch. 19 Eq. 462, 465 (Eng.).

32. *See* James Gordley, *Contract, Property and the Will – The Civil Law and Common Law Tradition, in* THE STATE AND FREEDOM OF CONTRACT 66-87 (discussing Adam Smith, Jeremy Bentham, Immanuel Kant, Aristotle, Thomas Aquinas, William Blackstone and Oliver Wendell Holmes).

33. *Lochner*, 198 U.S. 45, 53 (1905) (arguing that the right to contract is the right for a business owner to conduct his business free of government oversight), *Morehead*, 298 U.S. 587, 611 (1936) (characterizing the New York minimum wage for women and minors as nullification of contracts between employers and adult women), *overruled in part by* Olsen v. Nebraska, 313 U.S. 236 (1941)

34. *See* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1481-91 (1995) (discussing the inability for slaves to enforce contracts).

an individual to possess the faculty to contract versus the right of a government to restrict the scope of or even the parties to certain, specified contracts. Illustratively, the difference is the distinction between prohibiting an employer from contracting with "Sarah" to accept a wage below the minimum and prohibiting "Sarah" from entering into any employment agreement whatsoever. While both types of restrictions have existed in U.S. law at different times, the difference in their effect on "Sarah" is apparent, and it is more generally the difference between restrictions based on status and restrictions based on actions. Restrictions based on actions, especially in the realm of public safety, have long been seen "as legitimate exercises of government's acknowledged power to curtail freedom of contract in the interests of health, safety, and public order."[35]

In the United States, few Supreme Court decisions have engendered as much controversy as the 1905 decision *Lochner v. New York*.[36] In *Lochner*, the Court invalidated a New York employment law limiting the daily number of hours a baker could work as unduly favoring one party to the contract."[37] The *Lochner* decision arguably represents the pinnacle of the modern right to contract, free from governmental intrusion.[38] Neither Justice Harlan's dissent which critiqued the opinion for failing to adequately consider a state's legitimate interest in the health and safety of its denizens,[39] nor Justice Holmes's criticism of a judicial attempt to mandate laissez faire policies were sufficient to uphold this specific restriction on contract rights.[40] During the *Lochner* Era, lasting approximately thirty years, courts struck down laws if they were perceived as encroaching on economic liberty or private contract rights.[41]

In *Lochner*, as in the employment-based cases that followed, the Court assumed a near equality of bargaining power and found it anomalous that one party would be statutorily favored over the other in that situation.[42] As

35. Charles W. McCurdy, *The "Liberty of Contract" Regime, in* THE STATE AND FREEDOM OF CONTRACT 163 (Harry N. Schreiber, ed., 1998).

36. 198 U.S. 45 (1905).

37. *Id.* at 56. The Court framed the issue as whether the challenged state action was an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract" and concluded in the affirmative as both the buyer and seller of labor possessed equal rights to contract. *Id.*

38. *See generally* David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and The Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003).

39. *Lochner*, 198 U.S. at 70-74 (Harlan, J., dissenting).

40. *Id.* at 75-76 (Holmes, J., dissenting).

41. *See* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 413 (2012).

42. *See* Charles W. McCurdy, *The "Liberty of Contract" Regime, in* THE STATE AND FREEDOM OF CONTRACT 165 (Harry N. Schreiber, ed., 1998) (discussing the "principle of neutrality" and a judicial preference for avoiding favored treatment for groups or classes of individuals).

the *Lochner* Court put it,

> There is no reasonable ground for interfering with the liberty of person or the right of free contract . . . [and] there is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades . . . or that they are not able to assert their rights and care for themselves without the protecting arm of the state, *interfering with their independence of judgment and of action.* They are in no sense wards of the state.[43]

Here the restriction/protection of the individual party is framed not only under the guise of freedom of contract, but also an impingement of the rights of the *protected* party to enter into contracts that legislatures might perceive as disadvantageous or unsafe for that party. While facially neutral, it is not difficult to see how a playing field free from restrictions primarily benefits the party with greater bargaining power by allowing them to extort additional gains without any statutory checks. Throughout the *Lochner* era, courts invalidated laws that limited the freedom of contract, including restrictions on minimum wage,[44] maximum hour requirements,[45] union participation,[46] federal child labor laws[47] and the mining industry.[48]

In *Adair v. United States*, the Court invalidated a law which would have prohibited employers from including a provision in their employment contracts prohibiting employees from unionizing. The Court, following *Lochner*, held that the "employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with liberty of contract which no government can legally justify in a free land."[49] In both cases, Justice Holmes dissented vigorously.[50] Holmes examined more critically the concept of freedom of contract and stated: "I confess that I think that the right to make contracts at will that has been de-

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43. *Lochner*, 198 U.S. at 57 (emphasis added).

44. Adkins v. Children's Hospital, 261 U.S. 525 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

45. *Lochner*, 198 U.S. at 64.

46. Adair v. United States, 208 U.S. 161 (1908), *overruled in part by* Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941).

47. Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941).

48. Carter v. Carter Coal Company, 298 U.S. 238 (1936) (invaliding the Bituminous Coal Conservation Act that would have, among other things, established wage, hour and production standards).

49. *Adair*, 208 U.S. at 175.

50. *See Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting); *Adair*, 208 U.S. at 190 (Holmes, J., dissenting). In *Adair*, Holmes began his dissent noting he thought the statute constitutional, and "but for the decisions of [his] brethren, [he] should have felt pretty clear about it." *Id.*

rived from the word 'liberty' in the [Constitutional] amendments has been stretched to its extreme by [these] decisions."[51] According to Holmes, the questioned regulation "simply prohibits the more powerful party to exact certain undertakings, or to . . . unjustly discriminate on certain grounds . . . ."[52] History ultimately proved Justice Holmes correct on the matter when the alleged "switch in time"[53] brought about the Supreme Court decision in *West Coast Hotel Co. v Parrish* which ended the *Lochner* Era and sanctioned greater regulation and restriction on the freedom of contract.[54]

Under a Fourteenth Amendment due process framework, the *Parrish* Court analyzed the right of a state legislature to enact a minimum wage law as a question of liberty rather than freedom of contract.[55] The protected interest was the freedom from deprivation of liberty without due process of law. The Court noted that the liberty interest is "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people . . . . subject to the restraints of due process, and regulation which is reasonable in relation to its subject . . . ."[56] The same constraints on deprivation of liberty also apply to challenges based on freedom of contract.[57]

Undeniably refuting Lochnerian principles, the Court noted:

> [t]here is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.[58]

The *Parrish* decision granted clear power to the authorities to restrict the freedom of contract in certain circumstances, yet while doing so it also noted clear limits on restricting the freedom of contract based on status. The Court noted that arbitrary restraints on the liberty interest of contract are improper.[59] States retain the right to protect an individual from entering

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51. *Id.* at 191.

52. *Id.*

53. *See, e.g.*, William G. Ross, *When Did the "Switch in Time" Actually Occur?: Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1153-54 (2005).

54. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (validating a federal minimum wage law for women).

55. "The Constitution does not speak of freedom of contract. It speaks of liberty . . . ." *West Coast Hotel*, 300 U.S. at 581.

56. *Id.*

57. *Id.* at 392.

58. *Id.*

59. *Id.* "Liberty implies the absence of arbitrary restraint . . . ." *Id.* Although the Court also

into an improvident contract against his health, safety or welfare—but the power is for the benefit of the party at risk of harm.[60]

Likewise, addressing the bargaining power of female employees, the Court noted they were the lowest paid class, with relatively weak bargaining power, and the "ready victims" of those who would take advantage of their social and civil status.[61] The Court also addressed the economic arguments behind its decision, noting the "exploitation of a class of workers who are in an unequal [bargaining] position" that renders then uniquely vulnerable to being denied a living wage, harms their health and well-being, and creates a burden on society.[62]

Expanding the trend of *Parrish*, the following year the Court decided *United States v. Carolene Products Co.*, holding that laws affecting ordinary commerce should not be found unconstitutional unless the laws cannot be found to rest upon a rational basis.[63] In his famous Footnote 4, Justice Stone delineated a narrower scope of presumption of constitutionality for laws "directed at particular religious, or national or racial minorities."[64] Furthermore, Justice Stone noted particularly that "prejudice against discrete and insular minorities" requires a more meaningful judicial review when the prejudice "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[65]

Consequently, the constitutional right of freedom of contract passed to a subset of the freedom of liberty,[66] and with it a due process framework to assess legislatively imposed restraints on the right to contract. Thus the tension between freedom of contract and an ability to enter into a contract, insofar as it relates to certain protected classes, crystallized. The *Lochnerian* freedom of contract, the freedom that required parties to live with their duly executed contracts however overreaching or disadvantageous to the weaker party, succumbed to the state's interests in regulating "the evil where it is most felt"[67] whether based on the amorphous concept of social

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noted that "reasonable regulations and prohibitions" are acceptable provided they are in the greater public interest. *Id.* A law is not arbitrary and complies with the requirements of due process when it is shown to "have a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory . . . ." Nebbia v. New York, 291 U.S. 502, 503 (1934).

60. *West Coast Hotel*, 300 U.S. at 394.

61. *Id.* at 398.

62. *Id.* at 399.

63. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

64. *Id.* at 153, n.4 (citation omitted).

65. *Id.*

66. *See, e.g.*, RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW 84 (5th ed. 2007) (identifying the freedom of liberty as the ability to engage in a variety of activities, and a freedom that carries constitutional protection when the activities are deemed fundamental).

67. *West Coast Hotel*, 300 U.S. at 400.

or societal health or the state's police power.

The general framework then for evaluating economic regulations, being an issue of freedom of liberty, is to apply a rational basis standard. For cases involving economic regulations that disproportionately affect vulnerable parties or are arbitrary or discriminatory restraints on their liberty, including their freedom of contract, the Court recognized the need for enhanced scrutiny.[68] Keeping clear the distinction between *Parrishesque* legitimate restrictions on contract and improper restrictions of the ability to contract provides an appropriate judicial framework with which to examine the law. This distinction allows courts to strike down discriminatory restrictions on the right to contract while allowing the government ample authority to continue to regulate economic activity judged only by rationality. In the case of arbitrary or discriminatory laws, the stricter level of scrutiny would apply requiring the state to show a narrowly tailored, compelling governmental interest for the regulation.[69]

Finally, the due process clause continues to protect fundamental rights, those "rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition,"[70] and are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[71] As the definition of fundamental right has shifted to penumbras[72] with much of the jurisprudence since the 1960s focused on the right to privacy,[73] it still appears that the freedom to contract discussed here, the general right of an individual to enter into contracts, satisfies the objective requirement of a deeply held right and liberty.[74] As the protected liberty interest is a "rational continuum . . . which recognizes . . . that certain interests require particularly careful scrutiny," it cannot be seriously questioned that the freedom to contract is one of the bedrock foundations of our modern commercial society.[75] While it is true that the *Lochner* era demonstrated a need for legislative interven-

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68. *Carolene Products Co.*, 304 U.S. at 153, n.4.

69. *Id.*

70. Washington v. Glucksberg, 521 U.S. 702, 703 (1997). In defining a fundamental liberty interest, the Court has required a "careful description." Reno v. Flores, 507 U.S. 292, 302 (1993).

71. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). At other times the Court has elaborated that the right must be "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if [it] were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

72. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481-84 (1965) (grounding the right to privacy in "penumbras" emanating from the specific guarantees of the Bill of Rights).

73. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (finding a privacy right for sexual relations between consenting adults in their home); *Griswold*, 381 U.S. at 485-86 (holding that the use and purchase of contraceptives falls within the ambit of the constitutionally protected right to privacy).

74. Restrictions on fundamental rights also require the state to satisfy a strict scrutiny challenge. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

75. Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

tion in some aspects of contracting, it would be inappropriate to analogize discrete restrictions for a specific type of contract with the broader prescription that would prevent an individual from contractually obligating himself in nearly any type of contract. While past substantive due process jurisprudence "counsels caution and restraint. . . . [I]t does not counsel abandonment . . . ."[76]

The freedom of contract was imported with the rest of the common law in the founding of our country, and provided a bedrock on which our society was conceived.[77] At that time, it seems likely that the framers' themselves conceived of the freedom of contract as a fundamental right given the level of commerce in the country, but perhaps only for certain qualified male individuals. However, as the rights of all individuals have expanded to equal the rights of the more privileged during the birth of the country, the inherent fundamentality of the right to contract has likewise grown. While restrictions of many shapes and sizes are expected on many different types of contracts, the inherent ability of an individual to contractually obligate himself and likewise receive the obligation of another has roots that go back thousands of years, at least for the privileged. Given the broad scope of authority conveyed by the right to contract which literally extends from birth to death and even beyond, it is one of the most powerful rights we possess.[78]

B. Capacity - Protecting the Incapacitated Party

Societies have long imposed restrictions on an individual's right to contract.[79] In that sense, one may appropriately question whether the right to contract is truly so fundamental as to deny future abridgement. However, a quick examination of many of these historical restrictions, especially those based on capacity, reveals a relatively benign doctrine of contract law. Stat-

76. *Moore*, 431 U.S. at 502-03.

77. *See* E. ALLAN FARNSWORTH, CONTRACTS § 1.7 (4th ed. 2004) (noting contract law became the "legal underpinning of a dynamic and expanding free enterprise system."). Legal historians declared the early years of our country to be "above all else, the years of contract," and the "golden age of the law of contract." *Id.* (citing J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 18 (1956); L. FRIEDMAN, HISTORY OF AMERICAN LAW 275 (2d ed. 1985)).

78. Among the hundreds of thousands of contracts that one enters in his or her life, some of the most common and basic are: contracting with a hospital for delivery of a child; arranging for education for children or oneself; employment; managing one's commercial affairs; marrying; divorcing; purchasing a home; selling a home; planned giving; and finally making funeral or crematory arrangements.

