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BRIDGING THE TITLE VII GAP: PROTECTING ALL WORKERS FROM “WORK AUTHORIZATION” DISCRIMINATION

BY RACHEL K. ALEXANDER*

I. INTRODUCTION

Despite the numerous laws protecting workers in the United States, a gap remains that leaves all categories of workers unprotected under certain circumstances. Many scholars have examined protections and remedies available to unauthorized immigrant workers,¹ including existing protections after the United States Supreme Court’s decision in *Hoffman Plastic Compounds, Inc. v. NLRB*² in 2002.³ Others have

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1. Hereinafter called “unauthorized workers.” This Article uses the term “unauthorized workers” rather than some alternatives such as “illegal” or “undocumented” “immigrants” or “aliens” for the following reasons. The Article uses the word “worker” in lieu of “immigrant” or “alien” because this Article is concerned with the intersection of immigration and workplace law, and is thus specifically concerned with “workers,” rather than the immigration status of people in general. Also, the term “illegal” has a “political charge” that is unnecessary to the Article’s analysis. See, e.g., Keith Cunningham-Parmeter, *Redefining the Rights of Undocumented Workers*, 58 AM. U. L. REV. 1361, 1362 n.4 (2009) (“The term [undocumented worker] is designed to avoid the political charge and semantic difficulties presented by labels such as “illegal alien” and “undocumented immigrant.”). However, the term “undocumented” worker also presents difficulties because workers may be “documented” and still legally unauthorized to work, such as those who present fraudulent documents to an employer.

2. 535 U.S. 137 (2002). In *Hoffman*, the Court concluded “that allowing the [National Labor Relations] Board to award back-pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in [the Immigration Reform and Control Act]. *Id.* at 151–52. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.” *Id.*

3. See generally Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53 (2009) [hereinafter National Origin] (examining the role of advocates regarding Latinos’ workplace rights); Kati L. Griffith, *U.S. Migrant Worker Law: The*

investigated the impact of an immigrant workforce, including both authorized and unauthorized workers from a native-born worker's perspective.⁴ However, these discussions usually look at remedies available to unauthorized workers when those workers are subjected to unlawful wage practices, discrimination, or harassment in violation of various federal laws.⁵ Yet, there is a gap in protection when employers target, directly or indirectly, an unauthorized worker while still following the letter of workplace law. To avoid such lawful discrimination, immigration status should be deemed a protected class in workplace-discrimination law to avoid the disparate impact such discrimination has on all worker populations, within all racial and ethnic categories. This paper argues that work-authorization discrimination should be treated as an unlawful practice under Title VII's national origin protections

For instance, suppose that A Fictional Construction Corporation ("AFCC") operates construction sites in Kansas City, Missouri.⁶ AFCC seeks to fill jobs for "construction laborers"⁷ with unauthorized workers. It structures two groups of construction laborers: one group that works for \$10.00 per hour and AFCC hopes to staff with unauthorized workers, ("Group A") and one group that works for \$18.50 per hour ("Group B"), which is the mean hourly

Interstices of Immigration Law and Labor and Employment Law, 31 COMP. LAB. L. & POL'Y J. 125 (2009) (summarizing U.S. law governing documented and undocumented migrant workers); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008) [hereinafter *Addressing Segregation*] (exploring ways to dismantle segregation in the brown collar workplace); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (2007) (exploring whether employer sanctions have deterred illegal immigration and protected the U.S. job market); Irene Zopoth Hudson & Susan Schenck, Note, *America: Land of Opportunity or Exploitation?*, 19 HOFSTRA LAB. & EMP. L.J. 351 (2002) (offering a solution combining purposes, policies, and enforcement mechanisms of labor and employment law with immigration law).

4. See generally Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008) (exploring the relationship between work and citizenship using research on African-American and Latino immigrant workers); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69 (1998) (examining the conflation of Latinos' nationality and race in American law and society); Simi N. A. Junior, Note, *Many Strands: Immigration Reform and the Effect of Mexican Migration on African American Unemployment*, 10 RUTGERS RACE & L. REV. 487 (2009) (examining the effects of Mexican immigration on African American employment).

5. See *supra* notes 3–4 and accompanying text.

6. This hypothetical is purely fictional and does not and was not intended to resemble any actual employer.

7. BUREAU OF LABOR STATISTICS, *Standard Occupational Classification, 47-2061 Construction Laborers*, <http://www.bls.gov/soc/2010/soc472061.htm> (last modified Mar. 11, 2010).

wage for construction laborers in the Occupational Code.⁸ Group B also receives other employment benefits, such as health insurance. Despite the differences in compensation that each group receives, the worker qualifications are the same for both groups. Group A performs only menial tasks on job sites and, as a result, steers some candidates toward Group B as “overqualified.”

AFCC pays more than minimum wage to Group A, the lower paid group, and also pays overtime for hours worked over forty per workweek.⁹ AFCC also creates working conditions on the sites where Group A works that are lawful but unfavorable or less desirable than the job sites where Group B works. AFCC refrains from harassing or otherwise discriminating against employees in either group. AFCC has structured the Group A construction laborers with a suspicion, or perhaps with an unstated goal, that no “American” or authorized worker would choose to work in that department and is, as such, targeting unauthorized workers who will tolerate such conditions. However, AFCC follows its document-checking requirements in the Immigration Reform and Control Act of 1986 and has no direct reason to know that its workers are not authorized to work in the United States.¹⁰ In short, AFCC follows the letter of workplace law while taking advantage of some of their workers because of those workers’ lack of documentation and corresponding recourse.

This scenario presents problems for two categories of AFCC’s employees or prospective employees: (1) the unauthorized workers in Group A who are subjected to the less-favorable wages, benefits, and job conditions, and (2) other prospective employees (such as a legal immigrant or U.S. citizen of any race or national origin) who were refused positions into either group because of AFCC’s preference for hiring, what it presumes to be, unauthorized workers. Under existing protections within Title VII of the Civil Rights Act of 1964,¹¹ the unauthorized worker, legal immigrant, or U.S. citizen would only have rights under Title VII to sue for national origin discrimination. Part II

8. BUREAU OF LABOR STATISTICS, Occupational Employment Statistics, Occupational Employment and Wages, May 2008, 47-2061 Construction Laborers, <http://www.bls.gov/oes/2008/may/oes472061.htm> (last modified May 4, 2009).

9. See 29 U.S.C. §§ 206, 207 (2006) (requiring payment of minimum wages and overtime compensation for hours worked in excess of forty per workweek, respectively).

10. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)-(c), 100 Stat. 3359, 3360-63 (1986) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IRCA]. The IRCA only requires that employers check that documents reasonably appear valid on their face. See 8 U.S.C. § 1324a(b)(1)(A)(ii) (2006). See also Griffith, *supra* note 3, at 139 (describing document-checking and stating, “[d]ocument verification is very subjective.”).

