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INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] prohibits discrimination based on national origin. The only United States Supreme Court case to focus on this prohibition, *Espinoza v. Farah Manufacturing, Corp*.[2] was decided almost half a century ago. *Espinoza* created a legacy of a narrow definition of discrimination based on national origin that has made it extremely difficult for immigrant workers to fight discrimination in the workplace. This essay argues that *Espinoza* must be overruled in order to make Title VII's prohibition against national origin discrimination more meaningful, relevant, and useful to immigrant workers.

In keeping with the subject of this symposium, this essay focuses on the underlying ways in which discrimination operates against immigrant workers and analyzes the structures and frameworks that the courts have developed to address them. Immigrant workers are defined here as noncitizen workers, including both those with and without the legal authorization to work. This essay argues that discrimination based on national origin should include discrimination based on immigrant or noncitizen status.[3]

Current national origin discrimination doctrine does not match the ways in which immigrant workers experience discrimination. An employer may refuse to hire a person because he or she is Mexican or an immigrant. However, for both documented and undocumented workers, discrimination is more likely to take the form of exploitation, not exclusion. Workers are treated worse in the workplace because they are Mexican or because they are immigrants. In addition, although some of the discrimination may be based on a worker's specific country of origin, sometimes workers experience discrimination merely because they are not American. A worker may be exploited and treated poorly in the workplace simply because she is a noncitizen or immigrant. The typical immigrant victim of employment discrimination, then, experiences *exploitation based on immigrant status*. Unfortunately, Title VII's current framework for discrimination based on

1. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

2. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

3. Of course, under existing immigration laws, an employer must refuse to hire a person who does not have the legal right to be in the United States or to work in the United States. Despite this prohibition, the most recent estimates put the undocumented workforce at 8 million or five percent of the workforce. Drew DeSilver, *Immigrants Don't Make up a Majority of Workers in any U.S. Industry*, PEW RESEARCH CENTER: FACT TANK (March 16, 2017), http://www.pewresearch.org/fact-tank/2017/03/16/immigrants-dont-make-up-a-majority-of-workers-in-any-u-s-industry/. This essay is not arguing that refusal to hire undocumented or unauthorized workers because they lack the right to work here violates Title VII. It argues that, for both documented and undocumented workers, prohibited discrimination occurs when the worker is treated worse because of their immigrant or noncitizen status and when authorized workers are denied employment because of their immigrant or noncitizen status.

national origin does not match this reality. Instead, the paradigm case in court-created doctrine focuses on *exclusion based on country of origin***.**

In order to provide an understanding of how the law has developed, Part I of this essay presents an in-depth look at *Espinoza v. Farah*, the Supreme Court case that serves as the origin story for this doctrine. In addition to explaining the holding of the case, this section shows how the reasoning of the majority and dissent are based on a fundamental disagreement over the meaning of immigration and national origin discrimination. This section next examines the social history of the case, with a focus on the participants in the original case, the Chicano and labor rights movements in Texas and the role of race and ethnicity in citizenship requirement used by the defendant Farah. It also details the role the case played in the litigation strategy establishing the disparate impact doctrine. This provides the groundwork to critique the holding from a doctrinal standpoint and from a theoretical standpoint that examines the underlying social and historical factors that motivated the outcome of the case. Part I concludes with a description of the effects of *Espinoza* in creating a stunted Title VII framework and patchwork of other laws to deal with discrimination based on national origin. Part II of the essay presents two recent lines of case law interpreting Title VII that have begun to challenge the framework established by *Espinoza*. These cases involve American workers being displaced by holders of H-1B visas, and harassment and trafficking cases brought by the Equal Employment Opportunity Commission (EEOC). Finally, Part III looks to the future. It argues that the time is ripe to overrule *Espinoza*.

I. *ESPINOZA V. FARAH*: THE TRADITIONAL VIEW AND ITS IMPLICATIONS

In the United States, the traditional vehicle for resolving employment discrimination disputes has been private legal action filed in court under Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on race, sex, color, national origin, and religion.[4] Unfortunately, since the 1973 U.S. Supreme Court decision in *Espinoza*,[5] the bright line rule has been that discrimination based on citizenship status or immigrant status is not prohibited under Title VII because it is considered analytically distinct from discrimination based on national origin. This section presents the case holding, analyzes how it emerged and why it is wrong, and then discusses the framework it has created for claims of national origin discrimination based on immigration status.

4. 42 U.S.C. § 2000e-2. In addition, discrimination based on disability is prohibited by the Americans with Disabilities Act. 42 U.S.C § 12112 (2012). Discrimination based on age is prohibited by the Age Discrimination in Employment Act. 29 U.S.C. § 623 (2012).

5. 414 U.S. at 95–96.