79. The traditional grounds for voiding contracts based on incapacity are being under the legal age of majority or being mentally incapacitated due to mental infirmity or intoxication. *See* WILLISTON ON CONTRACTS § 9:1 (Richard A. Lord ed., 4th ed. 2009).

utes voiding contracts based on capacity generally do so to protect the individual perceived as the weaker contracting party due to that party's incapacity.[80] Though none of the capacity-based restrictions were imposed invidiously, the remedy is still considered fairly extraordinary as it contravenes the general preference for freedom to contract,[81] and the law presumes capacity absent evidence otherwise.[82]

Generally, laws protecting the incapacitated party provide that contracts are voidable[83] as opposed to void.[84] States made the contracts voidable instead of void to allow the incapacitated party the opportunity to ratify the contract should that party deem it advisable to do so, while providing the party the freedom to escape the obligation if the party deemed the contract imprudent.[85] The debate on capacity has not been free from challenge. Arguments against voiding contracts based on capacity have been made regarding the potential unfairness to the other contracting party as well as the potential "mixed blessing" of being included in protected class with limited rights.[86]

Finally, courts and legislatures have also had the opportunity to strike at certain classes of contracts that are deemed to be against public policy.[87] In these cases, either the court or policy makers identify types of contracts

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80. *E.g., Id.* at § 12(2) (excluding infants, intoxicated persons, and mentally ill persons from contracting for lack of capacity); *id.* cmt. (a) ("Capacity, as here used, means the legal power which a normal person would have under the same circumstances.") (citing RESTATEMENT (SECOND) AGENCY § 20, RESTATEMENT (SECOND) TRUSTS §18); *see also* Nagle, *infra* note 179, at 458-60 (discussing the impetus for the United States government subordinating the Native American for his own well-being).

81 *See* FARNSWORTH, *supra* note 77, at § 4.2 (noting an individual's ability to contract is impaired only in "extreme instances").

82. *See* WILLISTON, *supra* note 79, at § 9.1.

83. Additional grounds for incapacity still exist in some states such as for spendthrifts and convicts. *See* Joseph M. Perillo, Corbin on Contracts § 27.1 (2002 ed.).

84 WILLISTON, *supra* note 79, at 9.5, 9.9, 10.2, 10.3.

85. *See* FARNSWORTH, *supra* note 77, at § 4.2 (4th ed. 2004) (noting an individual's ability to contract is impaired only in "extreme instances").

86. *Id.*; *see also* JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 8.1 (6th ed. 2009); *see also* FARNSWORTH, *supra* note 81 at § 4.3 (citing the New York Court of Appeals):

> [A] protracted struggle has been maintained in the courts, on the one hand to protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practiced upon them by the designing and unprincipled, and on the other to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.

FARNSWORTH, *supra* note 78 at § 4.3 (citing Henry v. Root, 33 N.Y. 526, 536 (N.Y. 1865)).

87. RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. b (enumerating the common law capacity limitations as infants, the insane, intoxicated persons, married women, convicts, spendthrifts, aged persons, corporations, and Native Americans); *see also* WILLISTON, *supra* note 79, at § 9:3 (discussing how legislatures, though varied in the conclusion, have uniformly take control of age of majority/capacity through statute).

that are improper for their jurisdiction and prevent their legal enforcement.[88] Historically, contracts void for violating public policy have included protective types such as unconscionable agreements or overreaching restraints on trade or alienability,[89] as well as more general public policy grounds such as contract with businesses not registered in the state,[90] contracts with an illegal purpose or subject matter,[91] or those that regulate a transaction that the jurisdiction believes should not be allowed, such as for-profit surrogacy arrangements.[92] The jurisprudence of voiding contracts based on public policy, other than this brief mention, is largely ignored in this article because the principles involved are inapposite. This article is focusing on states' attempts to disenfranchise an entire class of individuals nearly entirely from their right to contract. This type of restriction is much more comprehensive and debilitating than a broad rule of law applied across society that focuses only on the content of the contract. Conflating the two doctrines serves only to confuse the issue and is therefore avoided.

1. The Contractual Incapacity of Minors

Incapacity due to infancy is especially benign for the incapacitated party as it provides the legal equivalent of a unilateral option for enforcement at the discretion of the minor involved. This incapacity has existed for centuries in the common law.[93] Though the criteria have changed over time and jurisdiction, the general rule still observed in the Restatement (Second) of Contracts is that contracts entered into prior to the day preceding the individual's eighteenth birthday are voidable.[94] Apparent age, maturity, intellectual capacity, and waivers are insufficient to remove the incapacity.[95] Likewise, unless otherwise statutorily mandated, neither emancipation nor marriage removes the incapacity.[96]

Like membership in the groups involving status below, membership in the group of individuals deemed minors is involuntary, arbitrary,[97] and temporarily immutable. Unlike status, the purpose for the contractual inca-

88. *E.g.*, WILLISTON, *supra* note 79, at §§ 18:10, 19:68, 61:2, 16:22.

89. *Id.* at § 18:10.

90. *Id.*, at § 19:68.

91. *Id.*, at § 61:2.

92. *Id.*, at § 16:22.

93. *See* FARNSWORTH, *supra* note 81, at § 4.4.; WILLISTON, *supra* note 79, at § 9.1 (noting a decision from 1292 invalidating a contractual release executed by a minor, and that by the 1400s, incapacity based on infancy had become well established).

94. RESTATEMENT (SECOND) CONTRACTS § 14 (1981).

95. *See* FARNSWORTH, *supra* note 78, at § 4.3.

96. *Id.*; WILLISTON, *supra* note 79, at § 9.4, n. 26, 27.

97. The arbitrariness of the rule is demonstrated by the differing ages of majority across jurisdictions and spheres. FARNSWORTH, *supra* note 78, at 4.3.

pacity is paternalistic in the sense that minors require the assistance of the legal system to protect them from executing unwise agreements.[98] The incapacity is not, however, absolute.

Minors can enter into binding contracts for "necessaries,"[99] as well as a few other limited categories.[100] Lord Coke defined necessaries to include: "necessary meat, drinke, apparel, necessary physicke, and other such necessaries, and likewise for . . . good teaching or instruction whereby [the minor] may profit himselfe afterwards."[101] However, even for necessaries, the doctrine of incapacity is based on the protection of the supposedly weaker contracting party. Minors' contractual liability is limited to the fair value of the necessaries received, and as such is more a quasi-contractual liability based on theories of unjust enrichment than on contractual obligations.[102] In any event, this incapacity exists to protect the affected party rather than to deny the party any fundamental right.

2. Mental Incapacity to Contract

The other principal grounds of incapacity in modern times are based on one's mental ability to understand the nature and consequences of one's actions.[103] Similar to the incapacity of minors, this incapacity was developed for the protection of the incapacitated individuals. The Restatement (Second) of Contracts established similar tests for both incapacity based on "mental illness or defect" as well as "intoxication."[104]

In both situations the test is whether the contracting individual was "unable to understand in a reasonable manner the nature and consequences of the transaction," or alternatively, "was unable to act in a reasonable manner in relation to the transaction."[105] The alternative, in case of mental illness or defect and not intoxication, also includes the qualifier: "and the other party has reason to know of his condition."[106] Like the doctrine of in-

98. *Id.*

99. WILLISTON, *supra* note 84 at § 9.18.

100. Among the few exceptions to the general rule of incapacity for minors, are the ability to enlist in the armed forces, a contract to support an illegitimate child, and certain types of employment. 5 WILLISTON ON CONTRACTS §§ 9.6, 9.8 (Richard A. Lord ed., 4th ed. 1990).

101. E. Coke on Littleton 259 (1628). To some extent, the doctrine of necessaries has been utilized to bind minors, especially married ones, on the argument that what may not be a necessary for an average minor may very well be for a married individual. Merrick v. Stephens, 337 S.W.2d 713 (Mo. App. 1960) (holding that for a married minor, a lease or purchase of shelter and lodging can become a necessity).

102. WILLISTON, *supra* note 79, at § 9.18.

103. RESTATEMENT (SECOND) CONTRACTS §§ 15-16.

104. *Id.*

105. *Id.*

106. *Id.* at § 15. This language has also been read into the qualification based on intoxica-

capacity based on age, the doctrine of incapacity based on mental illness or defect is an attempt to provide individuals suffering from the incapacity the ability to escape their contractual obligations provided they meet the criteria set forth above.[107]

In one sense, incapacity based on mental defect is much more difficult to establish than that of infancy given that while age is easily proven, cognitive understanding is an amorphous concept at best.[108] Courts have struggled with distinctions between comprehension and volition,[109] and mental illnesses that occur sporadically with lucid intervals.[110] Yet, in another sense, incapacity based on mental illness or defect can include an individual of any age, indeed age may be a principal factor, and could cover voluntary actions as well as with intentional intoxication.[111]

As with infancy-based incapacity, incapacity based on mental illness or intoxication is not absolute. Necessaries may be legitimately contracted for regardless of the disability,[112] and furthermore, in cases involving mental illness or defect, courts are more concerned with the knowledge of the other contracting party of an individual's defect.[113] Courts' focus on the opposing parties' knowledge of one's mental incapacity reflects the tension between the protectionist purpose of the doctrine and the freedom of all parties to contract and enjoy the benefits of their contracts. By focusing on what the other party to the contract knew of the other's incapacity, courts appear to be focusing on questions of potential overreaching and fraud rather than mental incapacity as such.[114]

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tion. WILLISTON, *supra* note 79, at § 10.10 n. 4 and accompanying text.

107. In addition, individuals who have guardians appointed to represent them are considered unable to manage their affairs and unable to validly effectuate contracts. *See* WILLISTON, *supra* note 84 at § 10.9.

108. *See* FARNSWORTH, *supra* note 78, at § 4.5 (noting criticism of the cognitive test and the difficulty of its application even though it has been "almost universally accepted by courts.")

109. *See* Faber v. Sweet Style Mfg. Corp., 242 N.Y.S.2d 763, 767-68 (N.Y. Sup. Ct. 1963) (noting although individuals suffering from manic-depressive psychosis comprehend the nature of their actions, they are compelled by their mental condition to act in ways in which they otherwise would not).

110. 5 WILLISTON ON CONTRACTS § 10.8 (Richard A. Lord ed., 4th ed. 1990) (noting difficulties in proving incapacity for individuals afflicted with Alzheimer's disease or similar dementia).

111. *Id. But see* E. ALLAN FARNSWORTH, CONTRACTS § 4.6, n. 11 *citing* (E. Coke on Littleton 247a (1628) (holding that a "drunkard who is *voluntaries daemon* . . . hath . . . no privilege thereby.")); 5 WILLISTON ON CONTRACTS § 10.11 (noting courts' ambivalence towards allowing intoxicated individuals the ability to utilize their voluntary intoxication as a defense against contract).

112. *See* WILLISTON, *supra* note 79, at §§ 9.18, 10.14.

113. *Id.* at § 10.11.

114. *Id.* Focusing on the knowledge of the other party erodes the reach of this branch of the doctrine of incapacity and therefore reduces the number of contracts that could be found invalid. *Id.*

Even with a knowledge qualifier, the doctrine of incapacity clearly exists to protect individuals from contracts they are unable to comprehend or avoid because of mental illness or intoxication.[115] The doctrine is not punitive or restrictive since it allows for contracts to be voidable rather than void.[116] In contrast to restrictions based on status which generally utilize an arbitrary, historically-discriminatory categorization, the restrictions on the right to contract based on capacity are not so much restrictions as protections, though some have argued that allowing contractual avoidance based on incapacity could tend to raise the cost of contracting for some if the opposing party were to require additional assurances of ability to contract.[117]

C. Status - To What Extent May the Right to Contract Be Lawfully Limited?

In contrast to beneficent limits imposed on the right to contract by one's incapacity are those regulations that purport to restrict the right to contract perniciously, generally based on membership in a demarcated class. The prototypical example of this type of legislation would be the Black Codes, which purposefully limited slaves' right to contract.[118] The law thus faces an inherent contradiction since the right to contract has long been subject to state-imposed limitations. Can a right be both fundamental and subject to a fairly large amount of arbitrary regulation? Or does the fact that a right is subject to a significant amount of regulation mandate a finding that the right is not fundamental? In the case of status-based restrictions on the right to contract, this article argues that the two propositions can be viewed disjunctively. Whereas generally applicable, limited restrictions on the ability to contract have long been accepted, discriminative, highly targeted attempts to disenfranchise a vulnerable population from a broadly held right to contract and participate in a mercantile society should be subject to legal limitations.

It is clear that the right to contract is subject to some limitation. "[N]either property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest. . . ."[119] Faced with that strong pronouncement from the Supreme Court, it appears that the ability of a sovereign to regulate the right to contract is clearly pronounced at least in regard to the "common interest." History is littered with examples of government intervention as

115. *Id.*
116. *Id.*
117. *Id.* at § 13.3.
118. *See infra* notes 144-146 and accompanying text.
119. Nebbia v. New York, 291 U.S. 502, 523 (1934).

to the right of contract based on status, though a historical review tends to show the practice as outdated and discriminatory,[120] and finds many courts seeking legal cover for striking down this type of status-based legislation.[121]

What is clear from the following text, however, is that a restriction of rights based on status has generally enjoyed legal and societal approval. On their face, none of the laws based on status discussed below existed for any reason other than to restrict the rights of a vulnerable class of individuals. In contrast to the laws regarding capacity to contract, laws regarding status to contract have nearly always been pernicious. The fact that the laws were malevolent, however, does not necessarily mean they were invalid - at least under the then-applicable law. The evolution of the right to contract into a fundamental right, however, is why contemporary laws that attempt the same type of discriminatory restrictions should be struck down. That is the crux of the issue we face with the Hammon-Beason Act regarding unauthorized immigrants' right to contract.

1. Race and Servitude - Status as Property

Race has long been the field most dominated by discriminatory encroachments on the right to contract. The purpose behind the restriction on the right to contract is clear. By eliminating the ability of an individual to privately order his affairs, accrue wealth, engage in commerce, or obtain pay for his labor, those making the rules were able to ensure continued dominance over the affected group while also reinforcing the societal belief that the group was less deserving of fundamental rights. Faced with the legal proposition that contract rights are subject to regulation, courts have sometimes created distinctions without a difference or simply adopted hyper-formalistic decisions ignoring the broader question of fundamental rights.