11. 42 U.S.C. §§ 2000(e) to 2000(e)(17) (2006).

of this Article discusses how, in an otherwise lawful employment relationship (one without discrimination on the basis of sex or age, harassment, or Fair Labor Standards Act¹²/wage violations), work-authorization discrimination is not presently an unlawful practice under Title VII's national origin protections. Part III of this Article discusses how the narrow scope of Title VII's current provisions impacts all categories of workers, including unauthorized workers, legal immigrants, and U.S. citizens.

II. "WORK AUTHORIZATION" IS NOT PRESENTLY A PROTECTED STATUS.

Many of the scholarly pieces examining work-authorization discrimination, as well as the few courts that have addressed the issue, focus on whether "alienage" or "immigration status" is a protected class under Title VII by virtue of its national origin protections.¹³ However, for purposes of this Article's analysis, neither "alienage" nor "immigration status" addresses the problems of: (1) employer biases in favor of unauthorized workers, (2) an employer's structuring of jobs to favor, directly or implicitly, unauthorized workers, and (3) consequential creation of substandard terms and conditions of employment.

12. 29 U.S.C. §§ 201-219 (2006).

13. See, e.g., Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 515 (2003) (stating, "[u]nder Title VII of the Civil Rights Act, discrimination on the basis of race, color, national origin, and ancestry are prohibited; discrimination on the basis of immigrant status is not prohibited. Immigrants may receive 'national origin' protection under Title VII, but they do not receive it based on their immigrant status."); *Addressing Segregation*, *supra* note 3, at 468 (stating, "[u]nder traditional doctrine, cases alleging discrimination based on immigration status do not fall within the rubric of national origin discrimination."). For court decisions, see, e.g., *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 95 (1973) (stating, "[a]liens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage."); *Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 850-51 (7th Cir. 2008) (stating that a reference to "immigrant status" insufficient to state a claim for national origin discrimination); *Udoeyop v. Accessible Space, Inc.*, No. 08-4743 (JNE/JJK), 2008 WL 4681389, at *2 (D. Minn. Oct. 21, 2008) (quoting *Espinoza*, 414 U.S. at 95) (bracket in original) (stating, "[t]he alleged consideration of Udoeyop's immigrant status does not support Udoeyop's discrimination claims because 'nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.'"); *DePayan v. Wend-Rockies, Inc.*, No. 07-cv-02520-LTB-MEH, 2008 WL 2168780, at *4 (D.Colo. May 21, 2008) (stating, "[h]owever, any discrimination on the basis of Plaintiff's alleged status as a citizen is also not cognizable as citizenship is not a protected class under Title VII."); *Rojas v. City of New Brunswick*, No. 04-3195 (WHW), 2008 WL 2355535, at *27 (D.N.J. June 4, 2008) (quoting *Mattus v. Facility Solutions, Inc.*, No. 05-0863, 2005 WL 3132190, at *8 (D.N.J. Nov. 21, 2005)) (stating, "[t]he prohibition of discrimination based on national origin does not prohibit discrimination on the ground of citizenship.").

A series of illustrations follow to help clarify these points. An applicant who is refused a job at an employer's facility where "alien" or "citizen" workers are favored may well be protected under Title VII's national origin protections.¹⁴ If the employer favors alien workers, the applicant may have a race discrimination claim (depending on the racial category of both the favored employee and the rejected applicant). Similarly, a native-born applicant would likely have a national origin claim against an employer who favors "alien" or "immigrant" workers because the disfavored characteristic is truly national origin—origination in the United States.¹⁵ A legal immigrant or naturalized citizen may have a national origin claim against an employer who favors native-born workers because it is the applicant's actual national origin that prevented the employment relationship. A legal immigrant might have a national origin claim against an employer who favors citizens because, again, the disfavored characteristic is national origin—origination in a country other than the United States. Thus, the characterization of "alienage" or "immigration status"¹⁶ is incomplete to the extent that it excludes an employer who favors one type of immigrant (unauthorized) over another (authorized) or over native-born workers. If an employer targets an unauthorized worker from Guatemala over a legal immigrant or naturalized citizen originally from Guatemala, there is no difference in national origin. The gap in coverage is further complicated by the fact that national origin, unlike ethnic traits or other characteristics, is frequently imperceptible.¹⁷

Although scholars have concluded that unauthorized workers are entitled to protections under Title VII and similar anti-

14. See, e.g., *Espinoza*, 414 U.S. at 95 (stating, "[c]ertainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin -- for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.").

15. Courts have recognized the availability of "reverse discrimination" claims in Title VII cases. See, e.g., *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1141 (10th Cir. 2008) (noting that employee's claim was better analyzed as one for reverse discrimination); *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2007) (outlining prima facie case for reverse discrimination); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 851 (D.C. Cir. 2006) (outlining elements of reverse discrimination claim).

16. "Alienage" refers to one's status as an alien, and "immigration status" refers to one's status as an immigrant irrespective of legality.

17. See Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 835 (1994) ("Discrimination, therefore, is more likely to occur against persons because of the perceptible manifestations of ethnic distinction, ethnic traits, than because of the often imperceptible fact of national origin.").

discrimination laws when an employer discriminates on the basis of something other than immigrant status (such as race, sex, or religion) most have also recognized that unauthorized workers are simply not entitled to protection based on their immigrant status.¹⁸ For instance, Professor Garcia explained:

Under Title VII of the Civil Rights Act, discrimination on the basis of race, color, national origin, and ancestry are prohibited; discrimination on the basis of immigrant status is not prohibited. Immigrants may receive “national origin” protection under Title VII, but they do

18. See, e.g., Griffith, *supra* note 3, at 160–61 (discussing unauthorized workers who are paid less than minimum wage or are discriminated against based on a class in Title VII but are afraid to make complaint); Ellinor R. Coder, Comment, *The Homeland Security Safe-Harbor Procedure for Social Security No-Match Letters: A Mismatched Immigration Enforcement Tool*, 86 N.C. L. REV. 493, 503 n.59 (2008) (stating “undocumented workers may take advantage of Title VII’s protections even though the statute does not protect discrimination based on alienage, which is a person’s status as a non-citizen. . . . Rather than claim discrimination based on alienage, undocumented workers may allege discrimination on one of the other protected classes, such as national origin, race, or sex.”) (internal citations omitted); Jun Roh, Comment, *The Aftermath of September Eleventh: Increased Exploitation of Undocumented Workers in the Workplace*, 5 WYO. L. REV. 237, 257 (2005) (noting “with this focus on controlling employee’s conduct, employers have subjected undocumented workers to various forms of discrimination prohibited by Title VII, including discrimination based on race, national origin, pregnancy, religion, and sex, after they hired undocumented workers.”). However, a practitioner in the area has described three types of unlawful discrimination based on citizenship or alienage, stating:

By way of background, national origin discrimination refers to practices that treat individuals differently based on their country of birth, the place from where their ancestors came, or their accents. Citizenship discrimination includes treating someone differently because of their immigration status. However, the citizenship discrimination provisions are not as broad as they first appear. The citizenship discrimination provisions only protect the following classes of individuals: permanent residents, temporary residents, asylees, refugees, and U.S. citizens. Non-exclusive examples of citizenship or immigration status discrimination include employers who only hire U.S. citizens (or U.S. citizens and green card holders only), employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization (often referred to as ‘reverse discrimination’).

