RETHINKING IMMIGRATION STATUS DISCRIMINATION AND EXPLOITATION IN THE LOW-WAGE WORKPLACE

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Popular discourse in the U.S. immigration debate often simply asserts that immigrants take jobs that native workers do not want. Though perhaps politically salient, such slogans overlook the complex interaction between employer preferences, immigration, and legal protections. Building on sociological research, this Comment explores the reality that many employers actually discriminate against U.S. workers in favor of immigrants, who, because of their vulnerable legal status and different social institutions, may be more susceptible to exploitation. While preferences based on immigration status itself—even distinct from race or national origin—are a significant basis for discrimination, there has been very little scholarship on this topic, especially from the perspective of U.S. workers facing discrimination.

Curbing this discrimination against U.S. workers is important for both workers' rights and immigrants' rights advocates. Those U.S. workers facing discrimination are often at the bottom end of the pay scale and are most susceptible to living in poverty. Although preferences for vulnerable immigrants may seem to provide opportunities to people from developing countries, they also can harm those same workers because the jobs provided come laced with labor violations and poor workplace conditions that may make it hard for employees to improve their situations. Thwarting this discrimination also can promote diverse workplaces, which are necessary not only to limit exploitation of all low-wage workers, but also to foster ties between different groups and strengthen democracy.

This Comment analyzes what remedies U.S. workers have for discrimination based on immigration status through evaluating three antidiscrimination statutes—the Immigration Reform and Control Act's (IRCA) antidiscrimination provision, Title VII, and 42 U.S.C. § 1981. Few cases have successfully defended U.S. workers from preferences for vulnerable immigrants. Though those successes have mainly been administrative challenges under IRCA, a comparative analysis demonstrates that Title VII or § 1981 may be better legal tools to remedy employment discrimination. Moreover, this Comment discusses ways to fight

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U.S. worker discrimination without harming vulnerable immigrants or creating a wedge between these sectors of the population. Bringing immigrant labor abuse claims and U.S. worker antidiscrimination lawsuits simultaneously is one approach for how to achieve this goal.

INTRODUCTION

Popular discourse in the U.S. immigration debate often simply asserts that immigrants take jobs that native workers do not want.[1] Though perhaps

1. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 962 (2006) (citing Donald L. Barlett & James B. Steele, *Who Left the Door Open?*, TIME, Sept. 20, 2004, at 62, which quoted President George W. Bush echoing this theme when he proposed the immigration law changes: "I put forth what I think is a very reasonable proposal, and a humane proposal, one that is not amnesty, but, in fact, recognizes that there are good, honorable, hardworking people here doing jobs Americans won't do").

politically salient, such slogans overlook the complex interaction between employer preferences, immigration, and legal protections. The reality is that many employers actually prefer to hire immigrants rather than U.S. workers,[2] believing that the former are more easily exploitable.[3] Consider, for example, the Decatur Hotels Corporation in New Orleans, which the Southern Poverty Law Center is suing for immigrant labor rights abuses.[4] Despite a local pool of available African American workers with appropriate qualifications,[5] Decatur Hotels hired temporary visa workers from Latin America to work at well above the minimum wage in front desk, maintenance, room service, and housekeeping jobs. Do none of the unemployed African Americans in New Orleans want these jobs, as the popular discourse would have one believe? Or does Decatur Hotels want vulnerable immigrant workers, believing they will willingly accept forced overtime or hour cuts, straight time pay for overtime work, and a host of other labor violations? Contrary to the popular discourse, Decatur Hotels' preference for immigrant workers is by no means unique or unusual. These widespread preferences lead to both immigrant labor rights abuses and discrimination against U.S. workers.

Despite the prevalence of this discrimination, this Comment is the first legal scholarship to directly address what remedies U.S. workers have for discrimination based on immigration status. While other scholars have explored the relationship between employment discrimination law and immigration status, they have taken the perspective of protecting immigrants from discrimination. Through analyzing the viability of alienage or citizenship claims by

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2. This Comment makes a distinction between "vulnerable immigrants" who are undocumented or hold temporary work visas and "U.S. workers" who are citizens or have permanent resident status, in order to more easily refer to these different groups.

3. *See* ROGER WALDINGER & MICHAEL I. LICHTER, HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR 141–80 (2003).

4. For a discussion of this lawsuit, see S. Poverty L. Ctr., SPLC Exposes Exploitation of Immigrant Workers (Aug. 16, 2006), http://www.splcenter.org/legal/news/article.jsp?aid=205&site_area=1. This case was also reported in the *New York Times*. *See* Leslie Eaton, *Immigrants Hired After Storm Sue New Orleans Hotel Executive*, N.Y. TIMES, Aug. 17, 2006, at A23.

5. According to the Urban Institute, many New Orleanians had trouble finding and keeping work even before Katrina. HARRY J. HOLZER & ROBERT I. LERMAN, URBAN INST., EMPLOYMENT ISSUES AND CHALLENGES IN POST-KATRINA NEW ORLEANS (2006), http://www.urban.org/UploadedPDF/900921_employment_issues.pdf. As of 2004, the city's unemployment rate stood at nearly 12 percent, over twice the national rate. *Id.* at 1. ("While blacks represent over two-thirds of residents of New Orleans, the overall city unemployment rate was 20 percent higher than the national unemployment rate of all black workers.") After Katrina, these problems just intensified with job displacement. *Id.* at 2; *see also* S. Poverty L. Ctr., *supra* note 4 ("At a time when the unemployment rate in the New Orleans metro area is 7.2 percent, these guest workers are lured here and locked into exploitation . . . . Meanwhile, African American survivors are locked out of the hotel industry even as they struggle to return home and regain their lives a year after Katrina" (quoting Saket Soni, New Orleans Worker Justice Coalition)).

U.S. workers facing discrimination by employers who favor vulnerable immigrants, this Comment develops two novel legal theories for why such preferences violate antidiscrimination law outside of the Immigration Reform and Control Act (IRCA).[6] Though one of these theories was brought up in case law before changes in current antidiscrimination law, neither has been examined in academic literature. Thus, this Comment provides both a new legal perspective on low-wage workplaces and suggestions for advocates on how to combat such discriminatory practices.

Thwarting this discrimination against U.S. workers is important for both workers' rights and immigrants' rights advocates. Those U.S. workers facing discrimination are at the bottom end of the pay scale and are most susceptible to living in poverty. As inequality in the United States increases, it is particularly important to make sure there are opportunities for all those not benefiting from periods of economic prosperity. Preferences for vulnerable immigrants may seem to provide opportunities to people from developing countries, but they also can harm those same workers because they often come laced with labor violations and deterioration of workplace conditions that may make it hard for employees to improve their situation. Thwarting this discrimination also can promote diverse workplaces, which are necessary not only to limit exploitation of all low-wage workers, but also to foster ties between different groups and to strengthen democracy.[7]

The legal challenge to remedying this discrimination, however, is that it does not always cut cleanly across race or national origin lines, which are traditionally protected categories in antidiscrimination law. Decatur Hotels hired black Dominicans with temporary work visas, which could negate a race discrimination claim by rejected African Americans.[8] It also hired Latin American immigrants with temporary visas when it might have been able to hire second-generation or legal permanent residents from the same country, demonstrating that the preference was not for a specific national origin. Because immigration status itself is a salient category in employment discrimination, this Comment argues that workers' rights advocates need to look creatively at current antidiscrimination law to develop strategies for combating "reverse" immigration status discrimination (status discrimination against U.S. workers).

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6. 8 U.S.C. § 1324a (2000).

7. *See generally* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003).

8. *See* Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000).

Part I of this Comment explains employer preferences for vulnerable immigrant workers. Immigrants who are undocumented or hold temporary work visas, such as H-2A or H-2B visas (referred to collectively as "vulnerable immigrants" throughout this Comment), have diminished power in the workplace. Moreover, ethnographic studies show that their transnational social institutions may make low-wage jobs seem like a better economic strategy for them as compared to their U.S. counterparts. U.S. citizens, legal permanent residents, and others with more stable immigration status (referred to collectively as "U.S. workers" throughout this Comment), may be less susceptible to exploitative bosses because they have permanent status. Through both real and perceived legal insecurity and different cultural orientations, employers construct vulnerable immigrants as willing subordinates who will work hard without giving "lip." Immigration status is, of course, not the only or necessarily the most prominent factor in employment decisions.[9] However, unpacking the sociological dimensions behind employer

9. Employment decisions and discrimination involve a complex process in which issues of immigration status, race, ethnicity, gender, and class all come together. Differences in geography and industry also lead to different employment issues. Employers are by no means only looking at immigration status but may discriminate based on many or even multiple axes. Mae Ngai demonstrates, for example, how, despite stable immigration status and citizenship, people of Asian and Latino communities are constructed as illegitimate, criminal, and unassimilable. This construction means that individuals who enjoy formal citizenship status still may lack citizenship as a matter of identity; they are what Ngai terms "alien citizens." MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 2, 170 (2004); *see also* Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1616 (2005). Building on this work, Leticia Saucedo argues that the "brown collar [Latino] labor pool is presumed to be undocumented," and low-wage Latino workers face negative employment treatment "regardless of documentation status." Saucedo, *supra* note 1, at 966, 970. Similarly, because Asians, regardless of immigration status, are often perceived as "foreign" in the United States, Natsu Taylor Saito argues for an antidiscrimination paradigm that can cognize the aspect of "foreignness." Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 315–16 (1997). Admittedly, then, the distinction between vulnerable immigrants and U.S. workers is overly formalized because those with citizenship or permanent resident status may still be seen as vulnerable. In addition, not all vulnerable immigrant groups are seen as the same with respect to low-wage work, but instead are racialized and stereotyped differently. For a discussion of differential racialization, see Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000). Despite these limitations, focusing on the differences between vulnerable immigrants and U.S. workers may still be helpful for recognizing a salient line of employment discrimination not captured in discussions of national origin, race, or "foreignness" discrimination. Though factors influencing employment decisions are entangled, ethnographic and empirical studies, discussed in Part I of this Comment, demonstrate that employers may treat immigrants even of the same ethnicity differently because of their immigration status. *See, e.g.*, WALDINGER & LICHTER, *supra* note 3, at 165–66. If some employers prefer first-generation undocumented workers over their second-generation, native-born counterparts, then more than ethnicity or racial discrimination is operating. There is also an element of immigration status discrimination that operates in low-wage workplaces, which is what this Comment addresses.

preferences is key both to demonstrating that immigration status is an integral line of demarcation in low-wage workplaces and for strategizing about how to best address this discrimination.

Part II evaluates the ability of three antidiscrimination statutes—IRCA's antidiscrimination provision,[10] Title VII,[11] and 42 U.S.C. § 1981—to recognize and redress the claims of U.S. workers facing immigration status discrimination. Few cases have successfully defended U.S. workers from preferences for vulnerable immigrants. Although those that have succeeded were mainly administrative challenges under IRCA, a comparative analysis demonstrates that Title VII or § 1981 are better legal tools to remedy employment discrimination. This analysis argues that § 1981 can be utilized by analogizing to reverse race discrimination and suggests that this might be the most productive avenue for U.S. workers.

Finally, this Comment concludes with a discussion of how to fight U.S. worker discrimination without harming vulnerable immigrants or creating a wedge between these sectors of the population. Bringing immigrant labor abuse and U.S. worker antidiscrimination lawsuits simultaneously is one approach for how to achieve this goal.

I. UNDERSTANDING EMPLOYER PREFERENCES FOR VULNERABLE IMMIGRANT WORKERS

The paradox of employer preferences for immigrant workers and the corresponding depression in wages underlies discrimination against U.S. workers and immigrant labor abuses. When an employer prefers a specific worker, it normally signals that the worker is better liked or more highly skilled than other candidates; such positive traits often correspond to relatively higher wages or other preferential working conditions. Within the context of low-wage work, however, this assumption is often reversed. Employers hiring low-wage, unskilled workers do not always seek employees whom they personally like.[12] Instead, they generally favor those who are most susceptible to exploitation and situated at the bottom of the social hierarchy, paying them less than would otherwise seem reasonable.[13] Vulnerable immigrant workers

10. 8 U.S.C. § 1324b.
11. 42 U.S.C. § 2000e (2000).
12. WALDINGER & LICHTER, *supra* note 3, at 17.
13. *Id.*

increasingly fill this space in the American workplace,[14] negatively impacting low-wage U.S. workers, particularly African Americans.

A. Beyond Traditional Notions of Discrimination

In low-wage workplaces, employers prefer workers who are, in the employers' estimation, most suitable for exploitation, not workers whom they personally favor. Traditional notions of discrimination are, therefore, inadequate for understanding employer preferences for vulnerable immigrant workers. As Roger Waldinger and Michael Lichter explain, social science scholarship on discrimination originated within the framework of a Euro-American–African American binary. According to this literature, whites would discriminate against African Americans in the employment context because of "psychic discomfort" involved with hiring workers from whom they wanted to maintain social distance.[15] Similarly, as John Tehranian argues, immigrants seeking naturalization in the early 1950s had to "perform whiteness" and prove their ability to assimilate to avoid citizenship discrimination.[16] Courts were reluctant to extend the rights and benefits afforded to whites unless the "nonwhite" plaintiff could prove that he or she was like others in the mainstream white society.[17] That is, those in power discriminate in favor of those who are most similar to them or whom they personally like. Much of this literature, however, is based on the assumption that motivations in the personal realm operate similarly in the employment arena.[18] But, as Waldinger and Lichter argue, in the low-wage context "*personal* preferences—for *and* against—are not directly relevant to the relationship between the bosses and the bossed."[19] In some industries, employers do not always prefer workers with whom they feel close social proximity, but

14. For an analysis of the transition of formerly unionized trucking, construction, building services, and garment jobs in Los Angeles to largely nonunionized immigrant workplaces, see RUTH MILKMAN, L.A. STORY 77–113 (2006). Though not all Latinos are necessarily vulnerable immigrants, Saucedo notes that Latino workers are overrepresented in low-wage industries, such as construction, hospitality, and service. Saucedo, *supra* note 1, at 965. Latinos are the fastest-growing segment of the labor force today, increasing by one million workers in 2004 alone. *Id.* The very large majority of those workers were newly arrived immigrants. *Id.*

15. WALDINGER & LICHTER, *supra* note 3, at 141.

16. John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000).

17. *Id.*; *see, e.g.*, People v. Hall, 4 Cal. 399 (1854).