In that vein, the judicial treatment of race and servitude, two distinct concepts, has been strongly interconnected since the birth of the United States.[122] It is difficult to discuss concepts behind restrictive laws based on race without recognizing the role slavery played or had played at the time states enacted various restrictions.[123] Likewise, it is important not to focus

120. *See infra* Sections II.C.1-4 (discussing laws preventing contract based on gender, race, or servitude).

121. Greater discussion of the Civil Rights Act and equal protection jurisprudence is found in Sections III.C and D *infra*.

122. *See* Pope, *supra* note 34, at 1481-91 (discussing the inability of slaves to contract).

123. *See* Paul Finkelman, *The Centrality of Slavery in American Legal Development*, *in* SLAVERY AND THE LAW 3, 5 (noting historically that "race [has been] generally irrelevant to enslavement.").

too much on the role servitude played, as not all race-based restrictions were driven by this unique interrelationship. In this section both race and servitude will be discussed, together where appropriate, separately otherwise.

Rights restrictions based on servitude have a long history dating from pre-Renaissance cultures, including, notably, the Roman civil code,[124] and ancient Greek law. In ancient Greek law, freedom of contract was a foundational principle of their society.[125]

> The doctrine of freedom of contract was so strong at Athens that it was possible to contract out of the protection of the law, or to agree that a contract should take precedence over law, or to expect a court of law to uphold a contract which is publicly admitted to have constituted a conspiracy to commit an unlawful act.[126]

Even with this strong concept of the legal supremacy of contract, in ancient times slaves lacked any rights, including, of course, the right to contract.[127]

Slaves themselves were generally considered chattel, or *res mancipi*,[128] and as such were freely transferable. The restriction of the right to contract in Rome was predicated on this notion. Even when the restriction was relaxed, it was done only for the interest of the owner, and only then through the creation of a legal fiction.[129]

In the territory that became the United States, the concepts of slavery

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124. *See generally* HAROLD BERMAN, *The Religious Sources of General Contract Law: An Historical Perspective, in* FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 187, 187-208 (1993) (describing the religious sources behind General Contract Law in Roman emperor Justinian's sixth century digest); James Gordley, The Philosophical Origins of Modern Contract Doctrine (1991) (discussing the rediscovery of Roman law and late-Scholastic philosophy that bore the first general theory of contract law in the eleventh century in Medieval Europe).

125. RUSS VERSTEEG, THE ESSENTIALS OF GREEK AND ROMAN LAW 83 (2010).

126. *Id.* at 83 (citing S.C. Todd, The Shape of Athenian Law 72, 263-67 (1993)).

127. VERSTEEG, *supra* note 125 at 47 (noting that slaves in ancient Athens were deemed personal property under the law, and as property could not own real property); W. W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW & COMMON LAW 23-26 (2nd ed., 1997) (noting that slaves lacked both rights and duties); *see also* ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 29 (1991) (noting that slaves were prohibited even from the contract of marriage, and that contracts entered into by slaves bound the other party to the master, but not the master to the other).

128. Russ VerSteeg, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 544-45 (2000).

129. *See* Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 28 -29 (2010) (discussing the legal fiction of slaves as chattel and the strict adherence to this legal fiction to deny slaves human civil liberties) (citing Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 311-12 (1996); Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 422 (1997)).

and race became generally conflated to the point where to debate one was to debate the other.[130] Under that framework, any law affecting slaves would automatically and only affect blacks. In addition, states also passed laws based on race to reach free blacks who would not be subject to the laws on slavery.[131] In both instances, blacks were denied rights based on status alone (either as a slave or a black person), a situation which was not legally rectified in large part until the Civil Rights Act of 1964.[132]

Especially in the south, states and localities acted to create laws and guidelines to regulate slave-based commerce and those slaves' and free blacks' interactions with society.[133] Not until the Reconstruction Era Amendments following the Civil War did the United States outlaw slavery,[134] grant citizenship to all persons born in the United States, ensure that states could not enact laws abrogating the privileges or immunities of U.S. citizens, ensured due process and equal protection of the laws,[135] and guarantee the right of a citizen to vote without regard to "race, color, or previous condition of servitude."[136] However, even these facially unambiguous amendments were insufficient to guard against states' attempts to restrict the rights of individuals based on race or prior status of servitude, especially as it relates to the right to contract.

Historically, U.S. slaves could not enter into legally binding contracts, sue or be sued, hold title to property, or enter into a legally binding marriage.[137] Free blacks, who were legally permitted to marry, were denied the right to contract for marriage if the marriage was with a white woman.[138]

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130. *See* Finkelman, *supra* note 120, at 4-5 (noting justifications for slavery in the United States were generally always predicated on race, and that "[f]or Americans, 'race has always been the central reality of slavery.'") (citing David Brion Davis, *Slavery and the American Mind,* in PERSPECTIVES AND IRONY IN AMERICAN SLAVERY 56 (Harry P. Owens, ed., 1976)).

131. *See* James A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary* Antebellum *South,* 82 N.C. L. REV. 535, 580-81 (2004) (describing a series of laws which targeted free black persons, including forced slavery for defaulting on taxes, indefinite detention for traveling without emancipation papers, mandates to register with government officials, and jail sentences for traveling outside of one's county of residence without "honest employment").

132. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, *codified as amended in* 42 U.S.C. § 1981 (2012) (ending Jim Crow, segregation, and many overtly racist laws).

133. *E.g.* XI HENING'S STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, 1782-84 at 39, 39-40 (William Waller Hening ed., 1823), 1 Collection of Acts of Virginia 260, 268, 445, 581-82. *See also* Gillmer, *supra* note 131, at 580-81.

134. U.S. CONST. amend. XIII.

135. U.S. CONST. amend. XIV, § 1.

136. U.S. CONST. amend. XV.

137. *See* William W. Fisher III, *Ideology and Imagery in the Law of Slavery, in* SLAVERY AND THE LAW 43, 43 (Finkelman, ed. 1997).

138. *Id.* at 45. In the United States there was always tension in how free blacks were treated compared to slaves. However, given the strong evangelical influence in the South, judges at

The North Carolina Supreme Court held "[u]nder our system of law, a slave can make no contract. . . . He has no legal capacity to make a contract. He has no legal mind."[139] The Alabama Supreme Court concurred, noting slaves' "absolute civil incapacity" and held them to be "incapable of owning property, or of performing any civil legal act . . . ."[140] In that case the Alabama Supreme Court noted that Alabama law "recognize[d] no other *status*" than free or slave, and slaves were lawfully incapable of possessing civil rights and legal capacity.[141]

In addition to the numerous legal opinions that restricted or eliminated the rights of slaves to contract,[142] states had long had "slave codes"[143] or "Black Codes" to regulate the legal rights, liabilities and procedures for blacks and slaves both before and after the Civil War.[144] Following the Civil War, the Black Codes were either amended or new ones implemented to ostensibly comply with the Reconstruction Era Amendments while maintaining blacks in a subservient role.[145] The original slave or Black Codes included the standard prohibitions on owning property, traveling, working for pay, or contracting for the purchase or sale of goods.[146]

Louisiana's Code Noir prohibited blacks from entering into sales

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times relied on biblical statements in determining how this tension should be resolved.

> [The slave] is made after the image of the Creator. . . .The owner has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man.

Ford v. Ford, 26 Tenn. 91, 95-96 (1846) (discussing the standing of slaves to defend a testamentary manumission).

139. Batten v. Faulk, 49 N.C. 233, 234 (1856).

140. Creswell's Executor v. Walker, 37 Ala. 229, *3 (Ala. 1861).

141. *Id.*, at *4.

142. *See, e.g.*, Emerson v. Howland, 8 F. Cas. 634 (C.C.D. Mass. 1816); Girod v. Lewis, 6 Mart. (o.s.) 559 (La. 1819), Abercrombie's Ex'r v. Abercrombie's Heirs, 27 Ala. 494 (Ala. 1855).

143. *E.g.*, 1865 Fla. Laws 2 (prohibited militia service by colored men), 1,466 (prohibiting colored persons from possessing firearms or knives or attending white religious services); *Id..*, at 30 (criminalizing white women to cohabitate with a man who is one-eighth black or greater), 1,469 (criminalizing breach of contract when a colored person breaches an employment contract).

144. DONALD LIVELY, THE CONSTITUTION, RACE, AND RENEWED RELEVANCE OF ORIGINAL INTENT 44-45 (2008).

145. Joe M. Richardson, *Florida Black Codes*, 47 FLA. HISTORICAL QUARTERLY 365, 373-76 (1969) (expressly securing the life, liberty, property, and happiness of all Floridians yet relegating colored Floridians and their rights into a lesser standing).

146. James B. Browning, *The North Carolina Black Code*, 15 J. NEGRO HISTORY 461, 465 (1930) (voiding marriages between white persons and persons of color and requiring any contract which involved a person of color with a value of ten dollars to be void unless in writing and signed by both parties as well as a white person who was able to read and write). Louisiana's original Black Code enacted in 1724 and based on the slave code of French Caribbean colonies was literally titled the "Code Noir." Louisiana Code Noir (1724) § XV, BlackPast.org, (April 22, 2013, 4:45 PM), blackpast.org/?=primary/lousianas-code-noir-1724.

agreements of any type, and also punished anyone who would purchase anything from them.[147] The Code Noir further prescribed any ownership of real or personal property by slaves, and that any real or personal property acquired by slaves through work, gift, inheritance or otherwise would pass by law to their masters.[148] Even freeborn or freed slaves faced additional civil incapacitation as the Code Noir voided any testamentary or inter vivos gift to them and instead directed such gifts to "the benefit of the nearest hospital."[149]

Later Black Codes, unable to focus on the condition of servitude that permeated prior ones, were unrepentantly clear in purpose even while granting certain rights. Louisiana's Black Code of 1865 included prohibitions on renting property, as well as Section 8, which prevented any black person from "sell[ing], barter[ing], or exchang[ing] any articles of merchandise or traffic within said parish without the special written permission of his employer, specifying the article of sale, barter or traffic. . . ."[150] North Carolina's Black Code also contained peculiar language regarding the right to contract:

> [A]ll contracts between any persons whatever, whereof one or more of them shall be a person of color, for the sale or purchase of any [domestic farm animal], whatever may be the value of such articles, and all contracts between such persons for any other article or articles of property whatever of the value of ten dollars or more; and all contracts executed or executory between such persons for the payment of money of the value of ten dollars or more, shall be void as to all persons whatever, unless the same be put in writing and signed by the venders or debtors, and witnessed by a white person who can read and write.[151]

In the Black Codes discussed above, basic rights to contract were severely restricted based explicitly on race and former slave status. These re-

147. Louisiana Code Noir (1724) § XXII, BlackPast.org, (April 22, 2013, 4:45 PM), blackpast.org/?=primary/lousianas-code-noir-1724.

148. Louisiana Code Noir (1724) §§ XXII, XXIII, BlackPast.org, (April 22, 2013, 4:45 PM), blackpast.org/?=primary/lousianas-code-noir-1724. *See also Gaius Digest* 48-55 (discussing the dependency of slaves to their masters and the power of agency).

149. Louisiana Code Noir (1724) § LIII, BlackPast.org, (April 22, 2013, 4:45 PM), blackpast.org/?=primary/lousianas-code-noir-1724. This statement is in direct contrast to § LIV which purported to grant to freed slaves the same rights enjoyed by any free-born person. *Id.*

150. Section 8 Louisiana Black Code, 1865, Senate Executive Document No. 2, 39th Congress, 1st Session., p. 93.

151. 1866 N.C. Sess. Laws 101, at § 7 (1866).

strictions continued in various forms until the Civil Rights Era and the enactment of the Civil Rights Act of 1964, discussed in Section III.D below. Even then, it is noteworthy that the mechanism that removed the restrictions was legislative rather than judicial, a distinction that has framed the current debate on contract rights based on status.

2. Gender as Status - An Evolution of Contractual Suffrage

Gender-based impingements, such as race or servitude-based constraints, were also used to perpetuate societal power imbalances by discriminatorily limiting the legal rights of women. In the United States, as recently as the early 1900s, married women were deemed to have lost their legal personhood through *civiliter mortua* or "civil death" occasioned by the legal union with their husband.[152] In the nineteenth century, the U.S. Supreme Court held in *Bradwell v. Illinois* that a married woman could not be an attorney due to her incapacity to contract with a third party.[153] Justice Bradley in his concurrence went further to note:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband . . . .[154]

States' deprivation of married women's right to contract was judicially condoned through at least the mid-1900s.[155] In *United States v. Yazell*,[156] the Supreme Court upheld a Texas law mandating the doctrine of coverture,[157] which incapacitated a married woman from contracting away rights to her separate property without a court decree removing that incapacity.[158] While the Court noted the institution of coverture existed in only 11 states at the

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152. *See* BAYLES, *supra* note 20, at 28-29 (citing laws in California, Georgia, New Mexico, Louisiana, and the Dakotas relegating women to an inferior legal position after marriage).

153. 83 U.S. 130 (1872).

154. *Id.* at 141. Justice Bradley went on to note, "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign office of wife and mother. This is the law of the Creator." *Id.*

155. HOMER CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 8.1, at 503 (2nd ed. 1987); *see also* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 596-600 (1991).

156. 382 U.S. 341 (1966).

157. 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

158. United States v. Yazell, 382 U.S. 341 (1966).

time and therefore the problem was not a "battle to vindicate the rights of women,"[159] it held that states had substantial latitude to regulate in the arenas of family and family-property arrangements.[160] As to the right to contract, the Court warned against "establish[ing] a principle which might cast doubt upon the effectiveness . . . of the laws of 11 other States relating to the contractual positions of married women"[161] except in in instances "where clear and substantial interests in the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."[162]

Nor is the United States viewpoint unique in scope or type. The common law as developed in England long treated women as an inferior legal person in their ability to contract, deal with real property and inheritance and succession.[163] Similarly, the Napoleonic Code in eighteenth century France prohibited a woman from entering into contracts or otherwise disposing of property.[164] This treatment is pervasive and many countries' legal systems have long been utilized to ensure the deference of women to their male caretakers be they fathers, brothers, or husbands by denying that the right to contract is a fundamental right of an individual.