A. The Decision

The story of the *Espinoza* decision begins in 1969 in El Paso, Texas, where Cecelia Espinoza applied for a job with Farah Manufacturing and was turned down because she was not a U.S. citizen.[6] Even though she was a legal permanent resident, married to a U.S. citizen, and was in the process of becoming a citizen, Farah refused to hire her based on its strict citizen-only policy.[7] At that time, Farah was the largest employer in El Paso, employing 14% of the overall workforce in its four plants.[8] The workforce, consisting mainly of cutters, seamstresses, shippers, and supervisors, was 98% Latino (primarily of Mexican descent) and 80% female.[9] Ms. Espinoza brought a claim under Title VII in federal district court, and both sides filed for summary judgment. The district court ruled for the plaintiff, reasoning that "the material facts are undisputed. Defendant intentionally refused to hire plaintiff because plaintiff was not a citizen of the United States. As a matter of law, this was a refusal to hire an individual 'because of such individual's . . . national origin, and, hence, an unlawful employment practice."[10] The district court did not articulate whether this holding was based on a disparate impact theory that the citizenship requirement adversely affected applicants because of their national origin or a disparate treatment theory that the policy directly excluded applicants based on their national origin. However, it did reference the EEOC Guidelines on disparate impact and stated, as part of the basis for its decision, that they would be given great deference.[11]

The Fifth Circuit, after considering both disparate treatment and disparate impact theories, reversed.[12] Focusing on Congressional intent, they dismissed the disparate treatment claim for the following reasons:

> Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her parents' birthplace— all of which characteristics she shared with the vast majority of Farah's employees. Rather, she was refused employment—irrespective of what her national origin may have been—because she had not acquired United States citizenship. Neither the language of the Act, nor its history, nor the specific

6. Espinoza v. Farah Mfg. Co., 343 F. Supp. 1205, 1206 (W.D. Tex. 1971) (statement of undisputed facts), *rev'd*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

7. For an examination of Farah's citizen only policy and its justifications, *see* Maria L. Ontiveros, *Building a Movement with Immigrant Workers: The 1972–74 Strike and Boycott at Farah Manufacturing* 15 EMP. RTS. & EMP. POL'Y J. 479, 481–482 (2011) [hereinafter Ontiveros, *Building a Movement*].

8. *Id.* at 482.

9. *Id.* In the district court opinion, the parties used the following statistics as their basis for a motion for summary judgment: "persons of Mexican ancestry make up more than 92% of defendant's total employees, 96% of its San Antonio employees, and 97% of the people doing the work for which plaintiff applied." 343 F. Supp. 1205, 1206.

10. 343 F. Supp. at 1208.

11. *Id.* at 1206–07.

12. Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

> facts of this case persuade us that such a refusal has been condemned by Congress.[13]

In essence, the Fifth Circuit defined national origin narrowly, as geographic country of origin. With respect to the disparate impact claim, the court acknowledged the EEOC Guidelines, which stated that discrimination based on citizenship had the effect of discrimination on the basis of national origin (based on the disparate impact theory established the prior year in *Griggs v. Duke Power*).[14] However, it rejected the claim because "citizenship discrimination in the case at bar was neither part of a larger plan nor a cover-up for some other motive. Thus, to the extent such discrimination has been declared by the EEOC to be per se illegal, we refuse to follow its regulation."[15] In other words, the Court of Appeals seemed to only recognize disparate impact as a theory when used to discover a hidden illegal motive or ill intent. The plaintiff appealed to the U.S. Supreme Court.

1. Majority Opinion of the Supreme Court

The Supreme Court considered the case as both a disparate treatment case of intentional discrimination and a disparate impact case. It assessed whether a neutral practice, that was not job related and consistent with business necessity, had an adverse impact on a protected group under its recently decided case *Griggs v. Duke Power*.[16] In evaluating the disparate treatment claim, the majority treated the case as a challenge to the "citizens only" rule that the plaintiff claimed prevented her from being hired because she was from Mexico. Essentially, the Court framed it as a case of discrimination by exclusion against people from a specific country. It began its decision by stating that "[t]his case involves interpretation of the phrase 'national origin.'"[17] It agreed with the Court of Appeals in finding that the "statutory phrase 'national origin' did not embrace citizenship."[18] Instead, it held that "the term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[19]

The majority based this conclusion on two factors. First, the only definition of national origin found in the legislative history of the Act defines national origin as "the country from which you or your forebears came" or your "ancestry."[20] They concluded, therefore, that national origin only looks

13. *Id.* at 1333–34.
14. *Id.* at 1334.
15. *Id.*
16. 401 U.S. 424 (1971).
17. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87 (1973).
18. *Id.*
19. *Id.* at 88.
20. *Id.* at 89.

to "country of origin," not citizenship. They used a very narrow, geographic definition of national origin that focuses on the specific country where a person was born. Second, they discussed several federal hiring provisions that allow for, or even require discrimination based on citizenship, while at the same time prohibiting discrimination based on national origin.[21] They reasoned that "interpret[ing] the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself had repeatedly flouted its own declaration of policy" and declined to do so.[22]

By defining Farah's policy as a citizenship policy, the majority framed the company's discrimination as being against non-citizens, rather than as discrimination against immigrants (or people not born in the United States). In this way, they were able to present it as analytically distinct from discrimination based on national origin. Additionally, by relying on the language of the legislative history for support, the majority focused on discrimination against people from a particular country (Mexico, in this case) rather than on discrimination against people born in any country other than the United States.