18. *See* WALDINGER & LICHTER, *supra* note 3, at 16.

19. *Id.*; *see also id.* at 17 ("Put somewhat differently, the qualities that make for good underlings may well preclude the potential for relationships of a more intimate sort . . . .").

instead hire those whom they perceive as very different from themselves and somehow more suitable for a particular job.

For instance, despite pervasive gender discrimination, employers historically (and presently) prefer women to fulfill specific jobs. As Alice Kessler-Harris demonstrates, throughout the early twentieth century, employers often preferred female labor because they could pay them a "wage deemed appropriate for female workers—not, that is to say, at the customary wage level of the occupation."[20] This favoritism of female workers and discrimination against men were associated with low wages and poor working conditions. Kessler-Harris remarks that "women lived in a world where unscrupulous employers did not hesitate to subject them to conditions 'akin to slavery' . . . [that] threatened [their] 'health and well-being.'"[21] Similarly, discrimination against men in nursing schools, according to Justice O'Connor's majority opinion in *Mississippi University for Women v. Hogan*,[22] only led to lower wages, stereotypes, and diminished prestige for female nurses.[23] This commonplace practice of hiring discrimination against men demonstrates that biases do not necessarily translate equally in personal and employment spheres. Instead, there may be preferences for certain workers who are traditionally disfavored in society, such as women, which frequently correspond with low wages and poor working conditions. A similar pattern operates with regards to vulnerable immigrant workers.

Within the context of low-wage employment, employers are generally looking for workers who are most susceptible to exploitation.[24] Because low-wage workers "have relatively few job-specific skills, employers often look for workers of a particular temperament rather than a specific set of skill characteristics."[25] This susceptibility to exploitation involves many dimensions. On one level, it means that an employer can pay the worker below the prevailing wage (or even below the minimum wage), subject him or her to arduous working conditions of forced extra hours, ignore hazardous health

20. ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS & SOCIAL CONSEQUENCES 15 (1990).

21. *Id.* at 43–44.

22. 458 U.S. 718 (1982).

23. *Id.* at 729–30. Justice O'Connor's opinion in part relied on findings from hearings before the U.S. Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination in 1980, in which officials of the American Nurses Association suggested that "excluding men from the field has depressed nurses' wages." *Id.* at 729 n.15. O'Connor noted that "to the extent the exclusion of men has that effect, [the university's] admissions policy actually penalizes the very class the State purports to benefit." *Id.*

24. WALDINGER & LICHTER, *supra* note 3, at 143.

25. DANIEL DOHAN, THE PRICE OF POVERTY: MONEY, WORK, AND CULTURE IN THE MEXICAN AMERICAN BARRIO 51 (2003).

conditions, and violate a plethora of other fair labor standards. Beyond accepting low pay and bad conditions, immigrant employees—according to employers in Waldinger and Lichter's study—are reliable, hard workers who do not complain. Thus, susceptibility to exploitation includes a quiet acceptance of such conditions. A worker must "know his or her place."[26] Employers are generally looking for workers who, once hired, will comply with what the manager dictates and "do the job as told, with the minimum amount of 'lip.'"[27] The business reasons for wanting employees who are most likely to "get the job done *on the employers' terms*"[28] are perhaps obvious. Employers then have more power over their workforce not just with regard to pay, but also in terms of reliable flexibility—control over hours, job responsibilities, and employment levels—which ensures that the workforce always meets their needs.

In addition to strict economic justifications, employers are also influenced by a desire to maintain social hierarchies, albeit often unconsciously.[29] Preferences for workers not only stem from who will do the job "better," but also from the well-understood social hierarchies that all members of a society are expected to recognize and uphold. Evelyn Nakano Glenn described occupational social hierarchies by analyzing the historical prevalence of minority women in domestic service work.[30] She described a process of social reproduction in which educational institutions, government programs, and dominant ideologies ascribe women of color the role of domestic service.[31] This social hierarchy "defined the proper place of these groups as in service; they belonged there, just as it was the dominant

26. WALDINGER & LICHTER, *supra* note 3, at 16.

27. *Id.* at 15.

28. *Id.* at 145.

29. For a discussion of unconscious racism and implicit bias, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

30. Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1 (1992).

31. *Id.* at 3, 11–13. Evelyn Nakano Glenn argues that society engages in social reproduction, broadly defined as "the creation and recreation of people as cultural and social, as well as physical, beings." *Id.* at 4. In this process, certain roles are ascribed to different classes of people. For example, Chicanas were ascribed to domestic service work, and thus, educational opportunities and state programs were targeted with this social hierarchy in mind. Urban schools in the Southwest targeted Chicana students for their homemaking skills, and unemployment programs during the Great Depression funneled women of color into domestic service jobs. *Id.* at 12.

group's place to be served."[32] Adhering to social hierarchies—embedded notions about the proper place for members of specific social categories—means that employers may not be propelled so much by who they like or dislike, but by their views about where particular categories of people "belong."[33]

Through network hiring[34] and discrimination, employers control the type of worker in a particular type of job. Consequently, many vulnerable immigrants are concentrated in low-wage industries where they "belong," such as food service, janitorial services, construction, and building trades.[35] For example, from 1970 to 2000, Ruth Milkman calculates that the percentage of janitors in Los Angeles who were foreign-born Latino rose from 10.3 percent to 63.4 percent.[36] Thus, the susceptibility to exploitation and reproduction of social hierarchies combine to create preferences for vulnerable immigrants in some low-wage industries, as well as discrimination against U.S. workers.

B. Employer Preferences for Vulnerable Immigrant Workers

That employers prefer vulnerable immigrant workers seems to be almost popular knowledge. Employers appreciate that immigrants will work for lower pay and perform jobs under worse conditions than U.S. workers, or so at least the common perception follows. But what is behind this perception of immigrant workers? Why are many vulnerable immigrant workers "suitabl[e] for subordination"[37] or at least perceived so by employers? This Subpart explains employer preferences for vulnerable immigrants by drawing on two overlapping theories: (1) legal vulnerability under U.S. laws; and (2) differing social institutions than those of U.S. workers. Unpacking the real and perceived differences between vulnerable immigrants and U.S. workers within these two theories demonstrates why employers prefer vulnerable immigrants for low-wage work. Because of a confluence of legal insecurity and different social institutions, vulnerable immigrant

32. *Id.* at 14. Similarly, Glenn notes that prototypic "dirty work" (maids, housemen, janitors, and cleaners) is usually filled by racial and ethnic minorities. *Id.* at 20.

33. WALDINGER & LICHTER, *supra* note 3, at 147.

34. Network hiring is when an employer finds new employees through the social or familial connections of the employees, rather than advertising the position publicly. For a discussion of the effects of network hiring, see WALDINGER & LICHTER, *supra* note 3, at 83–99, and Saucedo, *supra* note 1, at 976–77.

35. *See* MILKMAN, *supra* note 14, at 1, 7; Saucedo, *supra* note 1, at 978–79. Ironically, a few of these jobs—such as working in the back of a high-end restaurant—actually pay higher than civil service positions often filled by U.S. workers.

36. MILKMAN, *supra* note 14, at 108.

37. WALDINGER & LICHTER, *supra* note 3, at 143.

employees are constructed as hard workers, and preferable to lazy U.S. workers who have bad attitudes.

1. Legal Vulnerability

All workers, regardless of their immigration status, are protected by the Fair Labor Standards Act,[38] which is the federal law guaranteeing minimum wage and other basic labor protections.[39] However, because vulnerable immigrant workers have fewer legal rights in other areas of the law, they are more susceptible to exploitation than U.S. workers in several ways. First, they face deportation or other negative immigration consequences more easily than do U.S. workers.[40] Employers can call immigration authorities to report the presence of undocumented persons.[41] Those holding temporary work visas (H-2A or H-2B) are only permitted to work for the employer who sponsored the visa, and that employee can be terminated and deported, or not reissued a visa for the following year, all based on the employer's discretion.[42] Because of this precarious legal status, it may not

38. 29 U.S.C. § 201 (2000).

39. *See* EEOC v. Tortilleria "La Mejor," 758 F. Supp. 585, 590–91 (E.D. Cal. 1991). Also, all employees, regardless of their immigration status, have the right to organize. 29 U.S.C. §§ 157–158; NLRB v. A.D.R.A. Fuel Oil Buyer's Group, 135 F.3d 50, 56 (2d Cir. 1997) (overruled only to the issue of backpay). However, this right was recently limited by the U.S. Supreme Court. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). *Hoffman* threatens the undocumented worker's right to organize by holding that an undocumented worker could not receive backpay if illegally fired in retaliation for labor organizing. *Id.* at 140. Though it is unclear how broadly the *Hoffman* holding will be applied, at this point, it seems limited to the NLRB backpay context. *See, e.g.*, Rivera v. Nibco, 364 F.3d 1057, 1066–69 (9th Cir. 2004) (not extending *Hoffman* to Title VII cases); *see also* Saucedo, *supra* note 1, at 968–89 (discussing the *Hoffman* decision and newly arrived workers' fear of "rocking the boat").

40. Though not an issue for U.S. citizens, U.S. workers with legal permanent residence or temporary visa status may also fear deportation. They are subject to deportation for minor criminal or domestic abuse violations. Saucedo, *supra* note 1, at 970. Also, employers may confiscate their documents, or immigration authorities may mistakenly assume they are undocumented just because they work or live with other undocumented workers, or are of the same ethnicity. *See, e.g.*, S. Poverty L. Ctr., SPLC Sues Immigration Agency (Nov. 1, 2006), http://www.splcenter.org/legal/news/article.jsp?aid=221&site_area=1 (describing a Southern Poverty Law Center lawsuit against Immigration and Customs Enforcement (ICE) for unwarranted raids against citizens and noncitizens alike in Georgia alleging discrimination based on skin color). Though these immigrant workers may also fear deportation like undocumented workers, they are arguably not as vulnerable because they have legal status to be in the country.

41. Employers are shielded from the legal penalties associated with hiring undocumented workers by simply claiming they believed in good faith that the given documentation was authentic. Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workerforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2183 (1994).

42. For a discussion of deportation fear, see Saucedo, *supra* note 1, at 968–71.

be a wise strategy for many vulnerable immigrants to "rock the boat" at work by contesting wages or labor abuses.[43]

Moreover, vulnerable immigrant workers often lack the cultural capital to both understand their rights and know how to enforce them. Unlike many of their U.S. counterparts, especially citizens, they may not think they are afforded many workplace rights.[44] For those who understand their rights, some vulnerable immigrants (often with family abroad expecting financial support) may be reluctant to risk losing their jobs, even if they could potentially win a lawsuit down the line.[45] This cautiousness is compounded by the fact that many vulnerable immigrants may have difficulty finding new jobs because of their visa status, or their lack of English proficiency.[46] Moreover, most vulnerable immigrants are ineligible for public benefits, such as welfare or unemployment insurance, which would be crucial to temporarily sustaining their living if they were fired and had to search for another job.[47]

These circumstances combine to create a "particularly constricted set of choices"[48] for vulnerable workers. For many, coming to the United States may be more accurately described as a traditional aspect of transnational household survival, as much abiding by obligation as choosing a strategy from a range of selections. Indeed, this disadvantage appears in undocumented workers' paychecks. Even empirical research that controls for education level, time in the United States, and English proficiency demonstrates that undocumented immigrants earn over 40 percent less than their legal counterparts.[49] Thus, legal

43. For a discussion of the problems immigrants face under the constant threat of deportation, see Foo, *supra* note 41, at 2183.

44. Saucedo, *supra* note 1, at 966.

45. Often, by the time employees speak up, "it is too late and their employer has disappeared with their hard earned wages." Foo, *supra* note 41, at 2184. Thus, collections is a major issue, particularly in industries such as the garment trade, in which employers close and open under a new name and may be hard to track.

46. These concerns, of course, are not limited to undocumented or visa workers. As Lora Jo Foo writes, "conditions for legal immigrants and U.S. citizens with limited English-speaking skills have also worsened." *Id.* at 2184. She argues that in tough economic times, unskilled workers with language barriers "fear, quite realistically, that no other job will be waiting for them," and thus are reluctant to stand up to employers. *Id.*

47. Though undocumented immigrants have the least access to public benefits, many legal permanent residents are also ineligible to receive federal income support benefits, such as welfare and food stamps, depending on their date of entrance into the country, how long they have had their residency status, and other factors. For a breakdown of immigrant eligibility for federal benefits as updated to 2005 laws, see NAT'L IMMIGRATION L. CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS, at tbl.1 (4th ed. 2002), http://www.nilc.org/pubs/guideupdates/tbl1_ovrvw_fed_pgms_032505.pdf.

48. Saucedo, *supra* note 1, at 971.

49. Francisco L. Rivera-Batiz, *Undocumented Workers in the Labor Market: An Analysis of the Earnings of Legal and Illegal Mexican Immigrants in the United States*, 12 J. POPULATION ECON. 91, 111 (1999).

vulnerabilities related to both one's risk of deportation and ability to sustain oneself if discharged are crucial to understanding why vulnerable immigrant workers are susceptible to exploitation, and, thus, why there are employer preferences for vulnerable immigrant workers.

The legal insecurity of vulnerable workers stands in contrast to U.S. workers who do not face the threat of deportation and may be better able to sustain the risks of losing a job because of government benefits and perhaps an ability to switch jobs more easily. Because of their protected status, U.S. workers may be less tolerant of exploitative jobs and employer demands. For example, Daniel Dohan's ethnographic study described U.S. workers who quit their jobs because they felt as though their rights were being violated.[50] Similarly, Carol Cleaveland examined work refusal among low-income women in Philadelphia. She demonstrated that many of the women had confrontations with authority figures at various job sites due to the resentment of the subservience often demanded of workers in the lowest tiers of the primary economy.[51] Employers, however, may translate U.S. workers' assertion of their rights as talking back, laziness, or bad attitudes,[52] further justifying their preference for vulnerable immigrants.