It has not been until recently, notably through Title VII of the Federal Civil Rights Act of 1964 prohibiting gender-based employment discrimination,[165] and more fully developed case law under the guise of equal protection,[166] that these earlier prohibitions on some types of gender-based discrimination have been cast aside, though some contract limitations based

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159. *Yazell*, 382 U.S. at 350.

160. Justice Fortas elaborated that "We have no federal law relating to the protection of the separate property of married women. We should not here invent one and impose it upon the States, despite our personal distaste for coverture provisions. . ." *Id.* at 352-53.

161. *Id.* at 353.

162. *Id.* at 352. Justice Black, dissenting in *Yazell*, provided his opinion on the effect of coverture, the "common-law fiction that husband and wife are one." Justice Black believed the institution of coverture meant that after the parties become one in marriage, "the one is the husband" and the women was subsumed entirely by him. In noting that this point of view had been "completely discredited," he concluded, "[i]t seems at least unique to me that this Court in 1966 should exalt this archaic remnant of a primitive caste system to an honored place among the laws of the United States." *Id.* at 361.

163. *See* BLACKSTONE, *supra* note 157.

164. Under the Napoleonic Code, prior to any marriage, women were governed by their fathers, and, upon marriage, their husbands. Both father and husband were entitled to administer the wife's assets without her consent. *See* Arlette Gautier, *Legal Regulation Of Marital Relations: An Historical And Comparative Approach*, 19 INT'L J.L. POL'Y & FAM. 47, 53 (2005).

165. *See* Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2).

166. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (establishing an intermediate level of review for equal protection claims based on gender); U.S. v. Virginia, 518 U.S. 515, 564 (1996) (invalidating the Virginia Military Institute's single-sex matriculation policy).

on status persist.[167] At the constitutional level, equal protection arguments have been utilized to strike down discriminatory gender-based legislation using an intermediate level of scrutiny.[168] Challenges have utilized both a traditional suspect class analysis,[169] as well as distinguishing laws that infringe on "basic" instead of "non-basic" rights in determining the level of scrutiny to be applied.[170] In the latter context, any law attempting to restrict a "basic" right must be judged using more than a rational basis analysis.[171]

Additionally, some courts have focused instead on the unreasonable exercise of power in enacting gender-based legislation.[172] The New Jersey Supreme Court summed up the evolution in gender-based restrictions in the law noting in closing that "[w]hile the law may look to the past for the lessons it teaches, it must be geared to the present and towards the future if it is to serve the people in just and proper fashion."[173] It is in this context that judges have been less willing to uphold laws that restrict women's ability to contract for gainful employment. "Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women."[174]

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167. *See* Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding a Michigan law forbidding all women except those who are wives and daughters of tavern owners from working as barmaids on equal protection grounds). J. Frankfurter specifically noted, "despite the vast changes in the social and legal position of women," states are still free to "draw[] a sharp line between the sexes. . ." *Goesaert*, 335 U.S. at 465-66. *Goesaert* has faced substantial criticism. *See* Paterson Tavern & G.O.A. v. Borough of Hawthorne, 270 A.2d 628, 631 (N.J. 1970) (citing Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253, 1260 (S.D.N.Y. 1969) (invalidating practice of not serving female clients)), United States ex rel. Robinson v. York, 281 F. Supp. 8, 16 (D. Conn. 1968) (invalidating sex-based discriminatory sentencing practices); White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (striking down a law preventing females from serving as jurors).

168. *See, e.g.*, *Craig*, 429 U.S. 190.

169. *Id.*

170. LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 157-59 (1969).

171. *Id. See also* White v. Crook, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (invalidating a state law preventing women from engaging in jury duty which the court characterized as "one of the basic rights" of citizenship).

172. The Florida and New Jersey Supreme Courts invalidated local laws prohibiting women from working as bartenders on the grounds that such prohibitions were unreasonable and went "beyond any public need." Brown v. Foley, 158 Fla. 734, 735-36 (Fla. 1947) (holding a municipality is only empowered to implement "reasonable ordinances" and there was "no sound reason in law" to uphold the gender-based employment ordinance); Paterson Tavern & G.O.A. v. Borough of Hawthorne, 270 A.2d 628, 633 (N.J. 1970).

173. *Paterson Tavern & G.O.A.*, 270 A.2d at 633.

174. Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 534 (Cal. 1971).

3. American Indians – Wards of the United States

The U.S. government's attitude toward its contractual obligations with American Indians is perhaps the clearest example of government sponsored discrimination. Whereas slave ownership was only tolerated and not practiced by the U.S. government, it did actively participate in creating certain types of contractual limitations for American Indians that were designed to keep them permanently disadvantaged in their ability to manage their own affairs. For hundreds of years now American Indians have suffered significant legislative and judicial restrictions on their contractual rights.[175] As a leading treatise notes, "it seems clear that an unemancipated Indian has only a limited contractual capacity, subject to the control and approval of the United States, his guardian or trustee. . ."[176] Once again, it is clear that limitations on the right to contract were integral in perpetuating a legal framework that discriminatorily disempowered a class of individuals based on an immutable characteristic.

The reasons behind the tribes' limited contractual capacity are various, and at times entirely discriminatory. The distinction or status used to demarcate the group could be said to be predicated on race, national origin, or political subdivision, though their experience is unique given the centuries of open, ongoing hostilities between citizens of the United States and the tribes. Additionally, the law was forced to develop and settle the rights of the tribes that remained free as well as those who had been defeated and allotted reservations, groups that faced substantially different legal circumstances and who enjoyed considerably different rights.[177]

From the outset, the United States abused the contractual relationship between the tribes and them, and many contracts or treaties were simply ignored almost from the moment of their execution.[178] Additionally, when American Indians sought legal recourse, they were forced to seek compensation in a forum belonging to the very party who had breached its legal obligations to them.[179] Given the unique relationship and the tribes' status

175. Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 885-86 (2003).

176. WILLISTON, supra note 79, at § 11.12. *See also* RESTATEMENT (SECOND) CONTRACTS § 12 cmt. b (noting that American Indians have also been denied certain rights to contract as wards of the U.S. government).

177. 25 U.S.C. § 1 et seq. (2006) (collectively "'Indian Law").

178. *See, e.g.*, United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 324 (9th Cir. 1956) (noting an attempt by the Bureau of Indian Affairs in 1908 to transfer from the Yakima tribe seventy-five percent of the flow of a river intended to be used by them for irrigation in direct contravention of a treaty from the 1850s).

179. *See, e.g.*, Mary Kathryn Nagle, *Standing Bear v. Crook: The Case For Equality Under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 458 (2012) (noting the United States Attorney's defense in a habeas corpus action that Indians did not have the right to sue in a U.S. court of

as a domestic dependent nation,[180] the United State imposed the legal structure of guardianship on the American Indians, making themselves the guardians and trustee of the rights of its wards, the American Indians.[181] Not until 1879 was the American Indian Standing Bear of the Omaha tribe able to successfully argue in federal court that an American Indian was a "'person' within the meaning of the laws of the United States."[182] Yet, 130 years after Standing Bear's trial, the concept of the U.S. government as fiduciary of the tribes has endured.

While American Indians have greater rights today and have enjoyed some judicial success enforcing those rights,[183] the tribes still have federally restricted contractual rights.[184] One consequence of their tribal land being held in trust by the United States[185] is that any contract entered into by an American Indian tribe that would encumber its land for more than seven years is invalid without the consent of the Secretary of the Interior.[186] Additionally, individual American Indians are also subject to restrictions when contracting for property held in trust, though they are able to freely contract for private property not subject to trust regulations.[187]

Alternatively restrictions on tribes' right to contract, specifically through their status as ward of the United States, have been used to positively affect the tribes in their contractual relations and act as a paternalistic mechanism not unlike the doctrine of incapacity discussed above.[188] When the tribes have coupled the status of ward of the United Status with that of a "domestic dependent nation" with limited sovereign immunity,[189] they have been able to escape ostensibly legitimate contractual obligations.[190]

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law).

180. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 10 (1931).

181. *Id.* at 558-60.

182. United States ex rel. Standing Bear v. Crook, 25 F. Cas. 695, 700 (C.C.D. Neb. 1879) (No. 14,891). Judge Dundy went on to note the American Indians also enjoyed the "inherent right of expatriation, as well as the more fortunate white race, and . . . the inalienable right to 'life, liberty, and the pursuit of happiness. . .'" *Crook*, 25 F. Cas. at 701.

183. *See, e.g.*, Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009) (holding Native American beneficiaries of individual Indian money accounts were entitled to accounting and fiduciary relationship with the United States government).

184. *See* 25 U.S.C. § 81(b) (2006).

185. *Id.*

186. *Id.*

187. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 76 (4th Ed. 2012).

188. *See* Section II.C *infra*.

189. *See* United States v. U.S. Fidelity & Guar. Co., 309 U.S. 506, 512 (1940) ("These Indian nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.")(internal citations omitted); *see also* Worcester v. Georgia, 31 U.S. 515 (1832), Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823).

190. *See, e.g.*, Putnam v. United States, 248 F.2d 292 (8th Cir. 1957) (cancelling deeds and leases executed by American Indians without the required governmental approval).

While there are potential benefits, the history of this status-based restriction is not benign,[191] and perhaps more importantly, the rationale behind the implementation of this legal incapacity differs greatly from the purposes behind the adoption of the legal incapacities discussed in Section II.B above.

The United States has made full use of its guardian role, including engaging in activities that directly conflict with treaty obligations.[192] In regard to the legal treatment of American Indians, the Ninth Circuit has noted the:

> numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting 'the generous and protective spirit which the United States properly feels toward its Indian wards,' and the 'high standards of fair dealing' required of the United States in controlling Indian affairs', are but demonstrations of a gross national hypocrisy.[193]

Since the Indian Acts of the First Congress in 1789,[194] the federal government has continually restricted the contract rights of American Indians individually and the tribes collectively through, *inter alia*, limitations on sale of land,[195] regulation of trade,[196] regulation of allotments,[197] and trus-

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191. *See* United States v. Ahtanum Irrigation District, 236 F.2d 321, 332 n. 18 (9th Cir. 1956) (citing Senator Wheeler, stating "that the Secretary of the Interior and the Indian Bureau had no right to go ahead and act arbitrarily without the tribal council's consent, taking away water or land from these Indians and giving it to white settlers.") Congress agreed with Senator Wheeler's opinion in subsequent legislation acknowledging "'the Indians . . . have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled. . .'" *Id.* at 333 (citing The Act of August 1, 1914, ch. 222, 38 Stat. 604); *see also* Winters v. United States, 207 U.S. 564 (1908).

192. *See* Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).

193. *Ahtanum Irrigation Dist.*, 236 F.2d at 338 (internal citations omitted).

194. Act of Aug. 20, 1789, ch. 10, § 1, 1 Stat. 54 (1789) (levying a sum not exceeding $20,000 on imports and tonnage to defray the negotiation and treatment expenses of Indian tribes), Act of July 22, 1790, ch. 31, 1 Stat. 136 (1790) (further appropriating the import tax to defray the costs of those who manage Indians), Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790) (limiting trade and intercourse with Indians to those with Congressional authority, penalizing those who defy legislation, forcing forfeiture of all merchandise of those who defy legislation, abrogating the right of Indians to convey good title of land without federal authority, punishing white criminals who commit crimes on tribal lands with crimes of the state or territory surrounding the Indians).

195. Act of July 22, 1790, ch. 33, §4, 1 Stat. 137 (1790).

196. *Id.* at §1.

197. Act of June 14, 1862, ch. 101, 12 Stat. 427; General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388; 25 U.S.C.A. § 331 et seq. (*repealed by* Indian Land Consolidation Act Amds. of 2000, § 106, 114 Stat 1911).

teeship of tribal or individual resources.[198] Congressional power in this realm is so broad that it has been used to dissolve tribes and distribute remaining assets in the same fashion as if a company were to be dissolved.[199] While federal treatment of American Indians has been steadily improved from the late 1960s,[200] many of the contractual restrictions discussed above remain in place. The argument that these restrictions exist for the benefit of the American Indians is not dissimilar from earlier arguments regarding the faculties of blacks, slaves or women.[201] As with gender, race and servitude, the law has partially restricted a fundamental right to contract based on an involuntary characteristic of a group who has suffered substantial discrimination. In the case of American Indians it is fair to wonder, given the odd dichotomy of domestic-dependent nations,[202] how long their contractual incapacity will continue to exist.

III. CONSTITUTIONAL AND STATUTORY PROHIBITIONS ON STATUS-BASED RESTRICTIONS

As mentioned previously, the genesis of this article was the Hammon-Beason Alabama Taxpayer and Citizenship Protection Act which attempted to declare void most contracts entered into by unauthorized immigrants,[203] though the analysis applies equally to any status-based restriction grounded on arbitrary or discriminatory grounds. This law provides a class of individuals upon whom to test theories of valid contract restriction versus improper status-based restrictions. The identity of this group, individuals subject to U.S. immigration law, adds the additional ground of preemption for invalidating the statute that may not be open to many other groups.

It is useful to examine what the law in fact prohibited in its original form regarding contractual restrictions, especially for purposes of determining due process and/or civil rights violations. As mentioned above, on the civil side, the law prohibited the enforcement of any contract with an unauthorized immigrant if the other party, at the time of contracting, had

198. Congress, as trustee, has nearly plenary power to regulate tribal resources including both land and money. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 75 (2002) (citing Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)).

199. *Id.*

200. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 12-13 (2002).

201. The comparison is imperfect, however, given the unique legal position of American Indians as both sovereign and dependent.

202. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 47 (1831). In *Cherokee Nation*, Chief Justice Marshall established the unique clarification of the tribes as both sovereign and dependent on the U.S. government. *Id.* The U.S. government's continued vision of its relationship to the tribes as that of a benefactor over its ward suggests that the tribes may not obtain full contractual freedom for some time to come. *See supra* notes 195-198 and accompanying text.