David W. Gearhart, *This is not Normal Hiring: Best Practices for Employing Highly Skilled Foreign Nationals*, in *EMPLOYING HIGHLY SKILLED FOREIGN NATIONALS: LEADING LAWYERS ON COUNSELING CLIENTS, OBTAINING H-1B VISAS, AND DEVELOPING A SUCCESSFUL IMMIGRATION STRATEGY (INSIDE THE MINDS)* (Aspatore, 2009). See also Rebecca Smith, Amy Sugimori, & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers’ Rights*, 28 N.Y.U. Rev. L. & Soc. Change 597, 600 n.29 (2004) (quoting Office of Chief Economist, U.S. Dep’t of Agric., *IRCA Antidiscrimination Provisions*, at <http://www.usda.gov/oce/labor/ina.htm> (last modified May 16, 2006)) (repeating that one type of citizenship status discrimination includes “employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization”).

not receive it based on their immigrant status. Proving the national origin claim often requires plaintiffs to show that their discriminator bore some hostility toward their particular nation of origin or ancestry, as opposed to a general, undefined animus toward “newcomers” or “illegals.”¹⁹

Similarly, Professor Saucedo noted, as part of her series of “brown-collar workplace” articles “[u]nder traditional doctrine, cases alleging discrimination based on immigration status do not fall within the rubric of national origin discrimination.”²⁰ Other scholars recognize that unauthorized workers are not part of a protected class under the Equal Protection Clause of the Constitution.²¹

Courts have similarly found that both unauthorized-worker plaintiffs and native-born plaintiffs failed to state claims for national origin discrimination based on immigration status. For instance, in *Espinoza v. Farah Manufacturing Co.*,²² the United States Supreme Court determined:

We agree that aliens are protected from discrimination under [Title VII]. . . . The question posed in the present case, however, is not whether aliens are protected from illegal discrimination under the Act, but what kinds of discrimination the Act makes illegal. Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, **but nothing in the Act**

19. Garcia, *supra* note 13, at 515 (internal citations omitted).

20. *Addressing Segregation*, *supra* note 3, at 468 (internal citation omitted).

21. See Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & POL. 435, 467–68 (2008) (quoting *Cubas v. Martinez*, 33 A.D.3d 96, 113 (N.Y. App. Div. 2006)) (relaying “[r]ather, the Court followed *United States v. Toner*, which it summarized as noting that ‘illegal aliens [are not] a protected class so as to require the government to establish anything more than a rational basis for enacting the statute.’”) (brackets in original) (internal citations omitted); Youngro Lee, Note, *To Dream or Not to Dream: A Cost-Benefit Analysis of the Development, Relief, and Education for Alien Minors (Dream) Act*, 16 CORNELL J.L. & PUB. POL’Y 231, 244 (2006) (stating “[s]ince undocumented immigrants are not a constitutionally protected group, the legislature and the courts are not bound by the strict scrutiny standard.”).

22. 414 U.S. 86 (1973).

makes it illegal to discriminate on the basis of citizenship or alienage.²³

Accordingly, federal circuit and district courts have followed suit. The United States Court of Appeals for the Seventh Circuit dismissed an employee's claim for retaliation because he had failed to show that he engaged in protected activity by complaining about his employer's remarks regarding his immigration status.²⁴ The court determined that such remarks did not constitute evidence of national origin discrimination.²⁵

Likewise, in *DePayan v. Wend-Rockies*,²⁶ the United States District Court for the District of Colorado dismissed a native-born employee's claim that her employer treated her allegedly unauthorized coworkers more favorably in violation of Title VII and on the basis of national origin.²⁷ The *DePayan* court quoted the U.S. Supreme Court's conclusion in *Espinoza*, holding "[i]n [the] context of Title VII, that national origin refers to 'country where a person was born, or, more broadly, the country from which his or her ancestors came,' and therefore 'Congress did not intend the term 'national origin' to embrace citizenship requirements,'"²⁸ The *DePayan* court also referred to another court's decision which concluded that "Title VII does not apply to employment discrimination on basis of alienage."²⁹ Other courts have reached similar conclusions in cases involving claims of discrimination on the basis of alienage for both legal immigrants and unauthorized workers.³⁰

Unfortunately, these courts likely reached the correct legal conclusion because Title VII, as presently worded, does not protect employees based on immigration status or, for purposes of this Article, work-authorization status. These cases likely reached the correct conclusion about an absence of protection based on alienage because of Title VII's plain wording and what many scholars have termed a

23. *Id.* at 95 (emphasis added).

24. *See Andonissamy v. Hewlett-Packard Co.*, 547 F.3d 841, 850–51 (7th Cir. 2008).

25. *See id.* at 851.

26. No. 07-cv-02520-LTB-MEH, 2008 WL 2168780 (D. Colo. May 21, 2008).

27. *See id.* at *4.

28. *Id.* (quoting *Espinoza v. Farah Mfg. Co., Inc.* 414 U.S. 86, 88–89 (1973)).

29. *Id.* (quoting *EEOC v. Wendy's of Colorado Springs, Inc.*, 727 F. Supp. 1375, 1381 n.5 (D. Colo. 1989)).

30. *See, e.g., Udoeyop v. Accessible Space, Inc.*, No. 08-4743 (JNE/JJK), 2008 WL 4681389, at *2 (D.Minn. Oct. 21, 2008) (plaintiff was lawful immigrant); *Rojas v. City of New Brunswick*, No. 04-3195 (WHW), 2008 WL 2355535, at *26–27 (D.N.J. June 4, 2008) (plaintiff was allegedly an unauthorized immigrant).

“meager” legislative history.³¹ Prior to Title VII’s enactment, the term “national origin” had been used in both legislative and executive actions.³² With regard to the term’s use in Title VII, the legislative history boils down to “a few unilluminating paragraphs of the House debate.”³³ The term was likely included because it was part of a prior body of “boilerplate” language used in those prior enactments.³⁴ When enacting Title VII, Congress understood that national origin meant a person’s nation of birth or the nations of birth of a person’s ancestors,³⁵ and did not bother to delve further into the meaning of this categorization.