Though real legal distinctions between vulnerable immigrants and U.S. workers impact employer preferences, the *perception* of legal vulnerability, shared by employers and employees alike, is also crucial to understanding employer preferences. On one hand, vulnerable immigrant employees may not think they have any rights despite fair labor standards that do offer them protection. On the other hand, some employers perceive all vulnerable immigrants as exploitable, even though some may in fact be more prone to unionization or protest than other workers.[53] According to Waldinger and Lichter, employers use "statistical discrimination" to select workers.[54]

50. DOHAN, *supra* note 25, at 69 (stating that in the second-generation neighborhood, "some workers who abruptly quit jobs following disputes or mistreatment explained these job-quits as an individual decision to stand up to unfair treatment"); *see also* WALDINGER & LICTER, *supra* note 3, at 161 (quoting employers who complain that U.S. workers are too concerned with their rights, and thus prefer vulnerable immigrants to avoid "problems managing the workers").

51. Carol Cleaveland, *A Desperate Means to Dignity: Work Refusal Amongst Philadelphia Welfare Recipients*, 6 ETHNOGRAPHY 35 (2005).

52. *See, e.g.*, WALDINGER & LICHTER, *supra* note 3, at 159–61.

53. Ruth Milkman argues that "[t]here are at least three reasons why immigrant workers may be easier to organize than their native-born counterparts": the presence of stronger social networks among immigrants, the class-based collective organizations that may be more compatible with the lived experience of immigrants, and the shared experience of stigmatization among immigrants that helps form a sense of unity. MILKMAN, *supra* note 14, at 133. Moreover, employers may perceive all "foreign"-sounding and -looking persons to be legally vulnerable, when, in fact, they are citizens with full legal rights. *See* discussion *supra* note 9.

54. WALDINGER & LICHTER, *supra* note 3, at 151.

While employers are looking for the most subservient workers, they actually select workers on "the basis of other traits that *seem* correlated with the [preferred] characteristics."[55] They cannot screen directly for one's reluctance to report labor abuses or one's increased valuation of the dollar. So, instead, employers often use proxies and social hierarchies to screen for those they think will have a favorable cultural background and be legally vulnerable.[56] These proxies may have a strong basis in actual differences between groups of workers due to legal or social distinctions. But, for many employers, "[w]hat counts is the average, which produces a reasonable prediction, more cost-effective than carefully scrutinizing every applicant."[57] According to this theory, employers use immigration status as a proxy for workers' attitudes toward authority and largely disregard that there are variances between vulnerable immigrants and their attitudes towards low-wage work. Employers generally perceive vulnerable immigrants as susceptible to exploitation, and hire accordingly.

Recognizing this perception of vulnerability in immigrant workers is key to understanding how to remedy employer discrimination against U.S. workers. If legal vulnerability itself were the sole problem, then increasing the rights of undocumented and visa workers would help curb employer preferences for such workers. However, because employers often assume all persons from a given ethnic group or those who do not have specific documentation will be "willing subordinates," remedies need to focus not just on increasing and enforcing existing rights, but also on decreasing what appears to have become routine discrimination.

2. Social Institutions

Employer power, through the threat of deportation or job loss, operates within a worker's specific social context. This social context frames an employee's response to such looming threats, low wages, and harsh working conditions. Therefore, another key to understanding vulnerable immigrants' susceptibility to employer exploitation is the different social institutions that shape their response to the workplace. As recognized by several sociologists, the stigmatized status and harsh conditions of bottom-level work impinge differently on vulnerable immigrant workers who operate within transnational social institutions.[58] Waldinger and Lichter explain that

55. *Id.* at 150.
56. *See id.* at 150–51.
57. *Id.* at 151.
58. *See, e.g.*, DOHAN, *supra* note 25, at 216–18; WALDINGER & LICHTER, *supra* note 3, at 9.

"immigrants, who operate with a dual frame of reference, judg[e] conditions 'here' by the standards 'back home.' As long as the comparison remains relevant, low-status—indeed disreputable—work in an advanced capitalist society like the United States does not rate too badly."[59] But as Dohan demonstrates in his study, it is not just the transnational comparison, but also the social institutions that develop within vulnerable immigrant communities in the United States, that help form vulnerable immigrant workers' strategies for approaching low-wage work, making these workers more susceptible to exploitation.[60]

Dohan conducted an ethnographic study in which he examined individuals' relationships with low-wage work in two settings: a community of first-generation Mexican immigrants, and a largely second-generation Latino neighborhood.[61] Dohan's analysis demonstrates that social institutions—such as social networks, income-earning opportunities, and measures of success—"mediate labor market attachment in low-income areas."[62] Different social institutions in each of these communities led to "different understandings of the meaning of the [low-wage] jobs residents found."[63] In the community of first-generation (largely undocumented) immigrants, workers operated within transnational social networks in which they were "[e]mbedded in ongoing interactions with friends and relatives in Mexico through reminiscences, visits, phone calls, and letters . . . ."[64] Within this context, residents saw low wages as relatively valuable; each dollar remitted has more value in Mexico than the United States. Thus, "[i]n contrast to the economic impotence of low wages in mononational communities, the value of the dollar conferred by transnationality made low wages economically sensible to many residents of immigrant communities."[65] In addition, Dohan described how the migration experience itself provided a sense of mobility and advancement that can counterbalance the feeling of being stuck in a low-wage job.[66] Therefore, vulnerable immigrant "workers can object to specific aspects of lousy jobs—the low pay, unpredictable hours, dangerous working conditions, and

59. WALDINGER & LICHTER, *supra* note 3, at 9.
60. DOHAN, *supra* note 25, at 216–18.
61. For a broad description of the two communities in which Daniel Dohan conducted participant observation, see *id.* at 4–9.
62. *Id.* at 27.
63. *Id.*
64. *Id.* at 13.
65. *Id.* at 91.
66. *Id.* at 93.

mistreatment from bosses or customers—without condemning the desirability or necessity of work per se."[67]

In contrast, native-born, second-generation Latinos in Dohan's study mainly operated within a purely local context and thus viewed low-wage work differently. Dohan stressed that low-wage jobs were not only the primary means of income generation, but also the central organizing principle for home and social life in the second-generation community.[68] However, because of different social orientations, such jobs had different meaning within the second-generation community. U.S. workers spend dollars only in the United States and find it difficult to gain any mobility through low-wage work. Therefore, Dohan observed that they combined low-wage work with economic opportunities that may not be legally or socially available in first-generation communities, such as welfare or illicit trade.[69] Moreover, for U.S. workers, Dohan found that "[e]veryday interactions within the community affirmed that clothing, cars, and other material possessions were relevant signs of success and that moving out of the projects and into private housing was success's lasting measure."[70] A strategy of overwork in low-wage jobs allowed vulnerable immigrants to be successful by sending money home. However, in U.S. worker communities, low-wage work could not yield success as measured by abundant material possessions, so workers did not consistently remain in low-wage jobs. While second-generation employees applied to the very same jobs as their first-generation counterparts, they approached the jobs differently and were not as likely to stay in the job.[71] Instead, many bounced between jobs looking for chances at mobility, and turned to alternative sources of income.[72]

In sum, because of different social institutions, U.S. workers view low-wage jobs as stationary and fraught with compromises. But to vulnerable immigrants,

67. *Id.* at 67.
68. *Id.* at 66.
69. *Id.* at 82.
70. *Id.* at 89.
71. *Id.* at 36.
72. *Id.* at 88–89. Dohan describes the different strategies toward income generation as "overwork" for first-generation immigrants and "hustling" for second-generation immigrants. Overwork involves working as many hours as possible in low-wage jobs. *Id.* at 81. Hustling involved bouncing between jobs and other economic opportunities looking for advancement. *Id.* Given the different social institutions operating within these two communities, "hustling and overwork not only made sense *given* the opportunity structure but also made sense *of* prevailing orientations about the meaning of economic advancement." *Id.* at 82. Of course, there are first-generation immigrants who "hustle" and later-generation immigrants who "overwork," but Dohan demonstrates a general trend.

similar jobs represent a "difficult but sensible path toward higher status."[73] Given their different social institutions, vulnerable immigrant workers may be more willing to tolerate exploitation, and thus are preferred by employers. On the other hand, employers may see second-generation workers as unreliable or lazy, because they do not as exclusively commit to low-wage work as a strategy for achieving success.

As with legal vulnerability, employer perceptions of a worker's cultural perspective are also in play. Though many vulnerable immigrant workers experience these transnational social institutions, employers perceive vulnerable immigrants as those who assess the situation relative to economic conditions "back home," regardless of whether they actually do.[74] The practice of paying workers based on an idealized version of what one needs or deserves is embedded in U.S. social history and is elucidated through the example of women's wages. According to historian Kessler-Harris, employers assumed that working women lived in families in which they were largely supported by male income. Kessler-Harris noted that "'[i]t profited employers to use this idealized version of the family economy to determine women's wages.'"[75] Beyond reliance on family, employers paid women less because they had a sense that women were able to live with less resources. Quoting one advocate of the living wage, Kessler-Harris writes, "The living wage for a woman is lower than the living wage for a man because it is possible for her as a result of her traditional drudgery and forced tolerance of pain and suffering to keep alive upon less."[76]

The same idealization of the durability and the necessities of women occurs within the context of vulnerable immigrant workers. Employers rationalize their treatment of vulnerable immigrant workers by thinking an immigrant's "dual frame of references puts America's low wages sector in a remarkably favorable perspective."[77] In the case of both women and vulnerable immigrants, there are some social differences between them and the dominant group (men and U.S. workers, respectively). Many women

73. *Id.* at 71.

74. WALDINGER & LICHTER, *supra* note 3, at 179.

75. KESSLER-HARRIS, *supra* note 20, at 15 (quoting JOANNE J. MEYEROWITZ, WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO 1880–1930 33 (1988)). Alice Kessler-Harris argues that one can look at the wage "for meanings that transcend the economists' models. . . . [T]he wages is [sic] neither neutral nor natural but rather contains within it clues to how the laws of economists manifest themselves in the real worlds of human relationships, political compromise, and social struggle." *Id.* at 2.

76. *Id.* at 11 (quoting Kellogg Durland, *Labor Day Symposium*, 12 AM. FEDERATIONIST 619 (1905)).

77. WALDINGER & LICHTER, *supra* note 3, at 179.

may have been supported by a father or a husband, just as many immigrants are sending money home to the developing world.[78] However, any generalized differences between marginalized and dominant groups (whether between women and men or vulnerable immigrants and U.S. workers) does not cleanse employers of responsibility to pay their employees a fair wage for the work they do. While different social perspectives may make vulnerable immigrants more likely to stay in dead-end, low-wage jobs, employers are also unjustly bootstrapping on these differences to justify why they exploit their workers. That is, employers justify paying less by conveniently assuming that first-generation immigrants are sending most of their wages to the developing world. Ironically, if an employer assumes its employees are sending money home, it would logically follow that they need higher wages, to both support themselves in the United States and send remittances. However, as with women, employers' cultural conception of vulnerable immigrant workers must also include the perception that they need less than others to survive.

Moreover, employer perceptions of U.S. workers, particularly African Americans, contribute to their preference for vulnerable workers. Dohan demonstrates that for U.S. workers, it may not be sensible to toil in dead-end jobs,[79] but employers may interpret short tenure in a given job as laziness and unreliability. While U.S. workers are thinking about advancing within U.S. social norms, employers perceive them as having too high of expectations for mobility at work, and as wanting rewards without hard work.[80] Thus, employers sometimes translate assertions for increased pay or other improvements as "whining," "attitude," and low work ethic.[81]

Negative perceptions of African Americans are perhaps even more salient than critiques of the "American" worker. According to Lawrence Bobo, new "laissez-faire racism" perpetuates the idea that "blacks violate such traditional American values as individualism and self reliance, the work ethic, obedience, and discipline."[82] In addition, images from the Black Power and "gangsta" rap movements merge with embedded stereotypes, leading employers to identity African Americans with opposition to authority—the precise trait against which they are selecting.[83] Thus, it is

78. *Id.*
79. DOHAN, *supra* note 25, at 82.
80. *Id.* at 158, 161. Waldinger and Lichter also observe that employers complained less about U.S. workers' work ethic when the job included a ladder and opportunities for advancement. *Id.* at 159.
81. *Id.* at 158.
82. *Id.* at 169.
83. *Id.*

not just the different social institutions vulnerable immigrants and U.S. workers bring to the workplace that differentiates their orientation to low-wage work. While first-generation immigrants and U.S. workers may see jobs differently as per their different social institutions, employers' idealized perceptions of both immigrant and native culture also contribute to preferences for vulnerable immigrant workers.

C. The Economic Impact of Immigration on Low-wage U.S. Workers

The social processes just described are problematic not only because they stereotype both vulnerable immigrants and U.S. workers, promote racialized workplaces, and foster employer discrimination, but also because they have material effects on U.S. low-wage earners. As described above, in the low-wage context, employers are not looking for workers they personally like, but, instead, for those who will be willing subordinates at work. Vulnerable immigrants may fill this preferred category because they have fewer legal protections and bring a different social perspective to their job. Moreover, employer perceptions about the differences between vulnerable immigrants and U.S. workers foster a construction of the hard-working, subservient, first-generation immigrant versus the lazy, insolent U.S. worker. Employers then use immigration status as a signal for a worker's attitude toward low-wage work and susceptibility to exploitation, making immigration status a salient demarcation upon which discrimination proceeds. This discrimination has material effects for low-wage U.S. workers who are often rejected in this scheme.

Over strong disagreement, many social scientists have concluded that immigration has been positive for the U.S. economy when viewed in aggregate.[84] Regardless of this net positive, most social scientists also acknowledge that immigration has had some negative effects on low-wage, native-born workers, particularly African Americans. Economic research published by the National Bureau of Economic Research estimated that immigration in the 1990s depressed wages of American-born high school dropouts by 2.4 percent.[85] A letter from five hundred economists to the U.S. Congress conceded that the upper tiers benefit from immigration,

84. Though not all economic analysts agree, most see overall positive economic benefits of immigration. For a discussion of various studies, see Virginia Postrel, *Yes, Immigration May Lift Wages*, N.Y. TIMES, Nov. 3, 2005, at C2 (reporting on a University of California at Davis study that "estimates immigration in the 1990s increased the average wage of American-born workers by 2.7 percent"), and David Streitfeld, *Illegal but Essential?*, L.A. TIMES, Oct. 1, 2006, at A1.