203. ALA. CODE § 31-13-2 (Lexis Nexis Supp. 2012) (Legislative Findings).

direct or constructive knowledge of the party's unauthorized immigration status, and the contract either required the unauthorized immigrant to remain in the country more than twenty-four hours after execution of the contract or performance could not be expected to occur without the unauthorized immigrant remaining in the country.[204] Presumably, a contract between an unauthorized immigrant and his or her attorney in nearly any type of proceeding or legal matter would have run afoul of this prescription.[205]

On the state side, the law prohibited an unauthorized immigrant for entering or attempting to enter into any business transaction[206] with the state or a political subdivision of the state, classifying this action as a Class C felony.[207] As the state of Alabama has public cooperatives for industries such as electricity and water, the statute, read broadly in its original form, could easily have been construed to invalidate any contract by the state or its agents for those necessary services, and that is the subject of our next section.[208]

A. Contract Clause

This Article initially envisioned a spirited discussion on the Hammon-Beason Act on Contract Clause grounds given the broad text of the initial law.[209] However, the law has now been amended several times due in no small party to vigorous challenges it has faced in the courts.[210] The result of

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204. ALA. CODE § 31-13-26 (LexisNexis Supp. 2012). The law specifically excluded contracts: for lodging for one night; to purchase food to be consumed by the undocumented immigrant; for medical services; or for transportation for the undocumented immigrant to return to his or her home country. *Id.*

205. Alabama's governor has since signed into law language which narrowed the scope of "business transaction" to "Public Records Transactions", meaning drivers' licenses, license plates, ID cards, and business licenses. *Summary of HB 56 as Amended by 658*, FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), (June 13, 2012), http://www.fairus.org/DocServer/HB56SummaryAmended.pdf.

206. ALA. CODE § 31-13-29 (LexisNexis Supp. 2012), *as amended by* HB 658. The statute provides a non-exhaustive list of "Record transactions" that includes motor vehicle registration, driver's license or identification, or business licenses. It also excludes specifically marriage licenses. *Id.*

207. *Id.*

208. *See* ALA. CODE § 31-13-29(d) (creating a class C felony for any unlawfully present alien who attempts to enter into a Records Transaction with a public entity of Alabama).

209. ALA. CODE § 31-13-26(a)(2011).

210. Several months following the expansion of the preliminary injunction, Alabama amended the law to apply only to contracts entered subsequent to the enactment of the law to purposefully diffuse any Contract Clause claims, as well as additional modifications aimed at existing legal challenges. *See* HB 658, 2012 Leg., Reg. Sess. (Ala. 2012); *see also* United States v. Alabama, 611 F.3d 1236 (11th Cir. 2012); Hispanic Interest Coalition of Ala. v. Governor of Ala., 691 F.3d 1236 (11th Cir. 2012).

those amendments and challenges is that key provisions of the law that attempted to invalidate executed contracts no longer exist. However, any article discussing the fundamentality of the right to contract must make at least passing mention of the relevance of the Contract Clause. The so-called Contract Clause does not provide an unqualified freedom to contract; rather it prohibits states from retroactively vitiating existing private contract rights.[211] The exact language of the clause is "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . ."[212] While at one time a significant limit on state regulation,[213] it has since lost much of its prominence,[214] and its influence has waxed and waned even in more recent times.[215] By limiting the applicability of the clause to extant rather than prospective contracts and creating additional exceptions to coverage, the Court has greatly limited the scope of the Contract Clause and its power.

The original provision of Alabama's law that restricted the right to contract between private parties likely would have been partially prohibited by the Contract Clause. The original language of the statute prohibited the enforcement of any contract if one party had direct or constructive knowledge of the other's unlawful presence[216] as there was no limiting language in the statute regarding when the contract was executed. As such, the law could have governed both existing and prospective contracts. If that were the case, it would have directly violated the prohibition on the impairment of contractual obligations under the Contract Clause as well as its corollary in the Alabama Constitution.[217]

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211. U.S. CONST., art. I, § 10, cl. 1.

212. *Id.* The Contract Clause is not literally interpreted given the potential scope of coverage. Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934) (holding the Contract Clause prohibition is "not to be read with literal exactness like a mathematical formula").

213. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (striking down a state law purporting to annul a previous land grant and simultaneously establishing the propriety of Contract Clause jurisprudence even in public contracts), Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819), Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 623 (1870) (identifying the Contract Clause as the "most valuable provision of the Constitution . . .").

214. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (noting "the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment . . . ."); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (resisting a Contract Clause challenge to a state law that allowed courts to extend foreclosed properties' redemption periods); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703 (1984); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890 (1987);

215. *See, e.g.*, El Paso v. Simmons, 379 U.S. 497 (1965) (upholding a Texas law that limited certain contractual rights to reinstate an ownership interest in property); *see also* James W. Ely Jr., *Whatever Happened to the Contract Clause*, 4 CHARLESTON L. REV. 371, 372 (2010) (noting Contract Clause jurisprudence "virtually drop[ped] off the constitutional map"); *c.f.* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (invalidating a Minnesota law that would have imposed additional financial charges on a companies' pension-funding obligations).

216. ALA. CODE § 31-13-26(a) et seq. (LexisNexis Supp. 2012).

217. ALA. CONST. art. I, § 22 (1901). Alabama's Supreme Court has interpreted the Ala-

Applied retroactively, Alabama's law would likely have clearly and substantially impaired the parties' contract rights in violation of the Contract Clause.[218] As such, the impairment could only have been upheld if the state were able to show a "significant and legitimate public purpose" for the law, and that the impairment was based "upon reasonable conditions and [was] of a character appropriate to the public purpose."[219] Those impairments that have been recognized as legitimate have been to prevent widespread abuse of contracts and foreclosures,[220] and to protect consumers from economic harm based on the deregulation of markets.[221]

In contrast to those previous decisions, Alabama's law initially sought to revoke the long-standing freedom to contract from a discrete section of the population based on a discriminatory intent coupled with the bare recital of generalized economic harm and lawlessness. Furthermore, the law would also have impaired the right to contract of any lawfully present individual who knowingly contracted with an unauthorized immigrant.[222] In that sense, the law potentially would have harmed to a greater degree those individuals lawfully present in the United States by abridging *their* contractual rights even when they have not engaged in any unlawful conduct.

Even though much of the Contract Clause analysis may be foreclosed given Alabama's recent decision to amend the law to prevent retroactive application and the recent Eleventh Circuit decisions regarding the law,[223] the amendment indicates the extent of Alabama's concern over a potential Contract Clause challenge. The case should sound a clear warning bell to other states who may be considering similar, retroactively-applied legislation on the right to contract.

B. Preemption

Preemption law in the field of immigration generally focuses on the question of whether the state statute is a "regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may re-

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bama Contract Clause as similar to the Contract Clause in the U.S. Constitution. *See* Jefferson County Com'n v. Edwards, 32 So.3d 572, 588 (Ala. 2009) (referring to the two, without distinction, as the "Contract Clauses").

218. *See Allied Structural Steel*, 438 U.S. at 245 (noting the Framers' intent to protect private contracts and allow parties to rely on their contractual rights and obligations).

219. *Id.* at 234-235.

220. *Home Bldg. & Loan Ass'n*, 290 U.S. at 465.

221. *Energy Reserves Grp.*, 459 U.S. at 416-17.

222. ALA. CODE § 31-13-2 (LexisNexis Supp. 2012).

223.United States v. Alabama, 691 F.3d 1236 (11th Cir. 2012); Hispanic Interest Coalition of Ala. v. Governor of Ala., 691 F.3d 1236 (11th Cir. 2012).

main."[224] State statutes which are found to regulate immigration are impermissible encroachments and are invalidated as preempted by federal law. The Hammon-Beason Act, though on its face not regulating immigration in the sense of providing work authorization or visas, purports to regulate the right of contract which in turn limits where people may live, what they may eat, and how they transport themselves within the state. By prohibiting this fundamental right, the state is attempting to indirectly control which populations may reside in their state based on immigration status. This decision by a state on who may reside in their states impermissible infringes on federal immigration law.

Even with the recent amendments attempting to reduce the scope of the law, the general prohibitions in the Hammon-Beason Act against private and public contracts impermissibly and fundamentally alter the comprehensive immigration structure contravening the holdings in *De Canas v. Bica*[225] and *Toll v. Moreno*.[226] Alabama, by restricting the fundamental right to contract for the entire class of unauthorized immigrants in the state, has substantially changed the legal position of these individuals far beyond anything envisaged by Congress.[227] The change, discriminatory on its face and acknowledged as such, would create a perpetual second-class of individual under the law with a limitation of rights akin to those suffered by former slaves and blacks from the formation of the country through the Civil Rights Era.[228]

Under the preemption framework discussed below, Alabama's law faces significant hurdles. As originally drafted, the law's restrictions on the ability to contract, especially for essentials such as housing, water and electricity on possible penalty of criminal prosecution[229] appear to be an improper attempt to dictate who shall remain in the country, and under what conditions. *Hines v. Davidowitz* specifically counseled against enacting legislation that imposed "distinct, unusual, and extraordinary burdens" on immigrants or "singl[ing] [them] out for the imposition of discriminatory burdens."[230] *De Canas v. Bica* went further and provided a clear statement on the scope of permissible action noting, states "can neither add to nor

224. De Canas v. Bica, 424 U.S. 351 (1976).

225. *Id.*

226. 458 U.S. 1, 14 (1982) (striking down a state statute based solely on the individual immigration status as an "ancillary 'burden not contemplated by Congress'").

227. United States v. Alabama, 443 Fed. App'x 411 (11th Cir. 2011); United States v. Alabama, 691 F.3d 1236 (11th Cir. 2012).

228. *See* Pope, *supra* note 34, at 1481-91 (discussing the inability for slaves to enforce contracts).

229. Violations of the restrictions on entering into a business transaction with a public entity are classified as felonies. ALA. CODE § 31-13-29 et seq. (LexisNexis Supp. 2012).

230. 312 U.S. at 65-66, 69.

take from the conditions lawfully imposed by Congress . . . [on the] *residence* of aliens in the United States or several states."[231]

As mentioned above, Alabama, with regard only to contracts with state or local governments, had argued for a restrictive interpretation of the phrase "business transaction," so as to not include court filing fees or property tax payments.[232] Were the law to include these transactions, the results would be readily apparent: unauthorized immigrants would be denied access to courts and, in conjunction with the restriction on private housing contracts, would not be able to secure housing other than on a one-night contract.[233] Furthermore, by attempting to criminalize these very actions, Alabama is attempting to criminalize unauthorized presence which, by itself, is not a crime under federal law.[234] Alabama, by arguably preventing a populace from contracting for necessities (other than food which was specifically exempted) and coupling that prohibition with potential criminal penalties, moved beyond permissible legislation that affects immigrants, to a greater, impermissible regulation on immigration itself in its desire to increase self-deportation.[235]

It appears that Alabama has gone beyond enacting laws that affect immigrants to enacting a law that directly questions their ability to remain in the state. Under current federal law, preemption occurs in two distinct scenarios: either express preemption when the Constitution or a federal statute directly conflicts with state law,[236] or implied preemption when either the federal influence is so extensive as to exclusively occupy the sphere of regulation[237] or the state law presents an obstacle to compliance with federal requirements.[238] The preemption doctrine carries greater force in the immi-

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231. 424 U.S. at 357 n. 6 (emphasis added).

232. *See* Ala. Att'y Gen. Guidance 2011-02, at 1 (Dec. 2, 2001), *available at* http://www.ago.state.al.us/Page-Immigration (last visited July 3, 2012) (stating that this section would not include governmental-provided services such as "water, sewer, power, sanitation, food, and healthcare" on the argued basis of *ejusdem generis*. The guidance also states that the section would not apply to prevent access to Alabama courts). Alabama recently amended the statute to incorporate the restrictive interpretation. *See supra* note 202.

233. The United States's amended brief referred to the collective prohibitions as "legislated homelessness." Brief of Petitioner-Plaintiff at 4, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

234. *Arizona v. United States*, 132 S. Ct. at 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

235. ALA. CODE § 31-13-2 (LexisNexis Supp. 2012) (noting the state's interest in "discourage[ing] illegal immigration"). As the Fifth Circuit noted in *Moreau v. Oppenheim*, unlawful presence does not bar immigrants access to the court system or permit their contracts to be treated as void. 663 F.2d 1300, 1307-08 (5th Cir. Dec. 1981).

236. Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 95 (1982) (providing that Congress can explicitly provide for preemption of state laws).

237. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that Congress can exclusively occupy certain legal fields).

238. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (defining conflict preemption as, inter

gration context given the Court's longstanding recognition of Congress' plenary power in the field.[239]

Congress's plenary power over immigration matters does not mean states are prohibited from enacting legislation that may regulate immigrants in some fashion, but rather that they are limited as to what type of law they may enact.[240] In recent years for example, states and localities have had some success enacting legislation requiring employees to provide and employers to verify proof of work authorization, or face the potential loss of a business license,[241] or to provide instate tuition benefits to unauthorized immigrants based on the locale of their high school rather than immigration status.[242]

However, even with these limited inroads into the realm of immigration-related regulations, states continue to face substantial hurdles to regulate immigration. In 2012, the Supreme Court enjoined three of the four challenged provisions of Arizona's expansive anti-immigrant law S.B. 1070 on preemption grounds, and left the door open to future challenge on the fourth provision depending on Arizona's implementation of the provision.[243] The *Arizona* decision strongly bolsters the Eleventh Circuit's decision to temporarily enjoin Alabama's enforcement of the anti-contract provisions in its law on preemption grounds.[244]

Although basing its arguments on the equal protection clause of the Fourteenth Amendment,[245] in *Plyler v. Doe* the Supreme Court invalidated a

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alia, "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

239. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 585 (1889) (stating that the power to naturalize is a sovereign power restricted only by the constitution); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (noting that inherent in sovereignty is the right of a nation to restrict the entrance of foreigners); Chy Lung v. Freeman, 92 U.S. 275 (1876) (noting the national role of immigration); Arizona v. United States, 132 S. Ct. at 2505 (2012) (holding "the federal power to determine immigration policy is well settled," and this power is "an inherent attribute of sovereignty . . .").

240. Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011) (upholding the Arizona statute mandating use of an electronic work authorization system); *De Canas*, 424 U.S. at 355 (holding that simply enacting a statute directed at immigrants does not necessarily imply the statute regulates immigration).