However, as noted above, even if the term “national origin” or its legislative history in Title VII were broad enough to encompass discrimination on the basis of alienage or citizenship, it would still be too narrow to provide protections to workers discriminated against because of their status, non-status, or perceived status as unauthorized workers.³⁶ As Professor Saucedo recounted “[h]istorically, workplace law did not concern itself with immigration status in determining who was a ‘worker.’ It was not until 1986, with the passage of the Immigration Reform and Control Act . . . that Congress succeeded in explicitly inserting immigration regulation into the workplace.”³⁷

31. See Sandrino-Glasser, *supra* note 4, at 136 n.279 (citing *Espinoza v. Farah Mfg. Co., Inc.* 414 U.S. 86, 89 (1973)); Perea, *supra* note 17, at 821 (quoting *Espinoza v. Farah Mfg. Co., Inc.* 414 U.S. 86, 88–89 (1973)).

32. See Perea, *supra* note 17, at 810–12. Perhaps the ironic part of Title VII’s national origin protections is that “national origin” was a concept originally derived from immigration laws (national origin quotas), and yet “national origin” under Title VII does not protect immigrants. *Id.* at 811.

33. *Id.* at 807 (citing U.S. Equal Employment Opportunity Comm’n, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3179–81 (1968)).

34. *Id.* at 807, 811 (citing Exec. Order No. 10,590, 20 Fed. Reg. 409 (Jan. 19, 1955); Exec. Order No. 9,980, 13 Fed. Reg. 4311 (July 28, 1948)).

35. See *id.* at 807, 821. See also Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1386 (1997) (citing 110 CONG. REC. 2549 (1964) (remarks of Rep. Roosevelt)).

36. At least two federal courts have limited protections even further by determining that Title VII does not protect workers who are discriminated against because of the employer’s perception of the worker’s race or national origin. See *Uddin v. Universal Avionics Sys. Corp.*, No. 1:05-CV-1115-TWT, 2006 WL 1835291, at *6 (N.D.Ga. June 30, 2006) (stating, “Title VII does not explicitly protect persons who are perceived to belong to a protected class”); *Butler v. Potter*, 345 F. Supp. 2d 844, 850 (E.D. Tenn. 2004) (finding summary judgment appropriate because Title VII does not include claims for perceived race or national origin discrimination).

37. *National Origin*, *supra* note 3, at 59 (citing Pub. L. No. 99-603, §§ 101-103, 100 Stat. 3359, 3360-80 (1986) (codified as amended at 8 U.S.C. §§ 1324a-1324b (2006) and 18 U.S.C. § 1546 (2006)).

This gap in protection has grown troubling as employers have become savvier about immigration and workplace law.³⁸ Most employers are sophisticated enough to avoid overt discrimination prohibited by state and federal law.³⁹ Part of this sophistication allows employers to structure jobs, usually lawfully, to favor a particular employee over another.⁴⁰ As several scholars have noted, some employers prefer immigrant workers, especially unauthorized workers.⁴¹ This preference has been fueled by a common misperception that they will take jobs “no one else wants” or “no one else will do.”⁴² It is the employers’ sophistication about workplace law and corresponding ability to structure jobs implicitly targeting unauthorized workers that highlights the gap in Title VII’s current protections for all workers.

Scholarly research illuminates that employers’ preferences for various types of workers is rooted in prejudice and discriminatory intent. As Professors Gordon and Lenhardt noted, in examining racial tension between African Americans and immigrants:

Social scientists who have studied employer attitudes toward African Americans concur that employers have considerable prejudice against native-born black workers. Some of this bias extends to U.S.-born workers of all races and ethnicities and is rooted in the belief that native workers do not want to work hard.”⁴³ They continued, “[i]n contrast, employers have an

38. See Perea, *supra* note 17, at 860.

39. See *id.*

40. See Gordon & Lenhardt, *supra* note 4, at 1176–77 (citing Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 973–76 (2006) [hereinafter *Subservient Worker*]; other citation omitted).

41. See, e.g., Gordon & Lenhardt, *supra* note 4, at 1175–76; Wishnie, *supra* note 3, at 213–14.

42. See Gordon & Lenhardt, *supra* note 4, at 1176–77 (quoting Saucedo, *Addressing Segregation*, *supra* note 3, at 450) For example, in 2001, then-President Bush “criticized sanctioning employers for hiring ‘somebody [who] is willing to do . . . work . . . others in America aren’t willing to do.’” Hudson & Schenck, *supra* note 3, at 362–63 (citation omitted).

43. Gordon & Lenhardt, *supra* note 4, at 1174–75 (citing Joleen Kirschenman & Kathryn M. Neckerman, “We’d Love to Hire Them, But . . .”: *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS* 203, 204, 210 (Christopher Jencks & Paul E. Peterson eds., 1991); ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR*, 157–59, 166–67, 176–78, (2003); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355, 366 (2005); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brenda More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992–93 (2004) (internal citations omitted).

overwhelmingly positive view of new immigrants – positive, that is to say, to the extent that subservience is characterized as a positive trait in low-wage jobs offering few opportunities for advancement.⁴⁴

As Professor Wishnie posited, employers who obey immigration and workplace laws are at a competitive disadvantage to employers who hire unauthorized workers.⁴⁵ He found that “[b]ecause the risk of being fined for an IRCA [Immigration Reform and Control Act] violation is slight and the cost-savings from employing and exploiting an [unauthorized] worker potentially substantial (all the more so since *Hoffman*⁴⁶), unscrupulous employers have not hesitated to hire undocumented workers and to seize the unfair competitive advantage such a practice allows.”⁴⁷

Although exploitation of unauthorized workers is undoubtedly a concern, unauthorized workers have rights under the various labor and employment laws against unlawful practices including: wage violations, discrimination, and unlawful working conditions.⁴⁸ And, although the voices rising in support against the exploitation of unauthorized workers may have come too late and may not be sufficient, unauthorized workers have found means to combat such exploitation.⁴⁹ However, a problem still exists when employers structure jobs to prefer and ultimately hire unauthorized workers – many victim groups suffer because authorization to work in the United States is not a protected trait under Title VII.

III. ALL WORKERS, REGARDLESS OF IMMIGRATION STATUS, CAN BE VICTIMS OF WORK AUTHORIZATION DISCRIMINATION.

Although a majority of literature on the interplay between immigration status and national origin protections under Title VII focuses on the impact on unauthorized workers, many scholars agree

44. *Id.* (citing WALDINGER & LICHTER, *supra* note 42, at 144, 160–63; Saucedo, *Subservient Worker*, *supra* note 40, at 978–79).