85. Postrel, *supra* note 84, at C2.

and the lower tiers lose.[86] In regard to African American workers specifically, data from Los Angeles indicate that "immigration may harm the most vulnerable African Americans and yet yield no net negative [or positive] effect on Los Angeles's African Americans as a whole."[87]

Various scholars argue that immigration is not the cause of depressed wages, but rather fault employer economic restructuring. Ruth Milkman, for instance, argues that many low-wage industries began restructuring in the late 1970s to avoid unionization, depress wages, and increase labor flexibility.[88] These changes, according to Milkman, caused low-wage native workers to find new jobs, and their old positions—now deunionized, less lucrative, and less reliable—were filled by vulnerable immigrant workers.[89] Therefore, employers, rather than the presence of immigrants, effected the change in the labor market and job structure. However, the presence of vulnerable immigrants enabled employers to do such restructuring.[90] Moreover, even under this approach, low-wage U.S. workers, particularly African Americans, are squeezed into a smaller number of industries. As Waldinger and Lichter describe, African Americans "find themselves squeezed into a narrow and shrinking segment of the labor market where competence in basic skills—literacy, numeracy, and communication—is a must, and the rewards of the work are consistent with the expectations entertained by most native workers."[91]

The preceding analysis of employer preferences combined with these studies negate the assertion that vulnerable immigrants simply "converge on jobs so unpleasant" or stigmatized that U.S. workers will not even apply.[92] Instead, employer preferences for the most exploitable workers place all low-wage workers in a difficult position that is mediated by legal status, social institutions,

86. Streitfeld, *supra* note 84, at A1; *see also* MILKMAN, *supra* note 14, at 105 (citing George Borjas's study that attributed a large share of the recent growth in U.S. income inequality to immigration).

87. WALDINGER & LICHTER, *supra* note 3, at 209.

88. MILKMAN, *supra* note 14, at 8–9.

89. *Id.* at 9. Milkman writes:

> Contradicting the claims of some commentators that the influx of impoverished immigrants precipitated the deterioration of wages, benefits, and working condition in blue-collar jobs . . . the timing suggests that the causality runs the opposite direction: immigrants were hired mainly *after* the jobs in question had been degraded by deunionization and restructuring.

Id. Thus, when native-born workers abandoned their formerly unionized jobs in such industries as trucking, residential construction, building services, and garments, employers turned for replacements to the vast new supply of foreign-born workers, mostly from Mexico and Central America. *Id.* at 8–9.

90. Indeed, Saucedo argues that employers explicitly predetermine the "ethnic composition of their workforces" by setting pay rates and working conditions. Saucedo, *supra* note 1, at 973. Though, unlike Milkman, she argues that once brown-collar workers occupy a job, employers will then "devalue the position and its function, pay rate, terms and conditions, and advancement ladder." *Id.* at 975.

91. WALDINGER & LICHTER, *supra* note 3, at 216.

92. *Id.* at 210.

and stereotypes. Immigration status is one of a myriad of factors that influence employment decisions,[93] leading many employers to actively discriminate against U.S. workers in low-wage work, and confining many vulnerable immigrant workers to jobs wrought with labor violations. Thus, it is crucial to understand how to remedy this discrimination against U.S. workers in a way that increases the power and the position of all low-wage employees.

II. LEGAL REMEDIES FOR U.S. WORKERS FIGHTING DISCRIMINATION

Discrimination based on immigration status holds a precarious place in current legal jurisprudence.[94] Traditional civil rights laws protect persons from discrimination based on race, color, religion, sex, or national origin.[95] While discrimination against U.S. workers or vulnerable immigrant workers may sometimes fit into this standard rubric,[96] these categories fail to recognize that immigration status itself is an axis upon which discrimination occurs.[97] For example, racial discrimination claims may not restrict employer preferences for black Dominican temporary visa workers over native African Americans.[98]

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93. *See* discussion *supra* note 9.

94. After surveying multiple antidiscrimination statutes that consider alienage and citizenship status discrimination, Mack Player demonstrates that "[d]espite all of these overlapping statutory protections, serious gaps still exist, particularly with respect to discrimination against aliens based on lack of citizenship." Mack A. Player, *Citizenship, Alienage, and Ethnic Origin Discrimination in Employment Under the Law of the United States*, 20 GA. J. INT'L & COMP. L. 29 (1990). As discussed later in this Part, some antidiscrimination statutes seem to recognize alienage discrimination (at least as interpreted by some circuit courts), while others do not.

95. See, for example, section 703(a)(2) of Title VII which prohibits employment discrimination "because of [an] individual's race, color, religion, sex, or natural origin." 42 U.S.C. § 2000e-2(a)(2) (2000).

96. Some cases in which employers hire vulnerable immigrants and discriminate against U.S. workers do cut across race or national origin lines. For example, in Washington, a group of U.S. workers, including Hispanics, sued Global Horizons, Inc. for denying them jobs and illegally firing them in favor of visa workers from Thailand. Perez-Farias v. Global Horizons, Inc., No. CV-05-3061-MWL, 2006 WL 2129295, at *8 (E.D. Wash. July 28, 2006).

97. *See* Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 514 (2003) ("But why does law not provide full legal protection to immigrants, undocumented, temporary, or otherwise, on the basis of their *immigration status*?").

98. See Banks, *supra* note 8, at 1726–28, for a discussion of how the courts have treated claims of discrimination between groups of blacks based on different shades of skin color or different nationalities. Taunya Banks's analysis demonstrates that courts are unwilling to recognize race discrimination under § 1981 for claims between blacks from different nationalities who have different skin tones. *Id.* at 1727. For example, in *O'Louglin v. Procon, Inc.*, the plaintiff, a black Cuban, lost in part because he could not demonstrate that there were racial slurs made against other blacks at his workplace. 627 F. Supp. 675, 678 (E.D. Tex. 1986). The court failed to recognize that because the plaintiff was black and Cuban, he may have been "differently racialized" than black Americans and, thus, denied a claim under § 1981. *Id.* at 1726. Therefore, Banks argues that the "government's definition of the racial category black impedes recognition by courts that black people can be differently racialized." *Id.* at 1711.

Neither national origin nor race claims can shield a Mexican legal permanent resident from employer preferences for undocumented Mexican immigrants.[99] Ruben Garcia argues that the law should not merely conflate existing paradigms of race or national origin to protect immigrants.[100] Operating only within race or national origin categories makes immigrants invisible, and is further problematic because the categories are socially constructed and shift over time. Garcia questions, "[i]f courts someday should find Latinas/os or Asians actually 'white,' what protections will remain for the immigrant excluded or attacked as a 'wetback' or as 'illegal'?"[101] Thus, the changing dynamics of the U.S. workforce render race and national origin categories insufficient for addressing employment discrimination. Additionally, these changing dynamics challenge present antidiscrimination law to account for the saliency of immigration status (and perceived immigration status[102]) in employment decisions.

Current legal scholarship about alienage discrimination almost exclusively assumes the perspective of bias against immigrants.[103] Leticia Saucedo's article does directly explore employer preferences for "brown collar"

99. Because both the plaintiff and the defendant in this scenario were born in Mexico and have Mexican national origin, it may be hard to bring a national origin claim. However, if the plaintiff were a different race (such as Afro-Latino), then the court may be more likely to recognize a racial discrimination claim. *See* Banks, *supra* note 8.

100. Garcia, *supra* note 97, at 537 (concluding that "[t]he bottom line is that current race and national origin paradigms in antidiscrimination law fail to appreciate animus against immigrants not only because of the color of their skin, *but because they are immigrants*").

101. *Id.* at 533–34.

102. *Id.* at 535–36.

103. *See, e.g.*, *id.* at 533 (arguing for the recognition of immigration status as a protected category in antidiscrimination law because current doctrine drives wedges between marginalized groups and "avoids coming to grips with the historical and present xenophobia against newcomers or those whom we perceive as outsiders to our community," and stating that "the failure to see immigrant discrimination on its own ultimately has deleterious effects on all outsiders"); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1506 (2002) (recognizing that because today's immigrants are people of color, civil rights remedies must adapt to ensure that discrimination on the basis of citizenship does not effectively mask unlawful racial discrimination); Saito, *supra* note 9, at 315–16 (proposing that the law needs to contemplate discrimination based on the presumption of "foreignness" ascribed to those of Asian descent in the United States); Eric J. Smith, *Citizenship Discrimination and the Frank Amendment to the Immigration Reform and Control Act*, 35 WAYNE L. REV. 1523, 1545 (1989) (discussing the potential impact of the Frank Amendment on immigrant populations and concluding that "[d]espite the Frank Amendment, many categories of legal aliens remain vulnerable to discriminatory employment practices"). *But see* Saucedo, *supra* note 1 (drawing on sociology to demonstrate preferences for "brown collar" workers); Elisabeth J. Sweeney Yu, *Addressing the Economic Impact of Undocumented Immigration on the American Worker: Private RICO Litigation and Public Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 909, 934 (2006) (suggesting that the Racketeer Influenced and Corrupt Organizations Act (RICO) is "an available and effective mechanism that can achieve some of the aims of political policy proposals" that attempt to protect U.S. worker jobs from undocumented workers).

immigrant workers.[104] However, she is also primarily concerned with discrimination against immigrants.[105] This literature exploring discrimination against immigrants is not incompatible with recognizing discrimination against U.S. workers.[106] Yet, focusing solely on the immigrant's perspective fails to address how antidiscrimination provisions may function differently for U.S. workers than for vulnerable immigrant workers. Therefore, in this Part, I provide such an analysis by examining the way three federal employment discrimination statues operate with respect to protecting U.S. workers from immigration status discrimination.

Thus far, several cases have challenged the bias against U.S. workers under these statutes, but few have been successful.[107] The first part of this analysis examines the antidiscrimination provision of the IRCA.[108] Though U.S. workers have successfully filed lawsuits under this statute, it

104. Saucedo, *supra* note 1.

105. *Id.* Saucedo argues that courts should interpret Title VII in accordance with an antisubordination principle that cognizes deskilling and degrading immigrants' jobs as discrimination. *Id.* at 70–72.

106. *See* Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63 (2002). As Noah Zatz demonstrated, employment discrimination jurisprudence largely assumes a "zero-sum game," in which there is workplace competition between distinct, opposing groups. This model "render[s] nonsensical any simultaneous discrimination against members of more than one 'opposed' group: if there is discrimination against women then there can be no discrimination against men." *Id.* at 69. However, Zatz demonstrated how discrimination can occur against both "in" and "out" groups in a given workplace, as a "single set of employment practices could discriminate against members of different racial and sexual groups, especially against persons of the same race or sex as those perpetrating the discrimination." *Id.* at 80. Thus, there can be discrimination against both U.S. workers and vulnerable immigrants arising out of the same hiring and job structuring practices. And a hiring preference for immigrants can coexist with other discrimination against them.

107. Two examples of strong claims of U.S. workers against immigration status discrimination are *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975), and *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981). In *Lopez*, U.S. worker plaintiffs claimed that the ranch hired undocumented workers so they could not secure jobs as farmworkers. 523 F.2d. at 926. The court held that the plaintiffs had no right under the Civil Rights Act to be free from discrimination based on alienage. *Id.* at 927. Similarly, in *Rios*, the court held that aliens were only protected against discrimination unlawful under § 1981, and that alienage itself not is covered under § 1981. 530 F. Supp. at 360–61. Although these cases were not successful, the law has changed since these claims where made (as I discuss later in Part II.C), so perhaps they would have a better chance today. However, since the laws have changed, there have not been many U.S. worker cases that courts have found meritorious. *See, e.g.*, Camara v. Schwan's Food Mfg., Inc., No. Civ. A. 04-121-JGW, 2005 WL 1950142, at *4 (E.D. Ky. Aug. 15, 2005); Holguin v. Dona Ana Fashions, 3 OCAHO 582, 1993 WL 595730 (Dec. 1, 1993); Hensel v. Okla. City Veterans Affairs Med. Ctr., 3 OCAHO 532, 1993 WL 403085 (June 25, 1993). *But see* Iron Workers Local 455 v. Lake Const. & Dev. Corp., 7 OCAHO 964, 1997 WL 1122231 (Sept. 12, 1997).

108. 8 U.S.C. § 1324b (2000).

only provides limited means for remedying employer discrimination.[109] The second part briefly questions if Title VII,[110] a more effective means of fighting workplace discrimination, can be employed to protect some native-born U.S. citizen workers. Finally, the third part argues that § 1981 should be used as a tool for fighting employer preferences for legally vulnerable immigrant workers. By analogy to reverse race discrimination, § 1981 can probably be used in most circuits to remedy private alienage discrimination against U.S. workers. Though these strategies are not the only legal means of combating low-wage employers' preferences for vulnerable alien workers,[111] they are important tools that U.S. workers can use to fight discrimination, and that worker advocates can use to fight a more nuanced battle against workplace exploitation.

A. IRCA's Antidiscrimination Provision: A Successful but Incomplete Remedy

The IRCA is a legal tool U.S. workers can use to challenge preferences for vulnerable alien workers, but its effectiveness is severely limited by its administrative nature.

1. IRCA's Protection Against Citizenship Discrimination

IRCA contains a provision, codified in 8 U.S.C. § 1324b, that expressly prohibits employer discrimination based on "citizenship status." The act declares:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien . . .) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment (A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status.[112]

109. *See, e.g., Iron Workers Local*, 1997 WL 1122231, at *53.
110. 42 U.S.C. § 2000e-2(a)(2) (2000).
111. Alternative strategies and the limitations of the approach promoted in this Comment are briefly mentioned in Part II.D.
112. 8 U.S.C. § 1324b(a)(1).

This provision reflects Congress's concern that as a result of IRCA's sanctions for hiring undocumented persons,[113] employers would discriminate "against non-citizens, ethnic minorities, or anyone perceived by an employer as looking or sounding 'foreign.'"[114] Because existing federal statutes failed to prohibit discrimination based on citizenship, Congress passed the Frank Amendment (later codified as § 1324b), which created an administrative remedy for addressing both national origin and citizenship discrimination.[115]

Despite the primary intent of this provision, U.S. workers clearly fall within the act's coverage. Courts have consistently held that § 1324b protects native-born U.S. citizens even though they were not the act's primary target.[116] The plain language of § 1324b protects citizens from discrimination based on citizenship status. Additionally, though the statute protects against "citizenship status" discrimination, courts[117] have interpreted it to guard all "protected individuals" from discrimination based on their immigration status; thus, § 1324b can recognize claims between two noncitizens.[118] "Protected individuals" are defined as citizens,

113. *Id.* § 1324a (stating that it is unlawful for a person or other entity to hire an alien "knowing the alien is an unauthorized alien" or "to continue to employ the alien knowing the alien is (or has become) an unauthorized alien with respect to such employment").