241. Whiting, 131 S. Ct. at 1968; Gray v. City of Valley Park, Mo., No. 4:07CV00881 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (upholding local ordinance requiring verification of employees' work authorization against preemption challenge), *aff'd* 567 F.3d 976 (8th Cir. 2009).

242. Martinez v. Regents of Univ. of Cal., 241 P.3d 855 (Cal. 2010).

243. *Arizona*, 132 S. Ct. at 2497-2504, 2510 (detailing the federal/state preemption framework, and finding the challenged provisions impermissible encroachments on the federal government's power to regulate immigration).

244. *Alabama*, 443 Fed. App'x at 417 (11th Cir. 2011); *as amended by* Order enjoining Alabama's enforcement of Sections 27 and 30 of HB 56, United States v. Alabama, No. 11-14532-CC (11th Cir., Mar. 8, 2012).

245. *See* Section III.C. *infra*.

state law that would have prevented unauthorized immigrant children from attending public schools.[246] The Court noted that the law, if upheld, would create "a permanent caste of unauthorized resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits [of] our society . . . ."[247] In that sense, the consequence of restricting the right to contract would likely have similar effect by removing nearly every commercial transaction from legal sanction and thereby dramatically reducing the ability of unauthorized immigrants to lawfully participate in commerce or society.

In this case, the Hammon-Beason Act goes beyond the type of legislation that has been found permissible because of the primacy of the right to contract. Restricting the right to contract does not deal with the issues of work authorization or in-state tuition benefits, issues that are ancillary to presence. Rather, the law directly prohibits individuals from engaging in conduct necessary to their continued survival and existence in the state, especially as to the internationally recognized right to housing.[248] There can be no question that a statute prohibiting the right of an individual to contract for habitation deals directly with the underlying question of presence within the state. Therefore, state laws which purport to deny immigrants their necessities also unavoidably regulate immigration in violation of the preemption doctrine.

246. Plyler v. Doe, 457 U.S. 202, 230 (1982). In *Plyler*, the Supreme Court invalidated a Texas law withholding state funds for the education of unauthorized immigrant children. *Id.* The Court expressly held that unauthorized immigrants were not a protected class that would trigger strict scrutiny, but a law burdening them requires more than a rational basis review. *Plyer* requires such a law to "further[] some substantial goal of the state." *Id.* at 224. There is academic disagreement over the nomenclature of the standard of review actually applied by the Court in this case. *See, e.g.*, Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 889-90 (2012) (discussing whether the standard of review in a line of equal protection cases should be characterized "rational basis with bite").

247. *Plyler*, 457 U.S. at 218-19.

248. *See* Universal Declaration of Human Rights, G.A. Res. 217(III) A at Art. 25 (Dec. 10, 1948); Article 11(1), International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination G.A. Res. 2106 (XX) at Art. 5(c), U.N. DOC A/6014 (Dec. 21, 1965); and Paragraphs 8-9, Istanbul Declaration on Human Settlements and the Habitat Agenda (Second United Nations Conference on Human Settlements, Habitat II) (1996).

C. Fourteenth Amendment Claims

1. Substantive Due Process

The Fourteenth Amendment's due process clause protects against the deprivation of life, liberty or property without the due process of law.[249] As Justice Peckham noted in his unanimous opinion in *Allgeyer v. State of Louisiana*, the "liberty" interest protected is not:

> only the right of the citizen to be free from . . . physical restraint . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; *and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.*[250]

As noted in Section II.A. above, however, the Supreme Court eventually subsumed the explicit freedom of contract within the more general due process framework, giving states more latitude to curtail economic regulations subject to constraints on fundamental rights, arbitrariness or discrimination.[251] Under a due process analysis, if only economic or social regulations are involved, courts will use the traditional rational basis analysis where the laws or regulations are presumed valid, and thus will be upheld if they bear a rational relationship to the end sought.[252] In cases where courts elect to apply the rational basis standard to a challenged law, they

249. U.S. Const. amend. XIV, § 1. Both the Due Process Clause and the Equal Protection Clause provide protection against infringing state action. In this case, Alabama affirmatively passed a law prohibiting the right to contract with both the state as well as private parties. As the Court has noted, "state action in violation of the [Fourteenth] Amendment's provision is equally repugnant to the constitutional commands whether directed by state statute or [a judicial official]." Shelley v. Kraemer, 334 U.S. 1, 16 (1948); Strauder v. West Virginia, 100 U.S. 303 (1880) (invalidating racially discriminatory state law regarding jury selection).

250. Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (emphasis added) (striking down Louisiana's law which prohibiting insurance contract with companies who were not licensed under Louisiana law). Although the language of the *Allgeyer* decision refers to "citizen," the due process clause applies equally to all individuals within states' jurisdiction, and as such even unauthorized immigrants are protected by it. U.S. CONST. amend. XIV, § 1.

251. *See supra* Section II.A and accompanying text; Nebbia v. New York, 291 U.S. 502, 537 (1934). If an economic regulation were to be retroactively applied, however, the Court would be more willing to apply strict scrutiny. *See* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

252. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

nearly always uphold the law.[253]

Avoiding rational basis analysis is therefore one of the primary goals of any challenge to a law based on the freedom of contract. If the general right to contract is classified as fundamental, any encroachments on that right must pass a higher level of review. When fundamental rights are affected or the challenged regulation is arbitrary or discriminatory, a strict scrutiny test is used and the laws or regulations will be held invalid unless they are necessary to achieve a compelling governmental interest and are narrowly tailored to do so, a much more difficult test.[254] Whereas laws reviewed on a rational basis are nearly always upheld, laws examined with strict scrutiny are nearly always struck down. The question of whether the freedom to contract is a fundamental right may be dispositive in the case. Assuming the general right to contract is a fundamental right, any prohibition on it, especially like the one in Alabama's law, is likely to face strict scrutiny given its alleged discriminatory intent[255] and be invalidated.

In this case the questioned right is the individual's freedom to contract, meaning the individual's general ability to obligate himself and receive obligations in return from another. Several factors point to the conclusion that the freedom to contract described here is a fundamental right. First, the freedom to contract was a prime component of the common law legal system upon which our country was founded, making the right "deeply rooted in this Nation's history and tradition."[256] Second, the broad scope and usage of the general freedom to contract in our society strongly suggests that the right is perceived as a universal or fundamental right by all members of our society. Third, the general freedom to contract is intimately connected to several other fundamental rights including among others the right to contract for marriage,[257] private education,[258] and presumably the right to purchase and use contraceptive devices.[259] Any law abrogating the general right to contract will necessarily infringe on these previously recognized fundamental rights. Finally, based solely on pragmatism, an advanced commercial society could not be sustained without the ability to contract for future obligations and rights.

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253. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 18.3(b) (4th ed. 2007) (stating that prior to 1976 virtually any statute subject to rational basis scrutiny would survey challenge, and even thereafter the Supreme Court has shown a strong preference to uphold challenged laws "unless no reasonably conceivable set of facts" establishes the nexus between rationality and purpose).

254. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

255. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

256. *See supra* note 70 and accompanying text.

257. Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978).

258. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

259. *Griswold*, 381 U.S. 479.

Even if the generalized right to contract is not deemed fundamental, Alabama's law should be invalidated on due process grounds given its purposeful adverse impact on "discrete and insular minorities,"[260] thereby triggering strict scrutiny.[261] In *Sugarman v. Dougall*,[262] a case involving an equal protection claim, the Court stated that "aliens as a class are a prime example of a discrete and insular minority."[263] Additionally, immigrants, unless they have naturalized, are unable to vote and are therefore unable to avail themselves "of those political processes ordinarily to be relied upon to protect minorities . . . ."[264] Although discussed more fully in Section III.C.2 below, it would appear that the Alabama law clearly targets a minority group that has no recourse to the political process and that has traditionally been discriminated against.[265]

Regardless of whether the general right to contract is found to be a fundamental right, Alabama's law has both a discriminatory intent and impact. Therefore, under the due process standard, Alabama would need to show a compelling state interest and that the law is narrowly tailored to address that interest. The connection between the state interest in reducing unauthorized immigration and restricting an individual's right to contract seems tenuous at best. It is difficult to see how voiding a contract for the sale of goods between an unauthorized immigrant and a U.S. citizen, to the detriment of both, does anything other than tangentially discourage unauthorized presence.

2. Equal Protection

Whereas substantive due process analysis typically requires a fundamental right for its protections to apply, the equal protection clause makes no such distinction.[266] Instead, the Fourteenth Amendment's equal protection clause prohibits states from arbitrarily or discriminatorily treating individuals differently.[267] As with due process decisions, equal protection jurisprudence has developed differing levels of scrutiny depending on the class of individuals being regulated. For protected or suspect classes, state action will be subjected to a strict scrutiny standard requiring the state to show a compelling state interest is furthered by the contested law, and that

260. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

261. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

262. 413 U.S. 634, 648 (1973).

263. *Id.* (internal quotation marks omitted). *See infra* Section III.C.2 discussing equal protection claims based on alienage.

264. *Carolene Products*, 304 U.S. at 153 n.4

265. *See infra* Section III.C.2.

266. U.S. Const. amend. XIV, § 1.

267. *Id.*

the law is narrowly tailored to obtain that result.[268] For classes of individuals that are not considered suspect, rational basis scrutiny will be applied and the law will be upheld so long as it is "reasonably related" to a "legitimate" government interest.[269] Admittedly, an equal protection claim against the Alabama law will be difficult to frame as the Supreme Court has held that "unauthorized status" is not a protected class,[270] and would therefore be subject only to the rational basis test.

However, as noted in Section III.D below discussing the Civil Rights Acts, it is not difficult to analyze Alabama's law as legislating against a protected class on the basis of race or alienage. [271] Additionally, the scope of the equal protection clause is broader in some respect than the Civil Rights Acts as classifications based on national origin are also considered suspect.[272] Though it is not a large step to find that legislation restricting the rights of unauthorized immigrants to contract is simply using immigrant status as a proxy for race,[273] national origin or alienage, it is a step. The inferences involved, though, are all reasonable, especially in the context of Alabama. First, legislative history underscores the fact that the population targeted by the Hammon-Beason Act was nearly entirely Latino, and more specifically, Mexican-born.[274] Second, the Hammon-Beason Act only affects individuals born abroad thus utilizing national origin as a fundamental element of the law. Third, while the law may be over-inclusive in a sense,[275] it was clearly designed to purge a specific segment of the population from the state.[276] Taking these inferences together, it is eminently reasonable to conclude that immigration status in the Hammon-Beason Act was a euphemism for race, national origin, or alienage.

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268. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326-27 (requiring strict scrutiny analysis for equal protection claims based on suspect classes).

269. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319-20 (1993) (holding that classifications that involve neither fundamental rights nor suspect classes are subject only to a rational basis review).

270. Plyler v. Doe, 457 U.S. 202, 220 (1982) ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.").

271. *See supra* Section III.B.

272. Given the level of overlap among the three classes, the difficulty already identified in delineating them, and the fact that it is unnecessary to do so as any of the three would suffice, this Section of the article addresses the three claims jointly.

273. *See infra* note 326 and accompanying text (noting that artificial distinctions as proxies for a protected class will be subject to strict scrutiny).

274. *See infra* notes 286, 322 and accompanying text.

275. *See* Gustavo Valdes & Catherine E. Shoichet, *Auto Exec's Arrest a New Flashpoint in Alabama's Immigration Debate*, CNN, *http://www.cnn.com/2011/11/22/us/alabama-immigration-arrest/index.html* (Nov. 22, 2011) (detailing the arrest by Alabama police of a German Mercedes-Benz executive for failure to possess required documents).

276. *See infra* note 284 and accompanying text.

One problem that could arise under an equal protection claim based on that logical step is that the law is not discriminatory on its face based on race, national origin, or alienage. The Court has noted that equal protection challenges require not just disparate impact, but actual discriminatory intent,[277] though intent may be inferred through evidence of the disparate impact[278] or the law's application.[279] In *Arlington Heights v. Metropolitan Housing Corp.*,[280] the Court elaborated on the factors of discriminatory intent and noted that it could be found from disparate impact, a pattern of discriminatory government behavior preceding the enactment of the law, the historical background of the enactment of the law especially as it relates to the racial animus, and the degree of departure from normal operations either procedurally or substantively.[281] When discussing impact, the courts are ultimately engaged in a searching examination that asks whether the allegedly unprotected classifications were used as false proxies for categories otherwise eligible for stricter scrutiny.

Hearing a preliminary injunction claim on a fair housing challenge to Alabama's law, the District Court for the Middle District of Alabama stated the law is likely entirely "discriminatorily based," and that the legislative record for the law was "laced with derogatory comments about Hispanics."[282] That court also noted the law "is a substantive departure from the State's typical treatment . . . [and] in other words, the court has serious doubts that children-and, in particular, children who are actually citizens of this National-who are of a different hue, race and nationality would have been treated so adversely."[283]

In Alabama, approximately 65% of immigrants are of Hispanic or Latino origin, and the legislative debates focused almost solely on them.[284] Insofar as a law purports to regulate unauthorized immigrants in Alabama, it is truly regulating Hispanics and/or Latinos, and then only those born

277. Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that disproportionate impact alone will not trigger strict scrutiny); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

278. *Washington*, 426 U.S. at 241 (noting that the discriminatory purpose need not appear in the text of the statute, and that "a law's disproportionate impact is [not] irrelevant"). "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including [disparate impact]." *Id.*

279. *See, e.g.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

280. 429 U.S. 252 (1977).

281. *Id.* at 267.

282. Central Alabama Fair Housing Center v. Magee, 835 F. Supp. 2d 1165, 1193 (M.D. Ala. 2011).

283. *Id.* at 1191.