45. Wishnie, *supra* note 3, at 213.

46. *See* discussion on *Hoffman*, *supra* note 2.

47. Wishnie, *supra* note 3, at 213 (citing Brief *Amici Curiae* of Employers and Employer Organizations in Support of the NLRB et al., *7–9, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595) 2001 WL 1631729).

48. *See infra* note 49 and accompanying text.

49. *See, e.g.*, Saucedo, *National Origin*, *supra* note 3, at 53; Griffith, *supra* note 3, at 155 (stating “in the last decade, advocacy on behalf of migrant workers has intensified.”).

that discrimination of this type hurts all employees or prospective employees involved.⁵⁰ Furthermore, there exists a “demonstrated ability of employers to structure a job so that no native-born worker will want it” and, as a result, “the workers who are entering the job market for the newly restructured jobs do not have a cause of action, while the workers who do not get hired into the jobs, have little interest in fighting for them.”⁵¹ In other words, unauthorized workers who obtain newly structured positions have no recourse because the employers are not discriminating against them based on any criterion other than their real or perceived lack of authorization to work in the United States and their willingness to take a job so structured.

Likewise, the native-born worker, regardless of national origin, may not be interested in pursuing a claim for wrongful failure to hire because the job in question is not attractive enough. However, all employees in this scenario have been discriminated against, and without expansion of the concept of national origin or some other amendment to Title VII, these workers will continue without recourse. Therefore, the remainder of this Article discusses the particular impact on unauthorized workers, legal immigrants, native-born workers of the same race or ancestral national origin as the targeted unauthorized workers, and other native-born workers such as Caucasians and African Americans.⁵²

A. IMPACT ON UNAUTHORIZED WORKERS

Many scholars have theorized the repercussions of not affording protections to unauthorized workers pursuant to the Supreme Court’s decision in *Hoffman* or under other rationales.⁵³ However, when employers engage in an otherwise-lawful employment relationship with unauthorized workers, a gap in protection exists

50. See, e.g., Cunningham-Parmeter, *supra* note 1, at 1365 (concluding that “restricting workplace protections based on [immigration] status harms citizens as well as immigrants”); Marianne Staniunas, Comment, *All Employees Are Equal, But Some Employees Are More Equal Than Others*, 6 U. PA. J. LAB. & EMP. L. 393, 423 (2004) (reasoning, “[t]herefore, policies and laws that determine—or limit—the rights of undocumented immigrants directly affect the rights and lives of all U.S. residents. Even if one can make arguments against extending full legal protections to undocumented immigrants, one cannot ignore the repercussions of such policy decisions on the United States as a whole”); Hudson & Schenck, *supra* note 3, at 378 (arguing “[t]he exploitation of undocumented workers adversely affects the work environment of documented workers, who may remain silent when their own rights are violated for fear of being replaced by undocumented employees”).

51. Saucedo, *Addressing Segregation*, *supra* note 3, at 494–95.

52. See *supra* Part II.

53. See *supra* note 3 and accompanying text.

because Title VII does not protect them as a group.⁵⁴ This is particularly problematic because the employer-sanctions provisions contained within IRCA have not motivated employers to refrain from hiring unauthorized workers.⁵⁵ On the contrary, as Professor Wishnie contended, the employment of unauthorized workers has become “irresistible in low-wage, labor-intensive industries.”⁵⁶ This is especially true because the Supreme Court’s decision in *Hoffman*, in some respects, “insulated” employers from liability for hiring unauthorized workers because it limited the remedies to which unauthorized workers are entitled.⁵⁷

Recent immigration statistics support these rationales. For instance, the Pew Hispanic Center estimates that 11.9 million unauthorized immigrants were living in the United States as of 2008 and that there were 8.3 million unauthorized workers in the United States workforce as of March 2008.⁵⁸ These statistics are particularly significant in certain industries. For example, unauthorized workers comprised the following percentages of total workers in various industries: fourteen percent of food-manufacturing workers, thirteen percent of agricultural and furniture-manufacturing workers, twelve percent of construction, textile-manufacturing, and food-services workers, and ten percent of commercial-lodging or accommodation

54. See *supra* Part II.

55. See Wishnie, *supra* note 3, at 213; see Roh, *supra* note 18, at 265 (stating, “[c]urrent law does not successfully protect undocumented workers or deter illegal immigration.”); Garcia, *supra* note 13, at 526 (stating, “[d]espite the legal constraints on the behavior of employers and immigrants, law has not changed . . . the propensity of employers to violate the NLRA and IRCA with respect to immigrants . . .”); Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 626–27 (2000) (stating, “[h]owever, ‘the employer sanctions scheme has done little to rectify the ‘embarrassing secret’ of immigration—that illegal immigrants play an invaluable role in our daily lives”).

56. Wishnie, *supra* note 3, at 215.

57. See *id.* at 214 (stating “[t]he Hoffman decision has intensified this dynamic, making it absolutely clear that employers of undocumented workers are in many instances immune from ordinary labor law liability”). For literature further discussing *Hoffman* and its impact, see Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, its Predecessors and its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1 (2008); Mariel Martinez, *The Hoffman Aftermath: Analyzing the Plight of the Undocumented Worker Through a “Wider Lens,”* 7 U. PA. J. LAB. & EMP. L. 661 (2005); Christopher Ho & Jennifer C. Chang, *Drawing the Line After Hoffman Plastic Compounds, Inc. v. NLRB: Strategies for Protecting Undocumented Workers in the Title VII Context and Beyond*, 22 HOFSTRA LAB. & EMP. L.J. 473 (2005).

58. Jeffrey S. Passel & D’Vera Cohn, Pew Hispanic Ctr., *A Portrait of Unauthorized Immigrants in the United States*, (2009), available at <http://pewhispanic.org/files/reports/107.pdf>.

workers.⁵⁹ Indeed, it has been estimated that nearly eighty-five percent of “newly arrived” workers are actually unauthorized to work in the United States.⁶⁰

As Professor Keith Cunningham-Parmeter stated:

Unauthorized immigrants live in precarious times. American demand for inexpensive goods draws international migrants to our factories and fields. Developing nations encourage their people to work in the United States. As they are pushed and pulled toward the country, immigrants arrive in the United States to find armed Minutemen at the border and a growing public distaste for the unauthorized arrivals. They are wanted yet disdained, needed yet derided.⁶¹

Likewise, there exists a perception that unauthorized workers feel they have no choice but to enter the country illegally,⁶² and it is difficult to become “authorized” to work in the United States given current immigration regulations.⁶³

In addition to the myth that unauthorized workers will take jobs no one else wants,⁶⁴ there exists a corollary myth: “the immigrant success story myth.” Professor Saucedo explains:

The “immigrant success story” myth portrays the immigrant as starting at the bottom of the economic

59. The Perryman Group, *An Essential Resource: An Analysis of the Economic Impact of Undocumented Workers on Business Activity in the US with Estimated Effects by State and by Industry 33* (2008), available at <http://www.ilw.com/articles/2008,1008-perryman.pdf> (citing Pew Hispanic Ctr., *Research Report: The Size and Characteristics of the Unauthorized Migrant Population in the US 14* (2006)).