The majority's treatment of the disparate impact claim also relied on this framing in order to reject the plaintiff's claim. They agreed that a citizenship policy could potentially run afoul of the disparate impact principles established in *Griggs v. Duke Power*[23] if it had the purpose or effect of discriminating on the basis of national origin.[24] They suggested this could occur if the citizenship requirement was part of a larger scheme of unlawful national origin discrimination or if it was used as a pretext to disguise national origin discrimination.[25] They found that Farah could not be doing this because the workforce was overwhelmingly of Mexican descent. [26] They concluded:

> While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought. She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship.[27]

The majority's treatment of the disparate impact again focuses the definition of national origin on the country of origin. They state that there is no disparate effect because there are so many people of Mexican descent who

21. *Id*. at 89–90.

22. *Id.* at 90.

23. 401 U.S. 424 (1971).

24. *Espinoza*, 414 U.S. at 92.

25. *Id*.

26. *Id.* at 93 (citing statistics showing that 96% of the employees in the San Antonio division and 97% of seamstresses were of Mexican ancestry).

27. *Id.*

work at Farah. If they had considered discrimination based on national origin as discrimination based on being an immigrant more generally, that is, being born outside the United States, there would have been a disparate impact. Additionally, the opinion only examined discrimination as exclusion. The justices of the majority only looked at whether people of Mexican ancestry had been hired at Farah, ignoring how they were treated or whether they were exploited at the workplace because of their ancestry.

2. The Dissent

Justice Douglas' dissent avoids these pitfalls by framing the issue in a different way. On the disparate treatment claim, he argues that "alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be clearer that Farah's policy of excluding aliens is de facto a policy of preferring those who were born in this country."[28] He argues that discrimination in favor of those born in this country is in fact discrimination against those who are born outside the United States. As a result, the citizen only policy is per se discrimination based on national origin. This analysis is consistent with the reasoning of the district court opinion and the EEOC Guidelines.

On the disparate impact claim, Justice Douglas argues that *Griggs* established the rule that the Act prohibits neutral practices if they create artificial, arbitrary, or unnecessary barriers to employment based on a protected classification, even if it does not bar everyone in that protected group. In his view, it does not matter that many Mexican workers hold jobs at Farah or that "the citizenship requirement does not eliminate all applicants of foreign origin," just as it did not matter that the employment tests struck down in *Griggs* did not eliminate all black applicants.[29] He concludes:

> [D]iscrimination on the basis of alienage always has the effect of discrimination on the basis of national origin. Refusing to hire an individual because he is an alien is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.[30]

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

29. *Id.* at 97.

30. *Id.* (quoting Motion of the Equal Employment Opportunity Commission for Leave to File a Memorandum as Amicus Curiae and Memorandum at 5, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (No. 72-621), 1973 WL 172047). Justice Douglas also cites *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) which established the sex-plus doctrine of discrimination when it found that an employer's policy of prohibiting women with young children from holding a job was discriminatory, even though the employer hired other women for the job. Discrimination based on a prohibited characteristic (sex) plus another characteristic (having young children) was actionable under Title VII, even if the workforce hired was predominantly female. Although Justice Douglas does not specifically articulate the argument, various amicus briefs argued that the Farah policy was basically a policy of national origin plus discrimination. The employer refused to hire people those from outside the United States who were not citizens. *See* Motion of the Equal Employment Opportunity Commission for Leave to File a Memorandum

Justice Douglas argues that an interpretation of national origin discrimination that includes discrimination based on immigrant or citizenship status is necessary to ensure that Title VII is not just about protecting Blacks. He states, "[t]hese petitioners against whom discrimination is charged are Chicanos. But whether brown, yellow, black, or white, the thrust of the Act is clear: alienage is no barrier to employment here. *Griggs* as I understood it until today, extends its protective principles to all, not to blacks alone."[31] He goes on to emphasize that the plight of the workers at Farah is a plight common to all immigrant workers and that the type of discrimination they suffer is exploitation, as well as exclusion. He quotes an author writing about immigrants in the 1800s:

> For want of alternative, the immigrants took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweat-shops and the homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all.[32]

Justice Douglas concludes that Title VII is about protecting immigrants, not just immigrants' children who will be citizens by birth.