284. *Id.* at 1192 (noting "the use, in legislative debates, of illegal immigrant as a code for Latino or Hispanic, with the result that, while addressing illegal immigrants was the target, discriminating against Latinos was the target as well.").

abroad.[285] Indeed, legislative comments conclusively show an overarching emphasis on Hispanics and Hispanic ethnic stereotypes, with on the record comments about "4-foot Mexicans in there catching them chickens" and seeing "30 of them [illegals] get out of a car one day. . . I thought it was a circus."[286] Furthermore, prior to the enactment of the law, various segments of Alabama's state and local governments were already vociferous in their intent to create a hostile living environment for these individuals,[287] and the law itself was passed with the specific purpose of encouraging attrition through enforcement.[288]

To the extent that the Alabama law is seen as impermissibly utilizing immigration status as a proxy for race, national origin or alienage, it should be invalidated on equal protection grounds under a strict scrutiny analysis. The Alabama law seems to satisfy every criteria established in *Arlington Heights* in determining improper race-based classifications, and accordingly should be subjected to strict scrutiny.[289] If a court were to decline to impose strict scrutiny in this case, it is difficult to imagine any other set of facts ever satisfying the *Arlington Heights* test.[290]

D. Civil Rights Acts

The various Civil Rights Acts (1866, 1870, 1964, 1991)[291] provide signifi-

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285. Both the author and coauthor of Alabama's law were asked for evidence of the growth in unauthorized immigration, and both responded only with evidence of growth in the Hispanic population (authorized and unauthorized). Tim Lockette, *Biggest Whoppers of 2011... and One that Turned out to be True*, THE ANNISTON STAR (Dec. 29, 2011), *http://www.bamafactcheck.com/view/full_story/16926998/article-Biggest-Whoppers-of-2011--and-one-that-turned-out-to-be-true. See also* Ed Pilkington, *Human Rights Watch Accuses Alabama of Violating Constitution*, THE GUARDIAN, Dec. 14, 2011 (noting Alabama's "all-out assault on undocumented Hispanic people").

286. *Magee*, 835 F. Supp. 2d at 1191.

287. *See* Paul Reyes, *Help Not Wanted: What Happens When Outside Agitators Work with State Politicians to Pass the Nation's Most Draconian Anti-immigration Law Yet?*, MOTHER JONES, March 1, 2012 at 24 (detailing numerous unsubstantiated claims made by the Alabama law's authors prior to enactment of the law as to the economic cost and the magnitude of unauthorized immigration in the state).

288. *See* ALA. CODE § 31-13-2 et seq. (Lexis Nexis Supp. 2012).

289. Arlington Heights v. Metro. Dev. Corp., 429 U.S. 252 (1977). If however, the evidence as to disparate impact, legislative intent, and race-based animus is discounted and the stated class is accepted on its face as being unauthorized immigrants, it would be subject only to a rational basis test. In that case, any challenge to the Alabama law on equal protection grounds would face a substantial hurdle.

290. *Id.*

291. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866); Voting Rights Act of 1870, ch. 114, § 16, 16 Stat. 140 (1870), Civil Rights Act of 1964, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000(e) to 2000(h)-6 (1988)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

cant limitations on states' abilities to impose discriminatory laws or condone discriminatory conduct. Two laws in particular are of primary importance to our analysis, though one is decidedly more limited in scope and will be briefly discussed first.

1. The Civil Rights Act of 1964

The Civil Rights Act of 1964 is iconic legislation associated primarily with rectifying racial inequalities in the United States during and preceding the Civil Rights Era.[292] However, its scope was not limited to the traditional types of discrimination encountered by blacks throughout wide portions of the United States. Specifically, the 1964 Civil Rights Act prohibits discrimination against any individual in public accommodations based on the protected categories of race, color, religion and national origin.[293] The public accommodation section prohibits discrimination by inns, hotels, motels, etc. which would seemingly conflict with Alabama's prohibition on contracts for lodging in excess of one night, provided that the discrimination is seen as being based on one of the protected categories.[294] The Civil Rights Act of 1964 also prohibits discrimination by gas stations, theaters, athletic venues and other sources of entertainment. Alabama's law could require these service and goods providers to choose between compliance with the 1964 Civil Rights Act or the local law in specific violation of the 1964 Civil Rights Act[295] as well as the rules on conflict preemption.[296] Insofar as an elimination of the right to contract is found to be based on race or national origin in

292. *See* Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1030-31 (2005) (celebrating the Civil Rights Act of 1964 and the events which led to that legislation).

293. 42 U.S.C. § 2000a (2006).

294. Title II of the Act bars discrimination in public accommodations, including hotels and restaurants. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a (2006)).

295. 42 U.S.C. § 2000a-1 (prohibiting state-required discrimination or segregation); 2000h-4 (expressly preempting state laws that are "inconsistent with any of the purposes of [the Civil Rights Act]").

296. Although the preemption analysis in Section III.B above focused on immigration-related issues, this scenario would be a classic example of conflict preemption where a party is placed in the situation of being able to comply with only one law and simultaneously violate the other. Under the laws of preemption, the federal Civil Rights Act would prevail over the Alabama law. *Compare* Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947) (holding that Congress can exclusively occupy certain legal fields) *with* Chae Chan Ping v. United States, 130 U.S. 581 (1889) (stating that the power to naturalize is a sovereign power restricted only by the constitution), *and* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (noting that inherent in sovereign is the right of a nation to restrict the entrance of foreigners), *and* Chy Lung v. Freeman, 92 U.S. 275 (1876) (noting the national role of immigration), *and* Arizona v. U.S., 132 S.Ct. 2492, 2498 (2012) (holding "the federal power to determine immigration policy is well settled," and this power is "an inherent attribute of sovereignty. . .").

the unauthorized immigrant context, the law would run afoul of the 1964 Act.

2. The Civil Rights Act of 1866

Though useful in our analysis, Title II of the 1964 Civil Rights Act applies only to the relatively narrow category of discrimination in "places of public accommodation."[297] 42 U.S.C. § 1981 of the Civil Rights Acts of 1866 is far more useful for our purposes.[298] In contrast to § 1982 which by its terms is limited to citizens of the United States, § 1981 provides that:

> *all* persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .[299]

In 1991, Congress amended § 1981 to broaden its scope of applicability in light of recent cases that had limited claims for loss of promotion.[300] In so doing, it questioned the applicability of the law to both governmental and private discrimination,[301] and made difficult any claims predicated on disparate impact.[302] In the context of a broadened scope, § 1981 should be found to apply to race or alienage-based classifications that are ostensibly aimed at Hispanic or Latino immigrants even though the state attempts to use a false proxy of immigration status as the basis for its legislation.

Section 1981 defines the right of making and enforcing contracts as "includ[ing] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[303] The law specifically protects against both private and public attempts to impair the contractual obliga-

297. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a (2006)).

298. 42 U.S.C. § 1981 (2006).

299. *Id.* (emphasis added).

300. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

301. *Id.*

302. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). Among the Congressional Findings of the 1991 amendment was "**(2)** the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections . . . ." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat 1071 (1991).

303. 42 U.S.C. § 1981(b) (2006).

tions.[304] While broad in language, it has been interpreted as only prohibiting contractual discrimination based on race[305] or alienage,[306] and not national origin.[307] Even when there is discriminatory treatment based on race, such treatment will be allowed where the treatment is wholly unrelated to race or where there is a legitimate, nondiscriminatory justification which is not pretextual.[308]

One problem from excluding national origin based discrimination from § 1981 is defining the difference between discrimination based on national origin and discrimination based on alienage.[309] Justice White, in *Saint Francis College v. Al-Khazraji,* while noting the distinction, struggled to provide illustrative examples citing both individuals of Chinese or Arab descent as examples of discrimination based on alienage rather than country or place of origin.[310] In his concurrence, Justice Brennan would have narrowed the decision to prevent § 1981 claims based on "birthplace alone."[311]

One district court went so far as to conclude that § 1981, based solely on an historical interpretation of its predecessors, was inapplicable to resident aliens in a private setting—even if the claim is based on alienage rather than national origin.[312] Rather than applying a plain language interpretation of the statute, the court grasped at what it perceived as congressional intent in the melding of two former statutes, one which contained a limitation based on citizenship and the other which did not. The court did note conflicting legislative history where Senator Stewart stated that § 1981was to be extended to aliens, and that the amendment was to "extend the operation of the civil rights bill . . . to all persons within the jurisdiction of the United States." However the court was quick to add that the Senator may have "simply misunderstood the scope of the 1866 Act . . ." since it ap-

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304. § 1981(c).

305. Runyon v. McCrary, 427 U.S. 160, 168 (1976). *Contra* De Malherbe v. Int'l Union of Elevator Constructors, 438 F. Supp. 1121, 1137 (1977) (refusing to accept arguments based on dicta that § 1981 applies only to racial discrimination).

306. Graham v. Richardson, 403 U.S. 365, 377 (1971), Bell v. City of Milwaukee, 746 F.2d 1205, 1232 (7th Cir. 1984); Espinoza v. Hillwood Square Mut. Ass'n, 522 F. Supp. 559, 561 (E.D. Va. 1981).

307. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987).

308. *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 187 (1989) (elaborating on pleading requirements to demonstrate whether certain policies are pretextual grounds for discrimination).

309. "One must distinguish 'ancestry or ethnic characteristics' on the one hand from 'place or nation of origin on the other." Duane v. Gov't Employees Ins. Co., 784 F. Supp. 1209, 1216 n.4 (D. Md. 1992).

310. *Al-Khazraji,* 481 U.S. at 613.

311. *Id.* at 614.

312. *De Malherbe,* 438 F. Supp. at 1135. *Contra* Sud v. Import Motors, 379 F. Supp. 1064 (W.D. Mich. 1974) (holding that discrimination claims based on national origin should also be covered by § 1981).

peared that four Supreme Court justices also shared his "misconception."

At the time of the amendment to the Civil Rights Act of 1866, Senator Stewart commented at length about the need to extend the protection of the law to Chinese aliens, clearly showing his understanding of the statutory language and its intended scope, seemingly for both private and public discrimination. In fact, both preceding and subsequent decisions have affirmed Senator Stewart's opinion on the scope of the matter,[313] and following the 1991 amendments, it appears generally well settled that § 1981 applies to provide a remedy for both public and private discrimination claims including claims based on alienage.[314]

Applying § 1981 to a law revoking unauthorized immigrants' right to contract, the threshold question is whether the discrimination is based inappropriately on alienage or the unprotected grounds (under § 1981) of national origin. On its face it would appear the classification is based on the country of birth which would therefore be unprotected. However, using a disparate impact approach,[315] the law appears to be directly solely at Hispanic or Latino immigrants regardless of country of origin.[316] As mentioned above, country of birth and immigration status, which are unprotected classifications, become false proxies for race and alienage which are protected by § 1981.

The question then becomes whether courts will accept "Hispanic" or "Latino" as racial or alienage-based classifications, and on that point courts

313. Guerra v. Manchester Terminal Corp., 350 F. Supp. 529, 537-38 (S.D. Texas 1972), *aff'd*, 498 F.2d 641 (5th Cir. 1974), Budinsky v. Corning Glass Works, 425 F. Supp. 786, 787-89 (W.D. Pa. 1977), *Espinoza*, 522 F. Supp. at 561.

314. *Al-Khazraji*, 481 U.S. at 613; Duane v. Geico, 37 F.3d 1036 (4th Cir. 1994); Anderson v. Conboy, 156 F.3d 167 (2d Cir. 1998), *cert. granted* United Bd. of Carpenters v. Anderson, 526 U.S. 1086 (1999), *cert. dismissed*, 527 U.S. 1030 (1999); *Duane v. Gov't Employees Ins. Co.*, 784 F. Supp. at 1217; Ortega v. Merit Ins. Co., 433 F. Supp. 135 (N.D. Ill. 1977); Abdulrahim v. Gene B. Glick Co., 612 F. Supp. 256 (N.D. Ind. 1985). *See also* Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457 (2001). *Contra* Bhandari v. First National Bank of Commerce, 808 F.2d 1082, 1088 n.13, 14 (5th Cir. 1987), *vacated by* 492 U.S. 901 (1989), *reinstated by* 887 F.2d 609 (5th Cir. 1989) (compiling cases opining that § 1981 prohibits alienage discrimination).

315. *See* Waisome v. Port Authority of New York and New Jersey, 948 F.2d 1370, 1374-75 (2d Cir. 1991) (citing Connecticut v. Teal, 457 U.S. 440, 446-47 (1982), International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15 (1977), Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir.), *cert. denied*, 502 U.S. 924 (1991)).

316. Mary Bauer, *Court Cites Discriminatory Intent Behind Alabama's Anti-Immigrant Law*, SOUTHERN POVERTY LAW CENTER, (Dec. 14, 2011), http://splcenter.org/get-informed/news/court-cites-discriminatory-intent-behind-alabamas-anti-immigrant-law (illustrating that legislators, while debating the Hammon-Beason legislation, conflated immigration status with race, specifically deriding the fast growing illegal population and citing Hispanic population figures and justifying the bill describing "4-foot Mexicans in there catching them chickens" in the poultry industry).

have differed greatly with few if any identifiable trends.[317] If the questioned regulation is one which uses an intermediate, unprotected classification as a proxy for a protected classification that is readily identifiable and related to the unprotected classification, traditional § 1981 analysis should be applied to the protected classification. Adopting states' classifications at face value would reward states for clever derivations of historically protected classifications toward nominally unprotected ones.

In the case of the Hammon-Beason Act and other immigration status-based claims, the primary determination in deciding whether to allow a § 1981 claim of race or alienage based on Hispanic or Latino heritage should be how well the allegations relate to issues of race and/or ancestry versus country of origin. On its face, the Alabama law is one that attempted to use the derivative classification of immigration status to ostensibly regulate groups based on race or alienage. With regard to limiting the right to contract, as intended, it is not clear that Alabama's law singles out characteristics of race and/or ancestry rather than the unprotected classification of immigration status. As Judge Eubank noted in one opinion, "[t]he line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible; indeed, . . . there may in some instances be overlap."[318] However, looking past the proxy in this case, it is not difficult to see that the individuals most likely to be affected on the grounds of their immigration status also comprise a class of individuals who would receive § 1981 protection because of their race or alienage.