60. Saucedo, *Subservient Worker*, *supra* note 40, at 966 (citing RAKESH KOCHHAR, PEW HISPANIC CTR., *SURVEY OF MEXICAN MIGRANTS: THE ECONOMIC TRANSITION TO AMERICA 1, 16* (2005), available at <http://pewhispanic.org/files/reports/58.pdf>; JEFFREY S. PASSEL, PEW HISPANIC CTR., *ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION 1* (2005), available at <http://www.pewhispanic.org/files/reports/44.pdf>).

61. Cunningham-Parmeter, *supra* note 1, at 1362.

62. See Junior, *supra* note 4, at 518.

63. See Saucedo, *Subservient Worker*, *supra* note 40, at 968 (citing Immigration and Nationality Act §§ 203(b)(3)(A)(iii), 203(b)(3)(B) (2000)).

64. See *supra* note 37 and accompanying text; see also Saucedo, *Subservient Worker*, *supra* note 40, at 973 (noting that “[t]he myth [that brown-collar workers will take or choose jobs no one else wants] has an important and overlooked side effect, however, in that it perpetuates the idea that interest in, and decisions about, which jobs to take lie solely with the employee. It masks the power that employers have to create the jobs that no one else will take and target brown collar workers for those jobs”).

ladder and moving up in steady progression over time. It allows for the popular perception that, with time, the brown collar worker will assimilate and move up the economic ladder if only he desires to do so. In other words, should the immigrant choose to invest in his own human capital, he will not suffer harmful workplace conditions for long. As with the corollary myth of the unwanted job, however, the immigrant success story does not consider the degree to which brown collar workers' choices are constrained by social and legal policies. Nor does it acknowledge how employers take advantage of those constraints to develop a segmented market that inhibits job advancement opportunities.⁶⁵

This myth perpetuates the problems associated with unauthorized workers and employer-structured jobs because unauthorized workers might believe that if they can suffer inferior wages and conditions for a period of time, they will be promoted into the preferred and higher-paying jobs. Because these workers do not have recourse to act under Title VII when their employer targets them for jobs and otherwise structures those jobs lawfully despite lower wages and poorer conditions, they end up trapped in inferior jobs with nowhere to go.

B. IMPACT ON AUTHORIZED-IMMIGRANT WORKERS

The issue with immigrant workers who are authorized to work in the United States is that immigration status and, generally, national origin are imperceptible characteristics.⁶⁶ As a result, they are frequently categorized with unauthorized workers and may be perceived as such.⁶⁷ Although many scholars specifically focus on the

65. Saucedo, *Subservient Worker*, *supra* note 40, at 974–75.

66. See Perea, *supra* note 17, at 835 (stating "[d]iscrimination, therefore, is more likely to occur against persons because of the perceptible manifestations of ethnic distinction, ethnic traits, than because of the often imperceptible fact of national origin").

67. See Saucedo, *Subservient Worker*, *supra* note 40, at 966 (reasoning "[o]ne of the defining characteristics of brown collar workers is their 'newly arrived' status. Several elements of newly arrived status, including perceived immigration status, lack of knowledge about workplace rights, political disenfranchisement, 'push' factors, language deficiencies, and fear of job loss or deportation, or both, combine to create an especially vulnerable workforce"). Professor Saucedo remarked, "[t]hese sets of Latino workers—newly arrived, earlier arrived, and native born workers who fit the profile of the vulnerable worker—together suffer the fate of the brown collar worker. From the employer's point of view, earlier arrived

impact on Latino workers, it is important to remember that unauthorized and authorized immigrant workers come from countries around the world.⁶⁸ Although about seventy-six percent of unauthorized immigrants in the United States are Hispanic and nearly fifty-nine percent are from Mexico, approximately eleven percent are from Asia, eleven percent are from Central America, seven percent are from South America, four percent are from the Caribbean, and less than two percent are from the Middle East.⁶⁹ However, no matter where they were born, “[t]he exploitation of undocumented workers adversely affects the work environment of documented workers, who may remain silent when their own rights are violated for fear of being replaced by undocumented employees.”⁷⁰ As one student scholar notes “[n]either national origin nor race claims can shield a Mexican legal permanent resident from employer preferences for undocumented Mexican immigrants.”⁷¹

*C. IMPACT ON NATIVE-BORN WORKERS OF THE SAME
ANCESTRAL NATIONAL ORIGIN AS TARGETED UNAUTHORIZED
WORKERS*

Because immigrant status and national origin, generally, are imperceptible, native-born workers of a certain race or ancestral national origin are often perceived as immigrants or even unauthorized-immigrant workers.⁷² The reality is that not only are many Latinos in the United States “native born” in the sense that their own national origin is the United States, but many Latinos are ancestrally native born also.⁷³ This is problematic because, as Professor Saucedo discussed, native-born Latinos can be grouped into

and some native born Latinos are all part of the brown collar supply of labor for the “unwanted” jobs, even though they do not quite fit the brown collar profile completely.” *Id.*

68. See Sandrino-Glasser, *supra* note 4, at 79 (quoting Pastora San Juan Cafferty, *The “New” Immigration*, in *HISPANICS IN THE UNITED STATES: A NEW SOCIAL AGENDA* 35–36 (Pastora San Juan Safety & William C. Macready eds., 1985)) (stating, “[i]llegal immigrants are not solely Mexicans, ‘the others come from other countries, including Korea, Taiwan and the Philippines. Immigration is perceived as Mexican immigration because of the emphasis placed on apprehending Mexican immigrants’”).

69. PASSEL & COHN, *supra* note 58.

70. Hudson & Schenck, *supra* note 3, at 378.

71. Rachel Bloomekatz, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 *UCLA L. REV.* 1963, 1984 (2007).

72. See *supra* notes 16 and 65 and accompanying text.

73. See Ruiz Cameron, *supra* note 35, at 1360 (stating “[b]ut many present-day Latinos are not the descendants of immigrants, at least as we commonly use the term; rather, they are the children of ancestors who had settled the New World centuries before Anglos first arrived in the Southwest”).

inferior jobs with newly arrived and later-arrived immigrants.⁷⁴ Thus, in the hypothetical scenario with employer AFCC described in Part I, if AFCC targeted unauthorized Latino workers for its Group A construction laborers, and a native-born Latino applied for a job, AFCC could either refuse to hire the applicant or relegate the applicant to one of the lower-paid Group A positions.