114. Lucas Guttentag, *Immigration-Related Employment Discrimination: IRCA's Prohibitions, Procedures, and Remedies*, 37 FED. B. NEWS & J. 29, 29 (1990). For cases explaining the purposes of the act, see *United States v. General Dynamics Corp.*, 3 OCAHO 517, 1993 WL 403774, at *4 (May 6, 1993), and *Nguyen v. ADT Engineering, Inc.*, 3 OCAHO 489, 1993 WL 404261, at *5 (Feb 19, 1993).

115. *In re* Charge of Rosita Martinez v. Marcel Watch Corp., 1 OCAHO 143, 1990 WL 512157, at *2 (Mar. 22, 1990) (extensively citing the legislative history surrounding § 1324b, including the concern that after *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), discrimination based on citizenship or alienage was not legislatively prohibited); *see also* Smith, *supra* note 103, at 1532–36. In addition, § 1324b extends the scope of workplace protection because it applies to all employers with four or more employees. Lucas Guttentag writes, "[a]s a result of [§ 1324b], the percentage of American employers covered by federal antidiscrimination laws has been increased from approximately thirteen percent to forty-eight percent, and a speedy and less expensive administrative remedy has been instituted." Guttentag, *supra* note 114, at 29.

116. *See, e.g.*, United States v. McDonnell Douglas Corp., 2 OCAHO 351, 1991 WL 531842, at *8 (July 2, 1991) (according to the administrative officer: "Although I agree that native born American citizens were not the primary target of protection in the enactment of IRCA, I disagree with the implication that they are not protected. The plain language of the statute states, without qualification, that U.S. citizens are within the protected class. . . . I have come to appreciate that some employers do seek out a foreign work force").

117. The administrative court that has jurisdiction over § 1324b claims is the Office of the Chief Administrative Hearing Officer (OCAHO).

118. Administrative law decisions demonstrate that § 1324b transcends discrimination based on the citizen-alien distinction and recognizes discrimination between different alien groups. As noted above, employers do not necessarily discriminate between citizens and noncitizens. For example, employers may prefer to import visa workers through the labor certification process instead of hiring U.S. workers, including noncitizen permanent residents. In examining the

lawfully admitted permanent residents, refugees, asylees, and temporary residents admitted under § 1160(a) or § 1255(a)(1).[119] While this definition may be detrimental to some immigrants, such as temporary guest workers or others not included in this list, IRCA's status requirements are not a hindrance to U.S. workers (citizens, legal permanent residents, and others with more stable resident status).

IRCA's § 1324b protection of U.S. workers makes it one cause of action that a U.S. worker may bring to challenge employer partiality for vulnerable immigrants. However, despite the availability of § 1324b for U.S. workers, there are severe limitations to using this provision to address employers' attraction to exploitable immigrant labor, and only a few cases have successfully challenged such preferences.[120]

2. Limitations of Using IRCA to Redress Discrimination Against U.S. Workers

There are several aspects of § 1324b which profoundly inhibit U.S. workers' ability to effectively utilize it to combat discrimination.

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relationship between the visa program and § 1324b, Andrew Strojny recognizes that even noncitizen U.S. workers have a remedy against abuse of the visa program. Andrew M. Strojny, *The Interplay Between IRCA's Antidiscrimination Provision and the H-2 Visa Process*, 70 INTERPRETER RELEASES 1025, 1032 (1993). According to Strojny, under IRCA, "protected individuals" are "U.S. citizens, nationals, permanent residents, temporary residents, refugees, and asylees . . . who can show they had applied for the temporary jobs in question before the labor certification was granted or renewed, were qualified for the jobs, and were rejected by the company" that instead hired H-2 visa workers. *Id.* In addition, a few administrative law cases have applied § 1324b to protect noncitizen U.S. workers, such as legal permanent residents, from companies favoring other types of immigrant workers. For instance, in *United States v. General Dynamics Co.*, the court held that a company could not hire visa workers over a group of both citizen and noncitizen legal workers. 1993 WL 403774. Though the court did not address the issue of intra-alien discrimination directly, the court's holding gave a legal permanent resident a cause of action against another alien worker (a visa holder) under § 1324b. *Id.*; *see also Nguyen*, 1993 WL 404261, at *5 (deciding a case alleging discrimination by a corporation against a student with a visa, the administrative law judge concluded: "I disagree with [the corporation's] contention that IRCA fails to reach claims of discrimination as between non-citizens").

119. 8 U.S.C. § 1324b(a)(3) (2000). To be a "protected individual," one does not need to make a declaration of intending citizenship, but if one fails to apply for naturalization within six months of when one becomes eligible, or has applied but has not been naturalized within two years, then one can no longer assert a claim under § 1324b. *Id.*; *see* 3 C.J.S. *Aliens* § 63 (2003).

120. *See, e.g.*, Iron Workers Local 455 v. Lake Const. & Dev. Corp., 7 OCAHO 964, 1997 WL 1122231 (Sept. 12, 1997). Though not victorious in court, the plaintiffs in *United States v. McDonnell Douglas Corp.* settled for up to $20,000 in backpay and $10,000 in civil penalties. *OSC Settles Three More Cases, Files One Complaint*, 70 INTERPRETER RELEASES 618 (1993). The defendant corporation refused to hire U.S. workers or discouraged them from accepting employment and made offers to foreign visa workers with equal or lesser experience and qualifications. *Id.*

First, and perhaps most significantly, § 1324b does not provide a private right of action to initiate a suit in state or federal court.[121] Instead, § 1324b establishes an administrative process that restricts the plaintiff's power in his or her case. A claimant must first file with the Office of the Special Counsel for Immigration-Related Unfair Employment Practices, and only if rejected may he or she request a hearing with an administrative law judge, and later appeal to the appropriate U.S. court of appeals.[122] This process debilitates plaintiffs because a claimant cannot bring a § 1324b claim along with other discrimination claims in federal court, thus forcing a plaintiff to pursue multiple forums or pick which of their rights they want the state to protect.[123]

Secondly, even if a plaintiff is successful with this arduous administrative process, the statute does not provide for extensive remedies. If liability is found, a judge must order a cease and desist, and may require the employer to hire the individuals adversely affected, or force the employer to keep the names and addresses of all job applicants for up to three years.[124] There is a maximum civil penalty of only $1000 for each individual discriminated against,[125] and any awards of backpay must be split between all individuals who applied for a given position. For example, in *Iron Workers Local 455 v. Lake Construction & Development Corp.*,[126] after winning their § 1324b claim, six union workers had to split the backpay from the single job opening for which they had applied, and the court measured the award based on the salary of the hired undocumented immigrant.[127] Both Title VII and § 1981 allow for much more flexibility in the

121. *See* Tudoriu v. Horseshoe Casino Hammond, No. 2:04 CV 294, 2006 WL 752490, at *6 (N.D. Ind. Mar. 21, 2006); Biran v. JP Morgan Chase & Co., No. 02 Civ. 5506 (SHS), 2002 WL 31040345 (S.D.N.Y. Sept. 12, 2002); Murtaza v. N.Y. City Health & Hosps. Corp., No. 97-CV-4554, 1998 WL 229253 (E.D.N.Y. Mar. 31, 1998). Beyond not recognizing a private right of action, it is also unclear if § 1324b allows class action claims. *Compare* Lardy v. United Airlines, Inc., 6 OCAHO 843, 1995 WL 862135, at *3–4 (Mar. 8, 1996) (stating in dicta that § 1324b probably does not recognize class actions), *with* Banuelos v. Transp. Leasing Co., 1 OCAHO 156, 1990 WL 512081 (Apr. 20, 1990) (recognizing that there could be class action cases under IRCA, but not certifying one in this instance).

122. 8 U.S.C. § 1324b(b)–(j). For a clearer description of the provision's administrative remedy, see Guttentag, *supra* note 114, at 33–35.

123. For example, in *Tudoriu v. Horseshoe Casino Hammond* and *Murtaza v. New York City Health & Hospitals Corp.*, the plaintiffs could not bring simultaneous § 1324b and § 1981 claims, because they had to exhaust all administrative remedies under § 1324b first. *Todoriu*, 2006 WL 752490; *Murtaza*, 1998 WL 229253.

124. Guttentag, *supra* note 114, at 35.

125. *Id.*

126. 7 OCAHO 964, 1997 WL 1122231 (Sept. 12, 1997).

127. *Id.* at *46–47.

remedies that a judge may order, ranging from increased monetary damages to more appropriate or creative specific relief.[128] Because of these limited remedies and a difficult administrative process, many U.S. workers may be dissuaded from enforcing their rights under § 1324b, allowing employers to continue to prefer and exploit vulnerable alien workers.

Third, the few cases in which U.S. workers have brought claims under § 1324b demonstrate that it is difficult to prevail in such matters because judges do not examine the employers' motive in hiring vulnerable alien workers. Only one reported case has been successful. In *Iron Workers Local 455*, seven U.S. citizens (naturalized and native born) successfully challenged a company's preference for hiring an undocumented iron worker.[129] Lake Construction advertised a position for an ornamental iron worker as part of the process to receive alien labor certification, but did not even consider the plaintiff union members' subsequent applications.[130] In holding that the company violated § 1324b, the court emphasized that the preference for an undocumented worker was key to finding discrimination. The court noted the employers' motives in worker exploitation and recognized "that undocumented workers relying on an employer's sponsorship are. more reluctant than lawful workers to complain about safety violations, prevailing wage violations, or other workplace violations."[131] The key to the court's reasoning, however, was its doubt that there could ever be a "legally permissible non-discriminatory reason for choosing to employ an illegal alien in preference to a qualified United States citizen."[132] Because hiring an undocumented worker is against the law, "there is no management prerogative to prefer, or even to hire, an illegal alien."[133] Thus, while this case may be very powerful in suggesting discrimination in cases in which undocumented workers are hired instead of U.S. workers,[134] it is also limited. *Iron Workers Local 455* demonstrates that § 1324b can be used to protect U.S. workers from citizenship status discrimination, but also seems to limit its decision to the preferential hiring of undocumented workers.

Cases challenging the hiring of legal vulnerable immigrant workers, such as skilled or unskilled visa workers, have been less successful. In *United*

128. *See supra* notes 201–202 and accompanying text.
129. *Id.*
130. *Id.* at *8–9.
131. *Id.* at *18.
132. *Id.* at *36.
133. *Id.*
134. Though the court explicitly stated that "[t]his is not a holding that every knowing hire of an illegal alien necessarily equates to an act of discrimination." *Id.* at *44.

States v. General Dynamics Corp.,[135] an administrative law judge held that General Dynamics did not discriminate against U.S. workers when it rejected their applications and hired twenty-five British citizens for highly educated aerospace industry jobs.[136] The court acknowledged that the visa workers would work for below the local salary, could not leave to work for competing companies offering better pay, and could be easily fired.[137] However, in assessing discrimination, the court refused to look to the company's motive to obtain an exploitable workforce.[138] Instead, the court accepted the company's proffered reason—that it did not care about citizenship but was looking for employees for direct hire (at below the local market rate)—as legitimate for rejecting the U.S. workers.[139]

Comparing *General Dynamics* with *Iron Workers Local 455* demonstrates that though § 1324b exists as a legal tool for U.S. workers, it may be very difficult to successfully challenge preferences for vulnerable workers unless they are undocumented. This is because employers can easily cite "legitimate" reasons for preferring vulnerable immigrant workers that are not directly related to animus against U.S. workers, but are instead based on the market benefits employers may experience because their workers are legally vulnerable or operate within different social institutions than U.S. workers, or both.

Finally, IRCA's antidiscrimination provision does not currently allow for disparate impact claims,[140] nor does it cover all types of intentional employer conduct. Disparate impact claims may be crucial for U.S. workers to prove that seemingly neutral employment policies actually discriminate on the basis of alienage. Although § 1324b does not explicitly exclude

135. 3 OCAHO 517, 1993 WL 403774 (May 6, 1993).

136. *Id.*

137. *Id.* at *15. General Dynamics hired H-2 visa workers through a labor contractor who advertised that the workers "are basically indentured to the company(s) sponsoring their employment tenure." *Id.*

138. *Id.* at *74, *89–93.

139. *Id.* at *108.

140. Disparate treatment claims, which § 1324b clearly recognizes, require a showing of intentional discrimination; that is, that the employer intended to treat a person or group less favorably on the basis of their race, gender, national origin, or other illegitimate grounds. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In contrast, disparate impact looks to the discriminatory effects of an employment practice. An employee needs to show that an employment practice disproportionately disadvantages members of a protected class. Thus, they do not have to prove that an employer intended to discriminate, but just show that an employment practice has a statistically significant adverse impact and is not demonstrably necessary for adequate job performance. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

disparate impact claims,[141] when President Reagan signed IRCA into law, he issued a statement asserting that it only incorporated the intentional "disparate treatment" liability of Title VII, and not the more potent "disparate impact" theory.[142] Following this signing statement, the special counsel responsible for prosecuting § 1324b cases does not investigate or prosecute for disparate impacts.[143] Administrative law judges have also followed this language, examining claims only for disparate treatment.[144]

There may be several ways that advocates can attack the current policy. Lucas Guttentag argues that "[t]he language and structure of [§ 1324b] confirm that Congress intended to outlaw more than just intentional discrimination."[145] The legislative history of § 1324b suggests that Congress meant to extend Title VII, which includes disparate impact, and was particularly worried that small and seasonal employers did not come within its jurisdiction.[146] Moreover, the special counsel's regulations attempt to adopt a "broader interpretation" of a disparate treatment intent standard.[147] For example, they state that an English-only rule "that falls with disproportionate impact on a particular citizenship status group or national origin group" may be a violation.[148] This broader approach combined with the fact that the statute is largely silent on disparate impact suggest that there may be room for disparate impact analysis in § 1324b. There is also case law concluding that § 1324b does not require a showing of intent.[149] Nevertheless, current § 1324b jurisprudence requires U.S. workers to allege "knowing and intentional" discrimination,[150] which may limit their ability to combat formally neutral employment actions that discriminate.