B. The Story Behind the Decision

1. The View from San Antonio, Texas: Labor Rights and Chicano Power

In the late 1960s and early 1970s, a vibrant civil rights community in El Paso, Texas was fighting for equal rights for Latinos. During the same time, workers were fighting for their labor rights at Farah by participating in a strike and organizing a national boycott.[33] Both of these movements highlighted and sought to end the systematic exploitation of Chicanos in society and at the workplace, while recognizing the interaction between discrimination based on ethnicity, class, immigration status, and sex. Local activists, including Ruben Montemayor, the attorney who filed the *Espinoza* case, viewed the case as part of this overall fight.[34]

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as Amicus Curiae and Memorandum at 6, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (No. 72-621), 1973 WL 172047).

31. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 97 (1973) (Douglas, J., dissenting).

32. *Id.* at 98–99, (quoting from OSCAR HANDLIN, THE NEWCOMERS 24 (1959)).

33. *See* Ontiveros, *Building a Movement*, *supra* note 7; Laurie Coyle et al., *Women at Farah: An Unfinished Story, in* A NEEDLE, A BOBBIN, A STRIKE: WOMEN NEEDLEWORKERS IN AMERICA, 227 (Joan M. Jensen & Sue Davidson eds., 1985); Emily Honig, *Women at Farah Revisited: Political Mobilization and its Aftermath Among Chicana Workers in El Paso, Texas*, *1972–1992*, 22 FEMINIST STUD. 425 (1996).

34. In an interview, George Cooper, who argued the Espinoza case at the Supreme court, stated "From the point of view of Ruben and his clients, they were definitely connected. They saw this case as part of their campaign." Interview with George Cooper (June 10, 2009).

Although not as well documented or publicized as the discrimination faced by African Americans in the South, Latinos in the Southwest, including those in Texas, faced rampant discrimination.[35] This discrimination included segregated schools; Jim Crow-style segregation in stores, restaurants, and hotels; exclusion from juries; voter disqualification; and separate racial classification in the official census.[36] It was quite common to see signs reading "No Mexicans Allowed" or "No Latin American or Colored People accepted."[37] In response, Latino civil rights organizations began forming in the 1930s and 1940s, including the League of United Latin American Citizens (LULAC) founded in 1927 and the American G.I. Forum (AGIF) formed after World War II.[38] These civil rights organizations evolved over time. In the 1960s, the Latino civil rights movement included groups focusing on Chicano or "La Raza" identity such as the Centro de Accion Social Autonomo (CASA), the Mexican American Political Association (MAPA), and the La Raza Unida Party.[39] These groups developed the idea of "Chicanos as a nonwhite mestizo race," who took pride in their non-white identity.[40] The Mexican American Legal Defense and Education Fund (MALDEF) was established on May 1, 1968 to provide legal assistance to Mexican-Americans or Chicanos.[41]

By the time that *Espinoza* reached the Supreme Court, MALDEF was able to argue that courts had recognized that "Mexican-Americans constitute a separate group, often subject to distinct discrimination in today's society." They cited federal courts, including the Supreme Court, for the proposition that, with regards to the Mexican-American in Texas, "long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices [means that]. . . the Mexican-American population of Texas, which amounts to 20%, historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."[42] The economic results were stark. In San Antonio in 1970, the mean household income of Spanish language groups was approximately two-thirds of non-Spanish white

35. *See generally* CYNTHIA E. OROZCO, NO MEXICANS, WOMEN OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (2009).

36. Ariel J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 356–59 (2007).

37. *Id.* at 363–64.

38. *See id.* at 360–67.

39. *Id.* at 387–89.

40. *Id.*

41. Brief of Mexican American Legal Defense and Education Fund, Amicus Curiae at 1, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (No. 72-761), 1973 WL 172048.

42. *Id.* at 2 (citing Hernandez v. Texas, 374 U.S. 475 (1954) and Graves v. Barnes, 343 F. Supp. 704, 728 (W.D. Tex. 1972), *aff'd sub nom.* White v. Regester, 412 U.S. 755 (1973)).

households, and 29% of all Spanish language families had incomes below the poverty line, compared to seven percent of non-Spanish white families.[43]

At Farah itself, workers experienced exploitative conditions.[44] They received pay that was 30% less than other plants in the area.[45] The company retained some of the workers' savings in company-controlled accounts in which it earned interest to pay for benefits.[46] All workers labored under a quota system that set an unbearable and unattainable pace.[47] Although the company stated that it offered retirement, it routinely forced workers out just before retirement by giving them such oppressive hours and demanding jobs that they could not perform them.[48] Workers' actions at the plant were closely monitored. They were transported to and from the plant on buses to control their movements, and other steps were taken to limit distractions and interaction with outside family members.[49] The workers were exposed to a variety of workplace health and safety hazards, and the company provided exclusive medical treatment that was inadequate and incompetent.[50] The predominantly female workforce was subjected to rampant sexual harassment.[51] Finally, workers feared arbitrary actions being taken by supervisors, such as being discharged or disciplined for no reason, or being yelled out, shoved or ridiculed.[52]