The meaning and application of the term “national origin” can also be problematic because “national origin” can mean either one’s own country of birth or that of one’s ancestors.⁷⁵ Thus, people seeking protection based on “national origin” under Title VII may claim either their own country of birth or their ancestors’ country of birth. However, when prospective plaintiffs are native born to the United States, they must then rely on their ancestor’s national origin. As Professor Perea discusses:

Implicit in this claim of a distinguishable national origin is the assertion that she and/or her ancestors are of a different, non-American national origin or country of birth. However, persons born in the United States have American or United States national origin because this is their country of birth. Accordingly, citizens, other than naturalized citizens, who are plaintiffs in a “national origin” discrimination suit must invoke the ancestry of their parents or some earlier ancestor to find a country of birth, a national origin, different from the United States.⁷⁶

Professor Perea continues,

Because of its focus on either a fictional difference in national origin or on ancestry, the “national origin” language of the statute forces plaintiffs to define themselves as outsiders, belonging to some other country or place of birth and, correspondingly, outside the scope of American identity. By reinforcing the notion of “foreign national origin” even among American born citizens, at least two negative consequences result. First, United States citizens who constitute part of the American polity and part of

74. See *supra* notes 64–65 and accompanying text.

75. Perea, *supra* note 17, at 821.

76. *Id.* at 853–54.

American identity must define themselves as having a foreign national origin and as outsiders not belonging to the American community. This is a false, statutorily-created outsider status, since Americans born here all have equal claim to American national origin and to equal citizenship as a birth right. Second, the operation of the national origin language of the statute reinforces unstated norms of “true” American identity. The term “national origin” operates to reinforce an underinclusive conception of American identity.⁷⁷

This is significant both for the psychological and social costs, but it can also be significant in the situation forming the basis of this Article: an employer who structures positions to favor those it perceives to be unauthorized workers. If a native-born employee cannot claim national origin discrimination because the favored class is “unauthorized workers,” he or she has no Title VII claim. This leaves the employee with the possibility of claiming disparate impact on his or her racial group, such as Latinos. However, compensatory and punitive damages are not available on disparate impact claims and, as such, native-born workers’ recourse is limited even further.⁷⁸

D. IMPACT ON NATIVE-BORN WORKERS NOT OF THE SAME NATIONAL ORIGIN AS TARGETED UNAUTHORIZED WORKERS

The consensus amongst social scientists and other scholars is that the impact immigrant workers have on native-born workers is undetermined.⁷⁹ As Professor Kati Griffith summarized recently:

Some [studies] find that migrant workers have increasingly “caused a major competitive problem” for U.S. workers and may have reduced wage rates of some domestic workers. Others point out that, at the aggregate level, migrant workers do not negatively affect labor conditions for domestic workers. Much of

77. *Id.* at 854–55 (internal citations omitted).

78. Cunningham-Parmeter, *supra* note 1, at 1385 (citing 42 U.S.C. § 1981a(b) (2006)).

79. See *infra* text accompanying note 82.

this debate centers on “whether low-income [domestic] workers are hurt a lot or just a little.”⁸⁰

No matter what impact immigrant workers actually have on the American workplace, the perception, particularly fostered by the American media, is that unauthorized and other immigrant workers have a negative effect on native-born workers’ opportunities. For example, one student scholar noted:

As the U.S. strives to compete in the global economy, it is incumbent on the U.S. to maximize the potential of all U.S. citizens rather than continuing to marginalize them. As our society becomes increasingly diverse, this need will become more pressing. The statistics included in this note do not prove that African Americans are being replaced by Mexican immigrants, but they do suggest that when given a choice, employers in service sector jobs are increasingly choosing immigrants instead of African Americans.⁸¹

Professors Gordon and Lenhardt recognized the role the media plays in the perception, right or wrong, that native-born workers compete with immigrant workers, and particularly “Latino newcomers,” stating:

A growing population of Latino newcomers in areas and industries once dominated by African Americans has, we are told, left the two groups “competing for the same dry bone,” turning the workplace into a “war” between “rivals”: “the black jobless poor” and “the Latino working poor.” Although a few pieces highlight

80. Griffith, *supra* note 3, at 127–28 (bracketed material in original) (citing and quoting Paul Weiler, *Comparative Enhancing Worker Lives through Fairer Labor and Worklife Law in Comparative Perspective*, 25 COMP. LAB. L. & POL’Y J. 143, 147 (2003)); George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 QUART. J. OF ECON. 1335 (2003); Bruce Stokes, *The Lost Wages of Immigration*, NAT’L J., Jan. 7, 2006; David Card, *Is the New Immigration Really So Bad?*, 115 ECON. J. 300, 300–23 (2005); Simonetta Longhi, Peter Nijkamp, & Jacques Poot, *A Meta-Analytic Assessment of the Effect of Immigration on Wages*, 19 J. OF ECON. SURVEYS, 451, 472 (2005); Jonathan G. Goodrich, *Help Wanted: Looking for a Visa System that Promotes the U.S. Economy and National Security*, 42 U. RICH. L. REV. 975, 991 n.131 (2008); Gordon & Lenhardt, *supra* note 4, at 1183; Roger Lowenstein, *The Immigration Equation*, NY TIMES MAG., July 7, 2006, at 36.

81. Junior, *supra* note 4, at 520.

efforts at collaboration, the overall tenor is neatly summed up by the headline of a recent front-page Christian Science Monitor article: “Rising Black-Latino Clash on Jobs.”⁸²

Although much of the literature on this matter concerns the interrelationship of immigrant workers and African-American workers, when looking at the context presented in this Article—an employer who structures jobs to target unauthorized workers but maintains an otherwise-lawful employment relationship—all native-born workers are at risk. Irrespective of whether the perception that immigrant workers negatively impact native-born workers is accurate, the perception fuels conflict and litigation. It is frequently the case that native-born workers sue their employers for national origin discrimination because the employer favors some other group of employee, such as an unauthorized worker.⁸³

For example, the United States Supreme Court, in *DeCanas v. Bica*,⁸⁴ determined that a state statute forbidding employment of unauthorized workers “if such employment would have an adverse effect on lawful resident workers,” was not preempted by federal immigration law and was therefore not unconstitutional.⁸⁵ In *DeCanas*, a group of citizen-employees sued their employer for allegedly favoring unauthorized workers in violation of that state statute.⁸⁶ Many other employment-based lawsuits also feature disgruntled native-born employees or applicants who sue employers for the employers’ actual or perceived preference of unauthorized workers or other foreign-born workers.⁸⁷