Moreover, IRCA only explicitly prohibits disparate treatment discrimination in "hiring, discharge, recruitment for a fee, and referral for

141. Guttentag, *supra* note 114, at 32–33. The closest language in § 1324b that suggests disparate impact cases are to be excluded is in subsection (d)(2). With regard to private actions, it says that the special counsel either must file a complaint "after receiving such a charge respecting an unfair immigration-related employment practice which alleges knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity," or must notify the charging party within 120 days. 8 U.S.C. § 1324b(d)(2) (2000).

142. Guttentag, *supra* note 114, at 32–33.

143. *Id.* at 33.

144. *See, e.g.*, *Gen. Dynamics*, 1993 WL 403774.

145. Guttentag, *supra* note 114, at 33.

146. *Id.* at 32.

147. *Id.*

148. *Id.* (quoting 52 Fed. Reg. 37404–05 (Oct. 6, 1987)).

149. League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist., 662 F. Supp. 443 (S.D. Tex. 1987).

150. 8 U.S.C. § 1324b(d)(2) (2000).

a fee."[151] Analysis of congressional intent and case law demonstrates that it is unclear what employer conduct is within the purview of these categories. "Disparities in salary, working conditions, work rules, or benefits that exist at the time of employment constitute discrimination 'with respect to . . . hiring,'"[152] though other promotion or compensation decisions seem to be less clear.[153] Though advocates working under the rubric of hiring, firing, recruitment, and referral should challenge the courts to expand the definition of these categories, both precedent and the plain language of the statute demonstrate that it is by no means a comprehensive prohibition on workplace discrimination based on immigration status.

Unlike other antidiscrimination provisions, § 1324b unambiguously protects U.S. workers from citizenship status discrimination, perhaps making it more desirable for addressing such claims. However, the extensive administrative system and minimal remedies may discourage U.S. workers from asserting their rights under this statute, especially given that judges usually have not ruled favorably on such claims. Moreover, § 1324b only covers some employee conduct and does not recognize disparate impact claims. Both Title VII and § 1981 have considerable advantages to § 1324 because they do not have as limited of remedies and recognize more types of claims. For instance, a plaintiff bringing § 1981 claims does not have to go through an administrative agency, and under Title VII, he or she could allege disparate impact of an employer's policies.[154] Therefore, the various limitations on the act's coverage necessitate the exploration of other statutes to address this issue.

B. Title VII and Protecting Native-born U.S. Citizen Workers

Title VII provides more comprehensive protection from employment discrimination than § 1324b because it recognizes disparate impact claims and

151. *Id.* § 1324b(a)(1); Guttentag, *supra* note 114, at 30.

152. Guttentag, *supra* note 114, at 30.

153. Selecting contract workers (rather than directly hiring) is also considered "hiring," so a company cannot circumvent the law through subcontracting. United States v. Gen. Dynamics, 3 OCAHO 517, 1993 WL 403774, at *41–43 (May 6, 1993). By contrast, promotion decisions seem beyond the coverage of the act. *See* Guttentag, *supra* note at 114, at 30. Other aspects of employment are more controversial. The preamble of the act states that discrimination in compensation, promotion, or any other terms or conditions other than hiring, firing, and recruiting is not prohibited. However, the legislative history explicitly asserts that a pay disparity between citizens and alien employees would be unlawful. *Id.* Moreover, some administrative cases interpret the categories broadly, arguing "that the whole employment process is implicated, is well established in OCAHO jurisprudence." Iron Workers Local 455 v. Lake Const. & Dev. Corp., 7 OCAHO 964, 1997 WL 112223, at *33 (Sept. 12, 1997).

154. *See supra* notes 201–202 and accompanying text.

has more extensive remedies. However, the U.S. Supreme Court in *Espinoza v. Farah Manufacturing Co.*[155] held that Title VII does not prohibit discrimination against noncitizens on the basis of alienage or citizenship status.[156] Consequently, no court has recognized discrimination based on immigration status as a valid claim under Title VII.[157] However, if one approaches citizenship status discrimination from the perspective of native-born U.S. workers, one can suggest doctrinal space for their claims under Title VII, even within the confines of *Farah Manufacturing*.

1. *Farah Manufacturing* and Citizenship Discrimination

The Supreme Court in *Farah Manufacturing* distinguished citizenship status or alienage discrimination from national origin discrimination and refused to extend Title VII protections to alienage claims.[158] In *Farah Manufacturing*, a legal permanent resident from Mexico challenged a company's policy of not hiring aliens under Title VII.[159] Reasoning that both the plain language of the act and Congress's intent "did not affect the historical practice of requiring citizenship as a condition of employment,"[160] the Court held that Title VII protects aliens from race, color, religion, sex, or national origin discrimination, but does not protect against alienage discrimination itself.[161] In evaluating the plaintiff's claim, the Court recognized that national origin and citizenship status are closely related, and "there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin," but it definitively insisted on their distinctiveness.[162] Because the company hired Mexican Americans who were U.S. citizens, it was not discriminating against the plaintiff based on Mexican national origin, but instead based on alienage.[163]

155. 414 U.S. 86 (1973).
156. *Id.* (holding that an employment policy against hiring aliens did not violate Title VII).
157. *See, e.g.*, EEOC v. Switching Sys. Div. of Rockwell Int'l Corp., 783 F. Supp. 369, 373 (N.D. Ill. 1992); Longnecker v. Ore Sorters N. Am., Inc., 634 F. Supp. 1077, 1081–82 (N.D. Ga. 1986).
158. *Farah Mfg.*, 414 U.S. at 95.
159. *Id.* at 87.
160. *Id.* at 89–91.
161. *Id.* at 95.
162. *Id.* at 92.
163. *Id.* at 93, 95.

2. *Farah Manufacturing* From the Perspective of Native-born U.S. Citizen Workers

Farah Manufacturing primarily contemplated an immigrant seeking protection based on alien status, but how would it apply to a native-born U.S. citizen seeking protection against preferences for alien workers? For native-born U.S. citizens, citizenship status is inseparable from national origin. As Justice Douglas reasoned in his dissent in *Farah Manufacturing*, "[a]lienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth."[164] Therefore, if a company discriminates against U.S. citizens, it necessarily discriminates against all persons who are born in the United States. If the company has also employed naturalized citizens, then discrimination against citizenship would not overlap with national origin. However, in circumstances in which a company has not hired any naturalized citizens, or does not treat those naturalized citizens the same as native-born citizens,[165] then the connection between citizenship and national origin becomes even closer. In these circumstances, native-born U.S. citizens facing preferences for alien workers may be able to bring national origin claims under Title VII.

For example, employers may prefer to hire first-generation Mexican immigrants over their second-generation (native-born U.S. citizen) counterparts, for reasons described above. Under *Farah Manufacturing*, second-generation Mexican immigrants should have a national origin claim. By denying a second-generation Mexican immigrant a national origin claim in this situation, the courts would effectively deny second (or third or fourth) generation immigrants their American identity.[166] One could argue that an employer is really favoring the alien status of the worker and not his or her Mexican national origin over U.S. national origin. But this defense should

164. *Id.* at 96 (Douglas, J., dissenting).

165. Leti Volpp notes that a person who is a citizen by law is not necessarily regarded as a citizen in terms of the country's imagined community, and, therefore, there is a distinction between "citizenship as formal legal status" and "citizenship as identity/solidarity." Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1592–95 (2002). Similarly, because Asians and Latinos are often constructed as "foreign," they are not treated similarly to other native-born Anglo- or African Americans even if they have the same citizenship status. *See* discussion *supra* note 9.

166. Juan Perea illustrates how having to fit discrimination claims into a poorly defined concept of national origin has perpetuated the perception that Asians and Latinos are foreigners. He notes:

> All persons born in the United States are citizens of America or United States national origin. All persons born here constitute part of our collective American identity. Yet those who are discriminated against because of some ethic difference must phrase their claims of unconstitutional treatment because of "different" national origin.

Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 578 (1995).

fail because the link between citizenship and U.S. national origin is so tight, and employer preferences evolve from a combination of both legal differences bestowed by immigration status and stereotypes based on national origin.

Though Title VII does not protect against alienage discrimination, it does protect against national origin discrimination, and therefore could be a tool for native-born citizens fighting employer preferences for alien workers. Given the saliency of immigration status in employment decisions, and its intricate connection with national origin, Title VII should be amended to include immigration status as a protected category. However, given present constraints, advocates need to either find innovative ways to bring national origin claims under Title VII or explore new statutes, such as § 1981, to combat employment discrimination against U.S. workers.

C. Section 1981, Private Alienage Discrimination, and New Possibilities for Protecting U.S. Workers

Section 1981 of the Civil Rights Act of 1866[167] provides that "[a]ll persons within the jurisdiction of the United States . . . have the same right in every State and Territory to make and enforce contracts . . . ."[168] Though § 1981 originated as part of a movement to protect African Americans from discrimination, this statute may be extended to protect U.S. workers from alienage discrimination in the employment context. Over twenty years ago, several groups of U.S. workers attempted to challenge employer preferences for vulnerable alien workers based on § 1981, but they were unsuccessful.[169] Since then, however, there have been significant changes in the law and new circuit court interpretations. Building on these changes, § 1981 may be the most effective legal tool U.S. workers can employ to fight employment discrimination based on immigration status.

167. 42 U.S.C. § 1981 (2000).

168. *Id.* § 1981(a).

169. *See, e.g.*, Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) (holding that U.S. worker plaintiffs claiming that the ranch hired undocumented workers and that they could not secure jobs as farmworkers had no right to be free from discrimination based on alienage); Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981) (holding that aliens were only protected against discrimination unlawful under § 1981, not that alienage itself is covered under § 1981).

1. Section 1981 and Private Alienage Discrimination

Currently, courts are divided about the scope of § 1981's prohibition on alienage discrimination.[170] Without a clear Supreme Court holding, the law in this area is unstable, but the clear trend seems to indicate that § 1981 prohibits private discrimination based on one's alienage or citizenship status.[171] The Second Circuit's decision in *Anderson v. Conboy*[172] is the leading circuit court decision of this trend.[173]

In *Anderson*, the plaintiff claimed that Local 17 of the United Brotherhood of Carpenters and Joiners fired him because he was not a citizen of the United States. In deciding this case, the Second Circuit first held that § 1981 prohibits at least state-sponsored discrimination based on alienage. Section 1981 states that "[a]ll *persons* within the jurisdiction of the United States shall have the same right in every State and

170. Courts are divided over several questions with respect to § 1981's prohibition on alienage. First, there is some controversy over whether § 1981 prohibits alienage discrimination at all. The vast majority of cases hold that § 1981 protects against alienage discrimination, at least in the public sphere. These courts build on the Supreme Court's rulings in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) (invalidating a California law banning the issuance of fishing licenses to any person ineligible to citizenship), and *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating a state welfare law that denied benefits to noncitizens or subjected them to residency requirements to which citizens were not subjected). *See, e.g.*, Sagana v. Tenorio, 384 F.3d 731, 738 (9th Cir. 2004); Anderson v. Conboy, 156 F.3d 167, 176–77 (2nd Cir. 1998); Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987). However, there are a few cases that hold that § 1981 protects aliens against race discrimination, but do not find a prohibition against alienage discrimination itself. For example, in *Murtaza v. New York City Health & Hospitals Corp.*, No. 97-CV-4554, 1998 WL 229253 (E.D.N.Y. Mar. 31, 1998), the court held that a naturalized citizen did not have a § 1981 claim against a hospital that favored hiring residents on student visas because the were an easy source of low-wage labor for urban hospitals. *Id.* at *2–3. The court reasoned that the Supreme Court's decision in *Takahashi* did not in fact extend § 1981 to alienage discrimination, but only extended race discrimination protection to aliens. *Id.* at *29–31. The second and larger cleavage in § 1981 alienage jurisprudence surrounds whether § 1981 prohibits private alienage discrimination or only state-sponsored alienage discrimination. The Second and Fourth Circuits, as well as the majority of district courts, have held that § 1981 prohibits private alienage discrimination. *See, e.g.*, *Anderson*, 156 F.3d at 180; Duane v. GEICO, 37 F.3d 1036 (4th Cir. 1994); Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 913 F. Supp. 248 (S.D.N.Y. 1996). However, the Fifth Circuit held that § 1981 does not cover private alienage discrimination, and, based on its reasoning, it would not have been overruled by the 1991 Civil Rights Amendment. *Bhandari*, 829 F.2d at 1351. The majority of circuits and the Supreme Court have not decided this issue. For a greater discussion of private alienage discrimination jurisprudence, see Angela M. Ford, Comment, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457 (2001).

171. *See* discussion *supra* note 170. *See generally* Ford, *supra* note 170, at 467.

172. 156 F.3d. 167.

173. *Id.* at 167.

Territory to make and enforce contracts . . . as is enjoyed by white *citizens*."[174] The court read the juxtaposition of the words "persons" and "citizens" to prohibit alienage discrimination because "[a] 'person' who is denied employment because he or she is not a citizen cannot be said to enjoy the 'same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[175] In addition to the textual analysis, the legislative history of § 1981 demonstrates that Congress was highly concerned with the plight of Chinese aliens when it passed the act.[176] Because of this concern, Congress concurrently passed criminal sanctions for any person who discriminated against any inhabitant "on account of such person being an alien, or by reasons of his color or race."[177] Moreover, *Anderson* drew from Supreme Court precedent in *Takahashi v. Fish & Game Commission*,[178] in which the Court stated that § 1981 protects "all persons against state legislation bearing unequally upon them either because of alienage or color."[179] While other courts interpreted this text, history, and Supreme Court precedent to only protect against race discrimination,[180] the Second Circuit held that § 1981 protected against alienage discrimination as well.[181]

Anderson further held that § 1981's prohibition on alienage discrimination extends to both private and public discrimination.[182] In 1991, Congress amended § 1981 to clarify that the statute prevents discrimination by both private and public actors.[183] Because *Anderson* had already held that § 1981 prohibited alienage discrimination, the 1991 amendment (§ 1981(c)) simply extended this prohibition to private alienage discrimination. The court reasoned that "Section 1981(c)'s plain language extends that protection to cover private discrimination affecting those rights on the basis of alienage."[184] Despite the plain language of the

174. 42 U.S.C. § 1981(a) (2000) (emphasis added).
175. *Anderson*, 156 F.3d at 171 (omissions in original).
176. *Id.* at 174.
177. *Id.* at 174–75 (emphasis omitted).
178. *Id.* at 176–77 (citing Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 410 (1948)).
179. *Id.* at 177 (emphasis omitted) (quoting *Takahashi*, 334 U.S. at 419–20).
180. *See, e.g.*, *Murtaza v. N.Y. City Health & Hosps. Corp.*, No. 97-CV-4554, 1998 WL 229253, at *18–31 (E.D.N.Y. Mar. 31, 1998) (holding that most courts have misinterpreted and misused *Takahashi* and that § 1981 only protects aliens from race discrimination, not alienage discrimination by public or private actors).
181. *Anderson*, 156 F.3d at 175.
182. *Id.* at 178.
183. The Civil Rights Act of 1991 added the following language to § 1981: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(c) (2000).
184. *Anderson*, 156 F.3d at 177.