The employees at Farah and the Latino community recognized this discrimination as the same pattern of discrimination they experienced as Mexican-Americans, unrelated to their citizenship status. Most of the workers lived in the *Segundo* or Second Ward, an impoverished barrio in South El Paso near the Mexican border.[53] Whether or not they were U.S. citizens, they had a strong Mexican identity because of their close geographic and social connection to Mexico.[54] More importantly, the community viewed them as "Mexicans" and stigmatized them as "aliens," regardless of whether they were naturalized citizens, had been born in Texas, or had family roots in the area going back for centuries.[55] Within the factory walls, they viewed the excessive control and surveillance as similar to the *patron* system, a feudal

43. Brief for Petitioner at 19, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (No. 72-671), 1973 WL 172044 (citing data derived from U.S. Bureau of the Census).

44. Ontiveros, *Building a Movement*, *supra* note 7, at 483–85.

45. Martin Waldron, *Bitter Struggle by a Union*, N.Y. TIMES, Feb. 18, 1973, at 248.

46. Ontiveros, *Building a Movement*, *supra* note 7, at 484.

47. *Id.* at 485.

48. *Id.* at 484.

49. *Id.*

50. *Id.* at 484–85. Because the company provided this medical care, it refused to pay for outside doctors. In fact, it fired several workers injured on the job who sought outside medical treatment.

51. *Id.* at 486.

52. *Id.* at 485–86.

53. Coyle, *supra* note 33, at 240.

54. *Id.* at 235–40.

55. *Id.* at 240–41.

system used in Mexico.[56] The Farah supervisors intentionally used power dynamics, grounded in gender and ethnic characteristics, to humiliate, control and harass the female workers.[57] Workers at Farah and Latino members of the Texas communities experienced discrimination based on a combination of ethnicity, national origin, and immigration status that could not be disentangled.

At this same moment in history, the labor movement was busy trying to organize the garment sector in the South and Southeast, including a drive by the Amalgamated Clothing Workers of America to unionize 20,000 apparel jobs at thirty-five manufacturing plants throughout El Paso.[58] The organizing efforts quickly spread to include the Farah plants in San Antonio, and, before long, strikes erupted at Farah.[59] The strikers themselves, mainly women, used their shared class, ethnic, and gender characteristics as the basis for organizing and solidarity.[60] This solidarity carried them through the strike and shaped their future actions as well.[61]

A national boycott, organized in support of the strike, ran from 1972 through 1973.[62] The boycott consciously linked the fight against the exploitative work conditions at Farah with the broader fight for human rights, dignity, and equality for Chicano workers.[63] Boycott literature explained that support for workers was necessary so that "Farah Co. will not succeed in destroying the best hope of Mexican-Americans to improve their working conditions and their lives."[64] Organizers of the boycott linked their cause with that of Cesar Chavez and the grape boycotts organized by the United Farm Workers because "the theme would have considerable appeal to many idealistic Americans."[65] A major national civil rights group, the Citizens Committee for Justice for Farah Workers, formed in 1972 and carried the following message:

> At Farah, the issues are not only decent wages and working conditions. The issues are human decency; the rights of American citizens, the continuing struggle of Mexican-Americans to overcome the prejudice and repression that keep them vulnerable to exploitation. . . . If you're a Mexican-American

56. Allen Pusey, *Clothes Made the Man*, TEX. MONTHLY, June 1977, at 132, 136 (Under this system, workers lived and worked on land owned by the boss or patron. He exercised control over the workers, demanding obedience, while also portraying himself as a benevolent father. Most of the workers managed just a subsistence living.).

57. Ontiveros, *Building a Movement*, *supra* note 7, at 486.

58. *Id.* at 487.

59. *Id.* at 487–89.

60. VICKI L. RUIZ, FROM OUT OF THE SHADOWS: MEXICAN WOMEN IN TWENTIETH-CENTURY AMERICA 132 (1988); Ontiveros, *Building a Movement*, supra note 7, at 488–89.

61. Ontiveros, *supra* note 7, at 498–500; Emily Honig, *supra* note 33.

62. Ontiveros, *Building a Movement*, *supra* note 7, at 490–93.

63. *Id.* at 490–91.

64. Deborah DeWitt Malley, *How the Union Beat Willie Farah*, FORTUNE, Aug. 1974, at 164, 166.

65. *Id.* at 167.