82. Gordon & Lenhardt, *supra* note 4, at 1166 (citing and quoting Stephanie Chavez, *Racial Tensions Over South L.A. Jobs Grow*, L.A. TIMES, July 22, 1992, at B1; Dorothy Gilliam, *A Sad, Slow but Sure Awakening*, WASH. POST, May 13, 1992, at D1; Gary Lee & Robert Suro, *Latino-Black Rivalry Grows*, WASH. POST, Oct. 13, 1993, at A1; Ben Stocking, *Side By Side: Worlds Apart (Part 2)*, RALEIGH NEWS & OBSERVER, May 4, 1997, at A1; Steven Greenhouse, *Picking and Packing Portobellos, Now With a Union Contract*, N.Y. TIMES, July 21, 1999, at A14 (describing a successful United Farm Workers organizing campaign focusing on Latino and African American mushroom workers); *News and Notes With Ed Gordon: Black Hotel Workers Replaced by Immigrants* (NPR radio broadcast Mar. 27, 2006), <http://www.npr.org/templates/Story/Story.php?storyid=5303325>; Daniel B. Wood, *Rising Black-Latino Clash on Jobs*, CHRISTIAN SCI. MONITOR, May 25, 2006, at 1).

83. See *DeCanas v. Bica*, 424 U.S. 351 (1976).

84. *Id.*

85. *Id.* at 353–54.

86. *Id.* at 353.

87. See, e.g., *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 537–38 (6th Cir. 2008) (U.S. native-born employee brought suit against Swiss employer for favoring Swiss foreign-born employee); *Ward v. Bechtel Corp.*, 102 F.3d 199, 201 (5th Cir. 1997) (African-

Scholars recognize this is especially true because the Court's decision in *Hoffman* has encouraged native-born coworkers to challenge immigrants in the workplace.⁸⁸ The current policy pits different groups of employees against one another.⁸⁹ However, because there is no available national origin claim for those workers or applicants wanting to challenge an employer's practices in this regard, the challenge would have to come in other ways, including largely unfounded hostility and animosity towards immigrants and perceived immigrants.

IV. CONCLUSION

Oftentimes, when the legal community engages in a discussion about discrimination, whether in this context or in the case of sex, age, or disability discrimination, the discussion ends with access to jobs. The idea is that if a protected class has access to jobs, there can be no discrimination. However, access to jobs is not the end of the discrimination inquiry.⁹⁰ Instead, when employers have the power to structure jobs with a particular set of employees in mind and also have minimal restrictions placed on them in terms of "knowingly" hiring unauthorized workers, the focus should be on employer change. As Professor Saucedo suggests, "[o]ne possible set of changes that employers can consider is to reduce the amount of deskilling taking place in occupations within low-wage workplaces. It would involve creating more worth, and less rigidity into the tasks assigned to a particular job."⁹¹ In other words, there needs to be a legal basis upon

American worker sues for national origin discrimination); *Grey v. City of Norwalk Bd. of Educ.*, 304 F. Supp. 2d 314, 319, 321 (D. Conn. 2004) (African American woman brings suit alleging national origin discrimination); *Freeman v. Kansas*, 128 F. Supp. 2d 1311, 1313 (D. Kan. 2001) (African American woman brought suit claiming discrimination based on national origin); *Lemnitzer v. Phil. Airlines, Inc.*, 816 F. Supp. 1441, 1445 (N.D. Cal. 1992), *aff'd in part, rev'd in part*, *Lemnitzer v. Phil. Airlines, Inc.*, No. 92-17073, 1995 WL 230404, at *1 (9th Cir. Apr. 18, 1995) (U.S. citizens sued for national origin based on employer's preference of Filipino workers). *See also* Immigration Employment Compliance Handbook § 8:8 (discussing unnamed 2003 cases in which citizen-applicant applied for job and was allegedly refused hire because of employer's preference for unauthorized workers). Additionally, this author handled national origin discrimination claims filed against employers by Caucasian citizen-employees because those employers allegedly favored unauthorized workers.

88. Saucedo, *Subservient Worker*, *supra* note 40, at 969.

89. Saucedo, *Addressing Segregation*, *supra* note 3, at 495.

90. See Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 1 U. CHI. LEGAL F. 345, 348 (2009).

91. *Id.* at 378.

which to challenge employers like that in the hypothetical situation above with AFCC.⁹²

The sad reality is that employers are not likely to engage in this type of change without motivation, probably in the form of significant monetary penalties. And, because government enforcement of immigration law has already proven to be at least under-effective,⁹³ something must be done to allow affected employees, whether native born, authorized immigrant, or unauthorized worker, to recover for employers' job structuring and employee targeting. As such, "work authorization" needs to become a source of protection for all workers, whether through an amendment to Title VII or otherwise. Scholars in the area have proposed all sorts of solutions for related problems, including an inexorable-100 inference under discrimination law,⁹⁴ limited amnesty for unauthorized workers,⁹⁵ establishment of a new protected class,⁹⁶ and private attorney general status under the Trafficking Victims Protection Act.⁹⁷ However, no matter what vehicle this change comes in, change is necessary to prevent discrimination against every category of worker in the United States. It is not a matter of protecting citizens, lawful immigrants, or unauthorized workers—it is a matter of protecting every worker.

92. See *supra* Part I.

93. See *supra* notes 52–56 and accompanying text.

94. Saucedo, *Addressing Segregation*, *supra* note 3, at 449 (reasoning, "With this goal, [this Article] proposes a Title VII segregation framework, centered on recognizing a new inference of discrimination when all—or 100 percent of—workers in a job category are from a protected group, the 'inexorable 100.' The inexorable 100 is the mirror image of the 'inexorable zero,' an inference of discrimination currently recognized by courts where there is a complete absence of a protected group in a job category.").

95. Roh, *supra* note 18, at 266–268; Hudson & Schenck, *supra* note 3 at 377–379, 384–387.

96. Garcia, *supra* note 13 at 533; Perea, *supra* note 17 at 860–863; Hudson & Schenck, *supra* note 3 at 383–384.

97. Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247 (2009) (quoting Juliet Stumpf and Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 NYU J. LEGIS. & PUB. POL. 131, 135 (2002–03) (stating, "For civil rights enforcement, the State depends heavily on private actors to take on the responsibility of 'private attorneys general—private individuals who act in the place of the State in order to increase compliance with antidiscrimination laws'"). For surveys of proposed solutions to issues involving immigrant status and unauthorized workers, see *id.* at 307 (citations omitted); Staniunas, *supra* note 50, at 422–23 (internal citations omitted); Hudson & Schenck, *supra* note 3, at 353–54 (internal citations omitted).