1991 amendment, some circuits have taken contrary approaches.[185] Therefore, there is some uncertainty as to whether discrimination on the basis of alien status will be protected throughout the country.

2. Reverse Alienage Discrimination? Applying Section 1981 to Claims of U.S. Workers Fighting Private Alienage Discrimination

Though *Anderson* was decided in the context of an alien facing discrimination in favor of citizens, its broader ruling prohibiting private alienage discrimination should also protect U.S. workers facing preferences for vulnerable immigrants. The court did not directly contemplate this issue in *Anderson*, nor has any other court decided a case on reverse alienage discrimination under § 1981. However, an analogy to race discrimination cases suggests that the precedent derived from *Anderson* should prohibit discrimination against U.S. workers based on citizenship status or alienage.

Race discrimination cases brought under § 1981 initially only recognized a remedy for African Americans.[186] The wording of the statute—"as is enjoyed by white citizens"—suggested that the protection was limited to nonwhite persons, and "lower federal courts [were] divided on the applicability of § 1981 to racial discrimination against white persons."[187] However, in 1976, the Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.*[188] held that § 1981 "is applicable to racial discrimination in private employment against white persons."[189] In making

185. For example, the Fifth Circuit held that § 1981 does not prohibit private alienage discrimination. Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1351–52 (5th Cir. 1987). Beyond looking to the text of § 1981, *Bhandari* noted that the legislative history surrounding the prohibition on alienage discrimination (section 16 of the Voting Rights Act of 1870) seemed to limit the protection to state action. *Id.* at 1346–48. Though this case was decided before the 1991 amendment, it is unlikely that the Fifth Circuit would have ruled differently afterwards, and, thus, most courts recognize the Fifth Circuit as being split with *Anderson* in the Second Circuit. *See* Camara v. Schwan's Food Mfg., Inc., No. Civ.A. 04-121-JGW, 2005 WL 1950142, at *5 (E.D. Ky. Aug. 15, 2005). The Fifth Circuit is unlikely to have changed its ruling if it decided *Bhandari* after 1991 because the amendment was based on *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that § 1981 protects from private racial discrimination), a case the Fifth Circuit found only applied to race discrimination and not to alienage discrimination. *Bhandari*, 829 F.2d at 1345. Moreover, the legislative history of the 1991 amendment itself "makes no mention of alienage discrimination," so it is unlikely that the Fifth Circuit would have felt that the amendment should change its ruling that contemplated the *Runyon* precedent. Ford, *supra* note 170, at 466.

186. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285 (1976).

187. *Id.* at 286 n.16.

188. 427 U.S. 273.

189. *Id.* at 287.

this decision, the Supreme Court abandoned a "mechanical" reading of the statute's language, and instead focused on the legislative history.[190] As detailed in the opinion, the discourse surrounding the Civil Rights Act of 1866 emphasized protecting "*all* persons in the United States in their civil rights,"[191] both "white men as well as black men."[192] The court reasoned:

> [Although] the immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves, the general discussion of the scope of the bill did not circumscribe its broad language to that limited goal. On the contrary, the bill was routinely viewed . . . as applying to the civil rights of whites as well as nonwhites.[193]

From this background, the court found the act's specific reference to white citizens was "only to emphasize the racial character of the rights being protected . . . not to limit its application to nonwhite persons."[194]

Given that § 1981 protects against reverse race discrimination, by analogy, § 1981 should also prohibit reverse alienage discrimination. As with race discrimination before *McDonald*, § 1981 at this point has only been used to protect aliens against alienage discrimination, not citizens. However, if reverse racial discrimination is now recognized, it would logically follow that reverse alienage discrimination should be a valid claim under § 1981.[195]

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190. *Id.*

191. *Id.* (quoting Senator Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866)).

192. *Id.* at 290.

193. *Id.* at 289.

194. *Id.* at 293 (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).

195. There does not seem to be a clear pattern or prevailing theory that courts follow regarding when to recognize reverse discrimination or decide that a statute is instead asymmetrical. Courts generally seem to look at each statute individually and apply the basic rules of statutory interpretation rather than draw from a greater ideology in deciding if a statute applies symmetrically. *See, e.g., id.* (drawing on textual analysis and legislative history to decide if § 1981 prevents race discrimination against whites); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2003) (denying reverse age discrimination because the Age Discrimination in Employment Act's text and legislative history demonstrate that it was concerned with protecting discrimination against older persons in favor of younger persons). However, in *Hamilton v. Caterpillar, Inc.*, the Seventh Circuit seemed to apply a larger theory suggesting that statutes should only be symmetrical if they concern immutable characteristics. The Seventh Circuit wrote that age discrimination cannot be reversed as can sex or race discrimination because "[a]ge is not a distinction that arises at birth. Nor is age immutable." Hamilton v. Caterpillar, Inc., 966 F.2d 1226, 1227 (7th Cir. 1992). Critical race theorists, on the other hand, would suggest that a statute's symmetry should depend on its ability to do antisubordination work (discussed briefly in this Comment's Conclusion). *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind," in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 257 (Kimberlé Crenshaw et al. eds., 1995).

One difference between the two issues is that the legislative history surrounding alienage discrimination does not as richly or explicitly address discrimination against citizens (as citizens) as discrimination against whites. In fact, *Anderson* relies on legislative history that specifically suggests alienage protection is just for aliens. *Anderson* quotes Senator William Stewart (R-NV) as stating that the statute "[e]xtends to foreigners, not citizens, the protection of our laws,"[196] and then relies on a criminal prohibition against discrimination "on account of such person being an alien, or by reason of his color or race. . . ."[197] While race and color are general terms encompassing whites, "being an alien" does not include protections for citizens. This legislative history suggests that Congress only considered traditional notions of discrimination when contemplating alienage discrimination, not how employers may manifest preferences in the low-wage context differently, as discussed in Part I.

Despite these distinctions in the legislative history, it is unreasonable to assume Congress intended to protect white persons from racial discrimination, but not citizens from alienage discrimination. The fact that the language of § 1981 explicitly recognized "white" privilege did not deter the Court from recognizing reverse race discrimination, and, thus, it would follow that they would interpret the "citizen" language in the same way. Therefore, courts that follow *Anderson* should also conclude that § 1981 protects reverse alienage discrimination, such as discrimination in favor of temporary visa workers instead of U.S. citizens.

There are several reasons that § 1981, if extended to cover reverse alienage discrimination, would be a more effective tool for combating discrimination against U.S. workers than § 1324b or Title VII. First, § 1981 provides a private right of action without administrative barriers. Unlike IRCA or Title VII, a claimant does not have to exhaust administrative remedies within the Office of the Special Council or the Equal Employment Opportunity Commission in order to bring a claim in federal court. While § 1981 does not provide for disparate impact actions like Title VII, because of *Espinoza v. Farah Manufacturing Co.*,[198] it is unclear whether Title VII could be extended to protect U.S. workers.

Nevertheless, there is strong case law from several circuits holding that § 1981 covers both public and private alienage discrimination. In addition,

196. Anderson v. Conboy, 156 F.3d 167, 173 (2d Cir. 1998) (quoting CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870)).
197. *Id.* at 174.
198. 414 U.S. 86 (1973).

§ 1981 has greater scope than § 1324b, which is limited to hiring, discharge, recruitment, and referral. Section 1981 protects against discrimination broadly in the right to "make and enforce contracts," which includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[199] One drawback, however, is that § 1981 may not recognize discrimination between types of immigration statuses, but only between citizens and aliens generally.[200] Finally, a court has much more flexibility in its choice of remedies under § 1981 than for § 1324b, which is limited to making the employer pay a small civil fine, pay backpay, hire the worker if appropriate, or hold the contact information of the plaintiff on file for three years.[201] Under § 1981 or Title VII, the choice of remedies is much broader, including monetary damages (frontpay, backpay, or other benefits compensation), punitive damages, and equitable relief such as forced modifications of employment practices, forced reinstatement, and other means that may be better able to both address the discriminatory practice and fairly compensate the plaintiff.[202]

199. 42 U.S.C. § 1981(b) (2000).

200. One important element left unresolved after *Anderson* is whether § 1981's prohibition on alienage discrimination prohibits discrimination between types of aliens, or just between citizens and aliens. An "alien" is defined as "[a] person who resides within the borders of a country but is not a citizen or subject of that country . . . ." BLACK'S LAW DICTIONARY 79 (8th ed. 2004). According to some courts, then, alienage discrimination involves discrimination against an individual on the basis of his or her foreign citizenship, regardless of his or her status in the United States. This interpretation suggests that alienage discrimination does not protect against preferences between workers with different immigration statuses, but only protects against discrimination based on being an alien (having foreign citizenship). For example, in *Camara v. Schwan's Food Manufacturing, Inc.*, the court dismissed the claim of an asylee claiming alienage discrimination under § 1981. No. Civ. A. 04-121-JGW, 2005 WL 1950142 (E.D. Ky. Aug. 15, 2005). The court recognized the circuit split regarding private alienage discrimination, but said that even if it were to follow the *Anderson* reasoning, the plaintiff would not have a claim because *Anderson* was "strictly based upon his alienage," rather than the specific issue of being an asylee. *Id.* at *6. Similar to § 1324b claims, there is not enough case law on this issue to definitively predict if courts will recognize discrimination between visa workers and legal permanent residents. However, unlike § 1324b and *United States v. General Dynamics Corp.*, 3 OCAHO 517, 1993 WL 403774 (May 6, 1993), the current case law suggests that § 1981 may not recognize discrimination between aliens of different immigration statuses. Therefore, this is an area that legal advocates may want to develop in order to extend the protection of § 1981 to more effectively remedy discrimination based on various immigration statuses, rather than just between aliens and citizens.

201. Guttentag, *supra* note 114, at 35.

202. *See* Russell Specter & Paul J. Spiegelman, *Employment Discrimination Action Under Federal Civil Rights Acts*, 21 AM. JUR. TRIALS 1 (1974). Title VII has a statutory damages cap, while § 1981 does not. *See* Chellen v. John Pickle Co., 446 F. Supp. 2d 1247, 1283 (N.D. Okla. 2006).

D. Toward Recognizing Discrimination Based on Immigration Status

Presently, these antidiscrimination statutes provide a patchwork of protections that together are helpful, but ultimately are insufficient for providing remedies for U.S. workers facing discrimination based on their immigration status. In order to comprehensively defend U.S. workers from preferences for vulnerable immigrants, the law should recognize immigration status as a protected category. Garcia argues that including immigration status under Title VII is key for protecting immigrants in the workplace who might not be protected under race or national origin lines;[203] it is similarly necessary for protecting U.S. workers. In addition, the paradigm of immigration status, rather than alienage or citizenship status, is crucial because it recognizes that discrimination does not just exist between citizens and aliens, but between groups of noncitizens who enjoy different levels of protection under immigration and labor laws. While amending Title VII to include immigration status might not be a feasible avenue, interpreting § 1324b to include disparate impact or extending § 1981 to recognize reverse alienage discrimination (even between different groups of noncitizens) would also be significant contributions for providing protection based on immigration status.

One concern with these approaches, even if they are enhanced to better protect immigration status, is that they require U.S. worker plaintiffs who have been rejected or otherwise harmed in an employment setting. As workplaces are further segregated and racialized, U.S. workers may not apply as frequently to work in the same jobs as vulnerable immigrant workers because they know employers are looking for vulnerable immigrant workers.[204] Saucedo argues that "[o]nce brown collar workers occupy a job, employers will devalue the position and its function, pay rate, terms and conditions, and advancement ladder. Employer biases infect the hiring process to create brown collar jobs in the first place, and then influence the workplace conditions after the job is considered an 'immigrant' job."[205] Thus, it may be difficult to find plaintiffs in some instances, and to win cases. This "lack of interest" is a general problem that corresponds with occupational segregation, allowing employers

203. Garcia, *supra* note 97, at 519.

204. As described above in Part I, it is not necessarily because U.S. workers do not want these jobs, but because they have been shut out of these industries either by discrimination or subsequent deteriorating working conditions, and therefore no longer perceive them to be viable employment opportunities. For a discussion of how employers deskill and restructure jobs after they discriminate for vulnerable immigrants, see Saucedo, *supra* note 1, at 973–78.

205. *Id.* at 975.

to defend their employment practices by arguing that no other groups of workers are interested in the given job.[206]

Despite this trend, there are still many occasions in which U.S. workers face immigration status discrimination in hiring. For instance, industries at different points restructure and transition between U.S. workers and immigrant workers.[207] These transition periods could possibly produce plaintiffs who may be able to fight the discrimination, such as layoffs or new hiring, in the transition. There are also often economically depressed populations living near immigrant workers, such as farmworkers, who may have applied for local jobs but have been replaced by temporary visa holders. Finally, as Dohan learned in his ethnographic study comparing first- and second-generation Mexican neighborhoods, the job opportunities for second-generation immigrants are often not that much better than for first-generation vulnerable workers.[208] Thus, second-generation U.S. workers may face discrimination in favor of their first-generation counterparts, who with a transnational perspective and without as many legal protections may be favored for low-wage work.

That said, employment discrimination often becomes entrenched in social practices, and self-reproduces through social network hiring, cultural perceptions, and other mechanisms. Further explorations into combating preferences for vulnerable immigrant workers should contemplate legal strategies that do not require individual U.S. workers to directly compete against vulnerable immigrant workers. One strategy may be to improve enforcement of labor laws and temporary visa provisions.[209] Examining another

206. *See generally* Vicki Schultz & Stephen Petterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992).