> in the Southwest today, you know the flesh and blood meaning of words like 'harassment,' 'intimidation,' 'brutality.'[66]

As a final piece of the puzzle, young Chicanos active in the civil rights movement in El Paso used the strike and boycott as part of their organizing strategy to fight against systemic discrimination.[67] They formed a new political party, La Raza Unida, which provided support for the strikers.[68]

The response to the conditions at Farah—the strike, the boycott, and political activity—emphasized the relationship between discrimination that had been directed against Latinos because of their sex, national origin, ethnicity, and immigration status, and their class and workplace issues. The *Espinoza* case was not an isolated case of one woman who was denied a job at Farah because of a citizens-only policy. It was a case brought as just one more piece of the overall struggle for equality. Understanding this social history provides insight into what employment discrimination based on national origin meant to people like Cecilia Espinoza and their hopes for what the new civil rights legislation could provide them to aid in their struggle.

2. Civil Rights Lawyers and Their Perspective

The *Espinoza* case can also be studied from another perspective. It can be understood as part of the carefully crafted litigation strategy of civil rights lawyers looking to give effect to the newly passed Civil Rights Act. Jack Greenberg, Director-Counsel of the NAACP Legal Defense and Education Fund (LDF), decided to begin a litigation campaign to enforce the provisions of the Civil Rights Act that were aimed at ending discrimination in employment.[69] This litigation campaign was similar to and on par with the campaign to overturn the "separate but equal" doctrine and culminated in *Brown v. Board of Education*. In order to give maximum power to Title VII, the Fund formulated a three-part strategy.[70] The first step involved educating African Americans about their rights under the new law and to prepare them to file charges with the Equal Employment Opportunity Commission. This step took place during 1964-1965 during the one year grace period built into the law for employers to come into compliance with the new statute.[71]

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66. Display Ad., N.Y. TIMES, July 30, 1972, at E5.

67. Martin Waldron, *Ruling on Farah Union is the Latest Step in a Clash of Two Cultures*, N.Y. TIMES, Feb. 4, 1974, at L13.

68. *Id.* In the November, 1972 elections, the new party received a surprising 200,000 votes or six percent. Teresa Palomo Acosta, Raza Unida Party, Texas State Historical Association, tshaonline.org, https://tshaonline.org/handbook/online/articles/war01.

69. JACK GREENBERG, CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT THE CIVIL RIGHTS REVOLUTION 413 (1994).

70. Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, 22 HOFSTRA LAB. & EMP. L.J. 431, 436–37 (2005).

71. The rest of the statute went into effect in 1964. Civil Rights Act of 1964, Pub. L. No. 88-352, § 716(a), 78 Stat. 241, 266 (1964).

Step two involved the creation of a legal team to bring lawsuits and to develop the theories on which these lawsuits would be based.[72] The main lawyers on the team were Robert Belton and Gabrielle (Gaby) Kirk McDonald.[73] Legal academics, including Columbia law professor Albert J. Rosenthal, also played a key part in this step because they "assisted the litigation team in thinking critically and strategically about many of the complex interpretive statutory construction issues raised by Title VII."[74] In 1964, Columbia law professor George Cooper and University of Michigan law professor Richard Sobel published an important article in the Harvard Law Review that explained why a neutral practice with a disparate impact on a protected class should be considered discriminatory, even without discriminatory intent, if the practice could not be shown to be a business necessity.[75] At the same time, the EEOC was gathering legal scholars and psychometricians to form an expert panel to evaluate the discriminatory effect of testing practices.[76] The EEOC relied on these experts to ground the Guidelines on Employment Testing Procedures it published in 1966, stating that the only acceptable professionally developed ability tests were those that could be validated against the performance requirements of the job.[77] This was all part of one concerted effort, on the part of "plaintiffs groups, liberal legal scholars, and the EEOC together [to] proactively mobilize a steadily expanding body of testing research to buttress their legal strategy of adverse impact."[78] This phase laid the groundwork for a broad definition of discrimination.

The third phase of the legal strategy involved the identification of the best plaintiffs and cases to bring. The NAACP LDF identified seniority and testing cases as the best way "to establish basic legal principles and norms that would provide broad-based relief to victims of racial discrimination in employment."[79] The seminal case *Griggs v. Dukes Power*,[80] which challenged high school graduation and ability test requirements, was the culmination of this strategy. Although the plaintiffs lost at both the District Court and Court of Appeals levels, the NAACP decided to appeal to the

72. Belton, *supra* note 70, at 436–37.

73. *Id. at* 436.

74. *Id.* at 436–37.

75. George Cooper & Richard Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1964).

76. Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971*, 110 AM. J. SOC. 709, 733–34 (2004).

77. *Id.* at 734 (referring to EEOC, *Guidelines on Employment Testing Procedures* 1, 8 (Aug. 24, 1966).

78. *Id.* at 734 n.16.

79. Belton, *supra* note 70, at 437.

80. 401 U.S. 424 (1971).