Faced with the difficult distinction of classifying Hispanic discrimination,[319] some courts have focused on actual treatment rather than legalistic distinctions. In *Madrigal v. Certainteed Corporation*, the court broadly construed § 1981 to cover discrimination against individuals who are perceived as nonwhite, "even though such racial characterization may be unsound or

317. *See, e.g.*,. Jones v. United Gas Improv. Corp., 68 F.R.D. 1, 8 (E.D. Pa. 1975) (rejecting as based on national origin a distinction based on surnames); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 187-88 (D. Md. 1977) (noting that the term "Hispanic" encompasses individuals who may suffer skin-color based discrimination, but that not all Hispanics could be classified as nonwhites); Pollard v. Hartford, 539 F. Supp. 1156, 1164-65 (D. Conn. 1982) (allowing § 1981 claims by persons of Hispanic background providing they allege discrimination based on race); Cubas v. Rapid American Corp., 420 F. Supp. 663, 666 (D. Pa. 1976) (allowing a claim by a Cuban-American and noting the individual's claim contained elements of racial discrimination); Miranda v. Amalgamated Clothing Workers, No. 74-172, 1974 WL 221, at *1 (D.N.J. May 2, 1974) (noting problems with the "anthropological abstract" of discrete races, and allowing a § 1981 claim by Puerto Ricans and other Hispanics); Gomez v. Pima, 426 F. Supp. 816 (D. Ariz. 1976); Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated by* 440 U.S. 625 (1979).

318. Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904 (W.D. Okla. 1977).

319. Ortiz v. Bank of America, 547 F. Supp. 550, 561 (E.D. Cal. 1982) (citing Bullard v. OMI Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981)) (acknowledging the difficulty in differentiating a national origin and racial claim).

debatable."[320] In *Manzanares v. Safeway Stores, Inc.*, the Tenth Circuit followed this perception-based approach in allowing a Mexican American to bring a § 1981 claim noting the identified group faced considerably different treatment than whites.[321] In the legislative history of the Alabama Law, the issue of race was ever-present, and the federal district court judge in a housing challenge to the Alabama law found that racial animus was clearly present in the passage of the law.[322]

The barrier to establishing discrimination against Hispanics as alienage-based rather than national origin-based may be high depending on the jurisdiction, especially in the view of some courts' that, while "Hispanic individuals may suffer discrimination akin to that suffered by members of the black race, it is not necessarily true of all Hispanic people."[323] However, many jurisdictions have allowed such claims. In *Chance v. Bd. of Examiners and Bd. of Ed. of City of New York*, the court simply decided that discrimination of Puerto Ricans was race-based even though a national origin claim would also likely suffice.[324] In *Apodaca v. General Electric Company*, the court recognized that discrimination against Spanish-surnamed individuals "has sometimes been based on the perception of them as non-white,"[325] clearly a race-based distinction.[326] Given the inherent difficulty in distinguishing between race- or alienage-based discrimination and national origin-based discrimination in the Hispanic context, courts have given these plaintiffs the

320. Madrigal v. Certainteed Corp., 508 F. Supp. 310, 311 (W.D. Mo. 1981).

321. Manzanares v. Safeway Stores, Inc. 593 F.2d 968 (10th Cir. 1979); *see also* Whatley v. Skaggs Companies, Inc., 502 F. Supp. 370 (D. Colo. 1980) (allowing § 1981 claims based on Mexican-American descent).

322. Central Alabama Fair Housing Center v.. *Magee*, 835 F. Supp. 2d 1165, 1194 n. 21 (M.D. Ala. 2011) (noting "many other examples in the record provide support for the inference that Latinos were the target of HB 56."). For example, Rep. Rogers explained that an especially infuriating situation for him was the fact that some Hispanics elect "white" as a race on their driver's licenses, when all those he knows are "darker than [he is]." *Id.* at 1193-94.

323. Martinez v. Hazelton Research Animals, Inc. 430 F. Supp. 186, 187 (D. Md. 1977).

324. 330 F. Supp. 203 (S.D. N.Y. 1971). In *Chance*, the lack of discussion of race versus national origin likely resulted from the fact that they two individuals challenging the discriminatory practices were black and Puerto Rican respectively. *Id.* Likewise, in *Alvarado v. El Paso Independent School District*, the court allowed a discrimination claim based on § 1981 by Mexican Americans. 445 F.2d 1011 (C.A. Tex. 1971); *see also* Scott v. Eversole Mortuary, 522 F.2d 1110 (C.A. Cal. 1975) (holding discrimination against American Indians constitutes discrimination based on race).

325. Apodaca v. Gen. Elec. Co., 445 F. Supp. 821, 823 (D.N.M. 1978); *see also* Aponte v. National Steel Service Ctr., 500 F. Supp. 198, 202-03 (N.D. Ill. 1980) (stating that Hispanics are often perceived by society in general as nonwhite).

326. *Apodaca*, 445 F. Supp. at 823 (citing Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662 (1975)). In *Apodaca*, although the court held that an allegation based on surname alone was insufficient to sustain a race-based claim of discrimination, the court gave plaintiff leave to amend her complaint. *Id.*

opportunity to prove the discrimination was racially motivated,[327] even when a national origin-based claim may also be present.

Many other courts have likewise followed the rationale that discrimination instigated by perceived racial differences qualifies for § 1981 protection.[328] One court, electing to allow a Hispanic-based § 1981 discrimination claim advance to trial noted the legal need to extend the scope of § 1981's protection:

> These cases [allowing § 1981 claims by Hispanics] recognize that such persons have been the victims of invidious group discrimination which, while perhaps not racial in a scientific sense, is racial in its social operation and perception. The court notes that problems of proof may arise later in these proceedings because of the lack of an authoritative and feasible method of discerning the relationship between national origin and racial discrimination where both are simultaneously present.[329]

It is clear that many of the difficulties in determining the scope of § 1981 result directly from the traditional white/nonwhite dichotomy during the passage of the 1866 Civil Rights Act.[330] It likewise appears that much of the discrimination of Hispanics results from perceived racial differences which § 1981 specifically prohibits.[331] While courts could continue to attempt to distinguish between national origin discrimination and race discrimination on a case-by-case basis, discrimination based on perceived racial differences and/or actual racial or alienage-based differences should already suffice for § 1981 protection,[332] and better fulfills the purpose of § 1981.

A simple thought experiment may better illustrate why the Alabama

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327. *Id.* at 823 (citing Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (W.D. Okla. 1977); Martinez v. Hazelton, 430 F. Supp. 186 (D. Md. 1977); Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976); Cubas v. Rapid Am. Corp., 420 F. Supp. 663 (E.D. Pa. 1976); Hernandez v. Erlenbusch, 368 F. Supp. 752 (D. Ore. 1973)).

328. Ramos v. Flagship Int'l, Inc., 612 F. Supp. 148, 152 (E.D.N.Y. 1985) (stating that any nonwhite group facing prohibited discrimination may sustain a § 1981 cause of action).

329. Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254 (N.D. Ill. 1978) *aff'd* 660 F.2d 1217 (7th Cir. 1981).

330. *See, e.g.*, Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 139-40 (1998) (identifying the equal protection treatment of race "through the black/white paradigm.").

331. Cisneros v. Corpus Christi Independent. School Dist., 324 F. Supp. 599, 606 n.30 (S.D. Tex. 1970) (quoting expert testimony finding Mexican American to be a minority from a racial point of view).

332. Cubas v. Rapid Am. Corp., 420 F. Supp. 663, 666 (E.D. Pa. 1976) (holding, "[w]e cannot find, as a matter of law, that the alleged discrimination against the plaintiff as a Cuban American did not contain elements of racial discrimination.").

law restricting the right to vote should be subject to § 1981 protection. Assume, for example, a state passed a law declaring any contracts entered into in that state or with its residents by individuals from West Africa to be void. If we are to assume that the right to contract is not fundamental, and likewise that such a provision would withstand equal protection and due process analysis, it would appear at first blush to also withstand a § 1981 claim as it is applicable to all individuals from West Africa regardless of race, national origin or other protected class.

However, how do we handle the fact that individuals from West Africa are overwhelmingly black and the intent (stated or otherwise) of the law was to primarily limit their rights? Even if we were to expand the scope of national origin to a geographic region, claims of discrimination based on national origin are bound to fail under § 1981. Surely, the reviewing court would find a violation through the use of a geographic definition of individuals as a simple proxy for race.[333] Evidence of any attempt to discriminate via proxy could be found in public statements indicating racial animosity behind the law. This would be the result even if the state were to provide evidence that black and white individuals from West Africa were treated equally.

Continuing the thought experiment, what if the state were to pass a similar law affecting only individuals from Western Europe where there are also issues of different countries of origin and languages spoken? Whereas the first law would seem problematic, the second law, though irrational, may not suffer from a § 1981 claim as there is no perceived racial or alienage component. The question then is whether a similar law aimed ostensibly at unauthorized immigrants with a disproportionate impact on Hispanic or Latino individuals is more like the first or second example, and that of course will depend to what extent the reviewing court recognizes "unauthorized immigrant" as a limited proxy for "Hispanic," and then whether discrimination based on Hispanic heritage is race- or alienage-based, which many courts have already allowed.[334] To the extent § 1981 protects Hispanics from discrimination based on alienage or race, the Alabama law violates its prohibition on contractual rights.

On a final note regarding § 1981 applicability, many commentators have recognized the similarities between today's situation with unauthor-

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333. In an equal protection context, Justice Kennedy noted that the utilization of an ethnic trait as "a surrogate for race" would violate the equal protection clause as a "pretext for racial discrimination." Hernandez v. New York, 500 U.S. 352, 371-72 (1991).

334. *E.g.*, Ramos v. Flagship Int'l Inc., 612 F. Supp. 148, 157 (E.D.N.Y. 1985) (stating that any non-white group facing prohibited discrimination may sustain a § 1981 cause of action), Apodaca v. Gen. Elec. Co., 445 F. Supp. 821, 823 (D.N.M. 1978) (recognizing a potential claim of discrimination against individuals with Spanish surnames based on the perception of the individuals as "non-white," and therefore racially based).

ized Hispanic workers and the circumstances faced by Chinese immigrants in the latter half of the nineteenth century.[335] It seems anomalous that those Chinese immigrant laborers would be treated better under § 1981 today on the grounds that the discrimination against them was race- or alienage-based rather than national origin or some other unprotected category. As Senator Stewart stated: "While [Chinese aliens] are here I say it is our duty to protect them. . . It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens."[336]

Any legalistic distinction that attempts to distinguish between unlawful treatment of Chinese immigrants as race- or alienage-based on the one hand versus similar unlawful treatment of Hispanic immigrants as national origin-based on the other seems unnecessarily strained and likely incorrect. To the extent a law focuses on a specific subset of individuals with largely shared physical characteristics so closely related to race and ancestry, especially with clearly expressed animosity as in the Alabama case, it should be construed as an improper classification based on alienage or race subject to § 1981 claims.[337]

IV. CONCLUSION

The general right to contract, that is, the general right of one individual to obligate himself and to receive another's obligation in return is a fundamental, though not unlimited right. History has shown that the ability to contract, to order ones affairs and to obtain contractually guaranteed pay-

335. *E.g.*, Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality Of The Anti-Immigrant Employment And Housing Ordinances At Issue In* Keller v. City of Fremont, 45 CREIGHTON L. REV. 503, 542-44 (2011-12), B.J. Smith, Comment, *Emma Lazarus Weeps: State-Based Anti-Immigration Initiatives and the Federalism Challenge*, 80 UMKC L. REV. 905 (2012), 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 (2011).

336. CONG. GLOBE, 41ST CONG., 2D SESS. 3658 (1870).

337. While admittedly a difficult question, courts should analyze more rigorously than they have in the past how the concepts of race and alienage intersect with demographers' definitions of Hispanic or Latinos. For the purposes of this article, I argue that courts should apply § 1981 to Hispanics and Latinos in the Hammon-Beason context because it is irrelevant to my argument whether there are real or perceived differences in race when there is in fact disparate treatment. In doing so, the intent is not to entrench any legal dichotomy between real and perceived racial differences, but to establish why § 1981 should apply regardless of any individual biases with regard to the real and perceived differences argument. A better structural approach, however, would require the courts to grapple with and digest the fact that scholars have long discredited the notion that "race" is defined solely in relation to biologically or scientifically real distinctions, a conclusion that further compels § 1981 protection. *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2d ed., 2006).

ments in exchange for services or goods is fundamental to the ability of any individual to succeed in a market economy. Any state's attempt to prohibit this freedom of contract, especially when directed against protected classes of individuals, should be struck down on multiple constitutional and federal statutory grounds. For the Alabama Law, these grounds include preemption, due process, equal protection, the Civil Rights Acts, and, as Alabama's law was originally drafted, the Contract Clause.

In both the United States and the rest of the world, the history of status-based restrictions of the right to contract has been laced with invidiousness and an attempt to maintain a class of citizens below that of the ruling class. Typically, the class of individual targeted for discriminatory treatment has been singled out due to what we now consider to be protected, immutable attributes such as race, gender and alienage. Now unauthorized immigrants in Alabama, who are largely comprised of Latinos, are being singled out in a similar fashion in an attempt to make life as inhospitable as possible by denying one of our most important rights.

It is nearly impossible to fathom our society without a robust right to contract with which to order our commercial and personal affairs. Alabama's attempt to restrict the basic right to contract for a "discrete and insular minority" based on an immutable characteristic would be a reversion to earlier times when certain classes of individuals such as women and blacks were deemed legally incompetent to contract based solely on their status as women or blacks. As recent history has shown, the rights of minority groups who have been historically disadvantaged should continue to move toward parity with that of the more privileged classes. In order to do so, broad protection should be provided for a fundamental right to contract. Therefore, these protections would extend to the general ability of an individual to contractually obligate himself, but would not prohibit states from capacity-based restrictions that generally prevent parties from taking undue advantage of legally incapacitated individuals. In this sense, states maintain the right to partially regulate certain classes of contracts. At the same time, they would be prohibited from enacting status-based restrictions aimed at discrete segments of the population on the broader, fundamental right to contract.

The law is clear that attempts to discriminate based on improper classifications are unlawful. The law should be equally clear that any attempt to use a false proxy as a facially neutral tool to discriminate against a protected class should also be recognized as improper. The Hammon-Beason Act or similar laws targeting unauthorized immigrants' right to contract and subsist within the United States should continue to be invalidated on preemption, equal protection, due process or Civil Rights Act grounds.