207. *See* MILKMAN, *supra* note 14, at 81.

208. DOHAN, *supra* note 25, at 37.

209. If employers discriminate in favor of workers who are most legally vulnerable, then one solution may be to enforce and strengthen labor laws so that employers cannot exploit vulnerable immigrant workers. For a comprehensive discussion about how to change and enforce labor laws to prevent low-wage worker exploitation, see generally Foo, *supra* note 41. In addition, enforcement of H-2A and H-2B visa contracts would restrict employers from importing foreign workers for jobs that U.S. workers would take. There is not a strong private right of action against an employer for violating the labor certification process, so it is difficult for an individual to legally challenge when the U.S. government issues worker visas to an employer for a specific task. *See* DeCanas v. Bica, 424 U.S. 351 (1976); Shah v. Wilco Sys., Inc., 126 F. Supp. 2d 641 (S.D.N.Y. 2000); Garrison v. OCK Const. Ltd., 864 F. Supp. 134 (D. Guam 1993). Perhaps this an area in which advocates can be creative and bring third-party beneficiary claims or conduct legislative lobbying in order to enforce the law. However, one should note that greater enforcement of labor laws could just encourage some companies to move overseas, so any increased labor enforcement in the United States should be accompanied by concurrent increased labor protections in trade agreements and other international efforts.

approach, several authors have discussed the possibility of using the Racketeer Influenced and Corrupt Organizations Act (RICO)[210] to enforce labor laws.[211] Finally, there are comprehensive policy approaches that can reduce both U.S. worker discrimination and abuses against vulnerable immigrants.[212] Therefore, protecting U.S. workers from discrimination in favor of vulnerable immigrant workers is clearly just a small step in addressing entrenched occupational segregation and exploitation of low-wage workers.

CONCLUSION

The argument for protecting the place of U.S. workers in low-wage workplaces may seem to be an argument against vulnerable immigrant workers, because it suggests employers should not value immigrant workers, and should instead hire natives. However, deeper analysis demonstrates that decreasing anti-U.S. worker discrimination is integral for combating workplace exploitation more generally. Indeed, fighting anti-U.S. worker discrimination could be part of a broader worker justice movement, pursued in a manner that brings workers together in fighting exploitation instead of fostering division.

Historically, employers and immigration laws have pitted different groups of low-wage workers against one another; in this scenario, not just

210. 18 U.S.C. § 1961 (2000).

211. For a discussion of RICO suits and undocumented immigration, see Yu, *supra* note 103, at 909. According to this approach, a company could sue a competitor that has a scheme of hiring undocumented workers for gaining a competitive advantage in contract bidding under RICO. *See, e.g.*, Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2nd Cir. 2001). Alternatively, U.S. workers have sued competing companies that hire undocumented workers to depress wages, though not all courts have found such workers to have standing under RICO. *Compare* Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004), *with* Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002). One additional alternative is using state unfair business practice laws to combat employers who hire undocumented workers for a below-market wage rate. For example, a Santa Monica labor contractor sued an agricultural company for rejecting its contract and hiring undocumented workers instead. Peter Prengaman, *Businesses Sue Rivals in Immigration Battle*, HOUSTON CHRON., Aug. 23, 2006, at 3. RICO or unfair business practice laws could be used by competing companies that may not have the best interests of their workers in mind. However, RICO cases could also be brought by the government or by workers themselves.

212. For example, Jennifer Gordon advocates for a policy that embraces "transnational labor citizenship" where temporary immigrant workers are aligned with a labor organization rather than a given employer. Guest workers would then already be organized in solidarity with U.S. workers when they come to work in the United States, thereby strengthening the labor movement and efforts to fight worker exploitation. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

by race or ethnicity, but by immigration status. The immigrant rights movement seeks to increase immigrants' position in U.S. employment, often emphasizing that immigrants are hard workers and are integral for the economy. Advocating for U.S. workers, then, seems at first blush antithetical to goals of this movement. Indeed, if one were to take this Comment's argument to the logical extreme—that employers should not discriminate against U.S. workers—then citizens or legal permanent residents would perhaps replace some visa and undocumented workers throughout the workforce.[213] Thus, one may ask why advocates should focus on protecting the legally protected U.S. workers and not the legally vulnerable immigrants.

Looking at anti-U.S. worker discrimination in a larger context, however, reveals that eliminating anti-U.S. worker discrimination could be a valuable tool for decreasing low-wage exploitation more generally. In Part I, this Comment argued that employers use immigration status as a proxy to find workers most susceptible to exploitation, preferring vulnerable immigrants whose social institutions and risk of deportation contribute to their susceptibility. Anti-U.S. worker discrimination only exists because it is linked to immigrant worker exploitation; that is, it is contingent on the fact that employers will exploit vulnerable immigrants. If forced to hire more U.S. workers, employers will not be as able to structure their workplaces (wages, hours, responsibilities, and so on) around an assumption of exploitation. Employers may be more careful to at least follow basic fair labor standards, or there may be more employees willing to "rock the boat" in the face of unfair practices.[214]

In addition, diverse workplaces are important for strengthening interethnic ties and democracy more generally. Though studies have shown that workplace diversity often incites interethnic conflict,[215] there is also strong support for the suggestion that diverse workplaces are crucial for strengthening a diverse democracy. Cynthia Estlund observes that "[i]n a

213. Indeed, § 1324b permits a preference for citizen workers and discrimination against aliens if the two are equally qualified. 8 U.S.C. § 1324b(a)(4) (2000); 28 C.F.R. § 44.200(b)(2) (2005).

214. However, Dohan explains that some U.S. workers quit to find a better job, rather than continually fight bad practices. DOHAN, *supra* note 25, at 69. Therefore, in addition to integrating U.S. workers, perhaps one must connect all low-wage workers to organizing structures that increase employees' ability to stand up for their rights. For example, in low-wage union organizing, citizens or legal permanent residents are often the spokespersons or the civil disobedience actors of the larger group of all workers because they have more legal protections. Thus, integration of U.S. and vulnerable immigrant employees is one key tool to fighting management exploitation of all low-wage workers.

215. For a discussion of interethnic conflict in low-wage workplaces, particularly between blacks and Latinos, see WALDINGER & LICHTER, *supra* note 3, at 181–202.

society that is still largely segregated, the workplace is where working adults are most likely to associate regularly with someone of another race."[216] At work, there is "close and regular interaction" between individuals in a society that tends to go "bowling alone."[217] The confluence of this interaction and diversity, according to Estlund, is "extraordinarily important in a diverse democratic society,"[218] because it has the potential to respond both to the disassociation and racial segregation that exists today.[219] Given that fighting discrimination against U.S. workers is important for improving low-wage working conditions and developing a diverse democracy, the difficult question is how to fight such discrimination without alienating vulnerable immigrants or pitting groups against one another.

Fighting discrimination against U.S. workers and exploitation of vulnerable immigrants without further dividing the two groups (and perhaps even fostering worker consciousness) is a delicate task. Advocates must successfully fight discrimination against U.S. workers without suggesting nativist attitudes. Those bringing antidiscrimination lawsuits must scrutinize the discourse of such lawsuits, the precedents they may be developing, and the timing of bringing such actions in order to navigate this tension between antidiscrimination and nativism.

One issue that advocates should be sensitive to is the language they use and the cultural ideas their discourse supports. As Leti Volpp argues in *Migrating Identities: On Labor, Culture, and Law*,[220] exploitation is often explained through cultural differences by both business leaders and immigrants' rights advocates.[221] For instance, she notes that in labor-violations cases, lawyers often make out immigrants to be the victims, incapable and passive in the face of brutal bosses.[222] These immigrants are harder workers, and came to the United States in search of the American Dream.[223] According to Volpp, these discourses are problematic because they rely on cultural racism, unintentionally suggesting that some cultures are "either inferior to or

216. ESTLUND, *supra* note 7, at 3.

217. *Id.* at 4–5. The term "bowling alone" was developed by Robert Putman. The image of the solitary bowler is emblematic of the erosion of civic engagement in modern society that Putman describes, and that Cynthia Estlund draws from in her book. *Id.*; ROBERT D. PUTMAN, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 111–13 (2000).

218. ESTLUND, *supra* note 7, at 4.

219. *Id.* at 3. Estlund diagnoses American society as "suffering both from declining levels of social and civic engagement, and from the lasting legacy of slavery in the form of racial division and segregation." *Id.*

220. 27 N.C. J. INT'L & COM. REG. 507 (2002).

221. *Id.* at 507.

222. *Id.* at 508–10.

223. *Id.* at 519.

incompatible" with the dominant culture.[224] Asserting that immigrants are "hard workers" often has connotations about which types of workers are not hard workers. Conversely, U.S. workers fighting discrimination may claim they are more deserving of work because of their status.

These assertions perpetuate a cultural hierarchy rather than acknowledge the different social institutions and strategies between vulnerable immigrant and U.S. workers, as Dohan explains.[225] They thereby construct a hierarchy of the deserving and undeserving between low-wage workers. These cultural stereotypes also ignore the culpability of the state or companies in workplace abuse.[226] The assumption that immigrants came for the American Dream or, alternatively, that they are "taking all our jobs" diverts attention from the role of U.S. companies in simultaneously promoting immigration, labor abuses, and discrimination against U.S. workers.[227]

Beyond focusing on the discourse, another area that deserves caution is the precedents that can be created through U.S. worker lawsuits. Advocates must be careful that they do not create jurisprudence that will help U.S. workers but later harm vulnerable immigrant workers (and vice versa). Amending Title VII to include immigration status as a protected category, recognizing greater causes of action and disparate impact under § 1324b, and encouraging prohibition of private alienage discrimination could each benefit vulnerable immigrants' rights as well as those of U.S. workers. However, there are always some dangers involved in creating new precedents.

In Part II, this Comment argued that extending § 1981 to protect reverse alienage discrimination, through an analogy to race, is perhaps the best legal strategy to fight U.S. worker discrimination. Prohibitions on reverse discrimination are controversial, and critics argue that they hurt those minorities that the original statute was supposed to protect. Some critical race theorists argue that subjecting reverse race discrimination to strict scrutiny in equal protection jurisprudence—adopting a colorblind principle—fosters continued white supremacy.[228] They argue that courts should instead evaluate laws based on their impact on subordinated populations in order to foster substantive equality, not just formal equality

224. *Id.* at 517–18.
225. DOHAN, *supra* note 25, at 82.
226. Volpp, *supra* note 221, at 514–17.
227. *Id.* at 518–19.
228. *See generally* Freeman, *supra* note 195; Gotanda, *supra* note 195, at 268 (arguing that "[t]he symmetrical standard of review cannot be justified by racial history, because racial history is skewed").

between groups.[229] Prohibiting reverse alienage discrimination, at least in some contexts, may seem less problematic because it would actually help African Americans, second-generation immigrants, and other poor whites, groups that are politically and socially disadvantaged in this society. Thus, reverse alienage discrimination claims can operate to fight subordination. One caveat is that reverse alienage discrimination precedents would not be confined to these groups. For instance, social service centers that just target persons of a particular immigration status could then be seen as violating § 1981. As with all public interest law, legal advocates fighting cases on behalf of U.S. workers need to be cautious of the greater context of worker exploitation in developing precedents.

In addition, worker justice advocates may be able to structure their cases and practices in ways that build coalitions between U.S. workers and vulnerable immigrants. Workers' centers that bring wage and hour lawsuits and contest other workplace violations can increase the diversity of the cases they bring, such that they balance between helping both groups of workers.[230] Then, U.S. workers who have been involved in litigation can train and advise vulnerable immigrant workers in their cases, and vice versa. This interchange would help to foster an understanding that both groups are fighting the same management that seeks to exploit their labor.

Furthermore, lawyers and organizers could bring simultaneous lawsuits and campaigns against a single employer alleging both labor law violations against vulnerable immigrant workers and discrimination against U.S. workers. Because discrimination and subordination go hand in hand in low-wage workplaces, so could lawsuits. Returning to the Decatur Hotels example, the lawyers and organizers effectively brought Spanish-speaking and Portuguese-speaking temporary workers together while filing separate lawsuits for each group. While the Spanish-speaking and Portuguese-speaking plaintiffs worked in different corporations under different conditions, they were both fighting the same individual owner. Seeing this connection, they held worker meetings and actions together despite language barriers. What was missing in this scenario, however, was an investigation into whether African American workers in New Orleans had applied for those same positions when the company advertised jobs, as required by the

229. *See generally* Freeman, *supra* note 195; Gotanda, *supra* note 195.

230. For a discussion of Workers Centers, see generally JANICE FINE, WORKERS CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006).

temporary labor certification process.[231] Bringing simultaneous cases with U.S. workers and vulnerable immigrants working collaboratively is important not only for strengthening bonds, but also for more effectively fighting exploitation in a given workplace.[232]

Rather than using language that perpetuates cultural hierarchies, lawsuits for both vulnerable immigrant workers and U.S. workers need to derive their discourse from a broader consciousness that recognizes the dignity and rights of all low-wage workers. Advocates should bring U.S. worker discrimination lawsuits collaboratively with claims of vulnerable immigrants fighting labor abuses. With these strategies, along with various legal theories involving § 1324b, Title VII, and § 1981, advocates can perhaps better fight worker exploitation without further dividing U.S. and vulnerable immigrant workers.

231. In meetings with the defendant, plaintiffs in the Southern Poverty Law Center suit demanded proof that the employer recruited within the African American community. S. Poverty L. Ctr., *supra* note 4.

232. In addition, advocates could bring immigrant labor abuse claims along with claims that allege discrimination against immigrants. *See, e.g.*, Chellen v. John Pickle Co., 446 F. Supp. 2d 1247 (N.D. Okla. 2006) (alleging Fair Labor Standards Act violations and Title VII and § 1981 discrimination against a group of Indian temporary visa workers employed in Tulsa). Though this type of suit does not bring different groups of workers together in the same way as simultaneous U.S. worker discrimination and immigrant labor abuse suits, it does connect labor abuses with discrimination. Recognizing that preferences for vulnerable immigrants can also correspond with discrimination against them is important for dismantling notions that vulnerable immigrants are supposed to be at the bottom of the social hierarchy, and do not need as high of wages as other workers. *See supra* Part I.