Supreme Court because of Judge Sobeloff's separate Fourth Circuit opinion, concurring in part and dissenting in part.[81] The Sobeloff opinion relied extensively on the scholarship of Professors Cooper and Sobel to argue for a theory of discrimination based on disparate impact.[82] Professor Cooper was co-counsel with the NAACP for the plaintiffs in *Griggs* at both the Court of Appeals and Supreme Court levels.[83] At the Supreme Court, a unanimous Court adopted the theory of disparate impact as an actionable form of discrimination under Title VII.

The *Espinoza* case presented an excellent opportunity for the NAACP LDF to continue to develop the disparate impact theory of discrimination. When the Supreme Court granted certiorari in *Espinoza,* plaintiffs' attorney Ruben Montemayor contacted the NAACP to look for help, and the NAACP referred him to George Cooper who was running an employment discrimination clinic at Columbia Law School.[84] Professor Cooper agreed to take the appeal for him and agreed to argue the case at the Supreme Court. Professor Cooper "definitely" saw *Espinoza* as a disparate impact case.[85] He described the case as about being able to get a job without your national origin adversely affecting you. This is the case where your national origin defines whether you can even be considered for a job. Farah's response is that being born in Mexico does not disqualify a person, as long as you become a naturalized citizen. But, if you're born in the states, you're automatically a citizen.[86]

The Equal Employment Opportunity Commission (EEOC) filed an amicus curiae brief that also focused on the development of anti-discrimination law, and in particular the *Griggs* case and EEOC Guidelines.[87] The EEOC argued that deference should be given to the guidelines it drafted. It drew the analogy to the sex plus cases and argued that "[a]n employer may not impose discriminatory conditions on a class protected by Title VII merely because there are other members of the class who are not directly affected by such conditions."[88] It explained that Farah's citizenship requirement "created two different and unequal standards for employment: the native born are automatically eligible for employment while those born elsewhere are

81. Belton, *supra* note 70, at 453–54.

82. Griggs v. Duke Power, 420 F.2d 1225, 1237 n.2 (4th Cir. 1970).

83. GREENBERG, *supra* note 69, at 418.

84. Interview with George Cooper (June 10, 2009).

85. *Id.*

86. *Id.*

87. Motion of the Equal Employment Opportunity Commission for Leave to File a Memorandum as Amicus Curiae and Memorandum, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (No. 72-621), 1973 WL 172047).

88. *Id.* at 6. The Supreme Court had held, in *Phillips v. Martin-Merrietta Corp.*, 400 U.S. 542 (1971) that an employer practiced sex discrimination when it refused to hire women with young children, even it hired women in general. It characterized this as sex-plus discrimination. RUIZ, *supra*, note 60.

eligible for employment only after they have completed the requirement period of residency and passed the [citizenship test]."[89] It went on to explain that resident aliens are barred from employment for at least the period of time (3-5 years) it takes to become a citizen. It concluded:

> In other words a group of employees is deprived of the opportunity for employment for the sole reason that they were born outside the United States and have not obtained citizenship. That is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.[90]

Under the doctrine of *Griggs,* the EEOC argued that such policies constituted discrimination even without any ill intent.[91]

Other civil rights attorneys were also highly interested in the *Espinoza* case and saw it as a way to define discrimination based on national origin to include the discrimination faced by immigrant workers. Ken Hecht and the San Francisco-based Employment Law Center filed an amicus curiae brief arguing that, unlike previous generations of immigrants, contemporary immigrants were overwhelmingly "people of color" so that alienage discrimination becomes discrimination on the basis of color prohibited by Title VII.[92] Although the term "people of color" is now part of familiar vernacular, it was not in common usage in the early 1970s. This brief argued that immigrants of color (broadly defined as resident aliens from Asia, Africa, and Central and South America, including Mexico) could be understood as a class protected by Title VII, independent of, yet still related to race and national origin.[93] This argument could have been very significant because, during the ensuing fifty years, the protected category of "color" has never really been developed to give meaningful protection to any group of workers.[94] Their brief also highlighted the economic difficulties faced by this class, focusing not just on their exclusion from the workforce but also their exploitation.[95]

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89. *Id.* at 5.

90. *Id.*

91. *Id.*

92. Brief of Employment Law Center, Amicus Curiae, Espinoza v. Farah Mfg. Co., 462 F.2d 1331 (5th Cir. 1972) (No. 72-621), 1973 WL 172046.

93. *Id.* at 4–6.

94. For a discussion of how "color" has developed as a claim, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1 (1994); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color under Title VII Forty Years after its Passage*, 26 BERKELEY J. EMP & LAB. L. 435 (2005); Tenille McCray, *Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims*, 30 LAW & INEQ. 149 (2012).

95. Brief of Employment Law Center*, supra* note 92, at 6–9 (quoting the Bay Area Social Planning Council Report on Chinese Newcomers in San Francisco, "[N]ew arrivals . . . seek employment in Chinatown firms where low wages and long hours often prevail. . . . The newcomer in effect becomes locked into a system that limits his contacts to other Chinese-speaking persons, requires him to work long

Sandy Rosen at the Mexican American Legal Defense and Education Fund filed an amicus curiae brief that also focused on the relationship between the immigrant experience, assimilation, and discrimination based on national origin. His brief argued:

> Farah has made much of the fact that 95% of its employees are Spanish-surnamed. Like the Fifth Circuit it makes too quick [an] identification of ethnic discrimination with national origin discrimination. . . . [N]ational origin discrimination has never been a phenomenon distributed evenly over an entire ethnic group. The 'national origin' discrimination one suffers naturally decreases the further in years and generations one is removed from foreign origins. The acquiring of United States citizenship, the increased familiarity with the language, customs, and mode of life of one's new home increase the assimilation process. It is unrealistic to expect a third generation American citizen and a newly arrived immigrant to be subject to similar discrimination because their last names are both Rivera. A law that could be satisfied with a list of employees' last names would be similarly unrealistic . . . Farah's discrimination comes into play only for the foreign born. . . . This additional element further disadvantages that class of persons most victimized by 'national origin' discrimination, i.e. recent immigrants, and those least assimilated into mainstream American life.

This argument presents a nuanced understanding of what national origin means, given the realities of immigrant status, and argues that discrimination based on national origin include discrimination against someone who is "foreign born."

C. Critique of Decision: Misunderstandings and Missed Opportunities

Understanding the social and civil rights lawyering history behind *Espinoza* lends new critical insights on the decision. From a Title VII doctrinal standpoint, the case is part of the overall litigation strategy establishing the disparate impact doctrine as a definition of discrimination. A citizen-only policy meets the criteria of a neutral practice, unrelated to job performance, which has a disparate impact on a protected group. The presence of so many employees of Mexican ancestry in the workforce does not provide an adequate defense under the "sex-plus" doctrine established by the Supreme Court. The majority of the Supreme Court, however, never viewed the *Espinoza* case as a disparate impact case, or if it did, it was unwilling to continue to build upon the doctrine. In an interview, Professor George Cooper suggested two main reasons for why, in his words, "[n]o one bought it."[96] First, from a political stand point, Cooper suggested that "the Court may have wanted to show that they weren't so liberal that they would

hours for subsistence, and leaves him little time to upgrade his skills by participating in English and vocational education classes.").

96. Interview with George Cooper, *supra* note 34.

buy any liberal argument."[97] The justices may have felt the need to stop the doctrinal expansion of "disparate impact" for political reasons. Second, Cooper admitted that the Court simply "did not see the case[] as I did."[98] They did not see it "so much as an extension of *Griggs*, as much as arguing over what national origin is."[99]

With respect to the argument over the definition of national origin, the decision is also incorrect. Understanding the situation confronting Latinos in San Antonio, Texas and at Farah, it becomes clear that the citizenship requirement was related to discrimination based on national origin. There were many ways in which discrimination was being practiced against people considered to be Mexican-Americans, and the ban on citizenship was part of it. From a larger theoretical perspective, then and now, discrimination based on citizenship or immigrant status is similar to discrimination based on national origin, ethnicity, and immigration status in the United States. Current types of discrimination against immigrant workers focus on "foreignness" or "immigrant" nature, not reference to particular country of origin.

Unfortunately, the *Espinoza* decision missed opportunities to understand and develop theories about the nature of discrimination based on national origin and also of "color." The amicus brief filed by the Employment Law Center focused on this issue and gave the Supreme Court an opportunity to develop this theory, but the Court declined. Recent scholarship by LatCrit scholars such as Juan Perea[100] and Ian Haney Lopez[101] have explored and tried to build this understanding. This development has been more advanced in cases dealing with jury selection and whether preemptory challenges based on language and national origin are unconstitutional challenges based on race,[102] as well as school desegregation cases.[103] Within the employment discrimination field, courts have not been able to develop this definitional

97. *Id.*

98. *Id.*

99. *Id.*

100. *See, e.g.*, Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

101. *See, e.g.*, IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

102. Hernandez v. Texas, 347 U.S. 475, 479 (1954) (overturning murder conviction of Mexican-American defendant because Mexican-Americans had been systematically excluded from the jury); for representative commentary on the case, see IGNACIO M. GARCIA, WHITE BUT NOT EQUAL: MEXICAN AMERICANS, JURY DISCRIMINATION, AND THE SUPREME COURT (2008).

103. *See, e.g.*, Mendez v. Westminister Sch. Dist., 64 F. Supp. 544 (S.D. Cal. 1946) (holding that segregation of Mexican-American school children in California was unlawful), *aff'd*, 161 F.2d 774 (9th Cir. 1947); for representative commentary on the case see PHILIPPA STRUM, MENDEZ V. WESTMINISTER AND MEXICAN-AMERICAN RIGHTS (2010); RICHARD R. VALENCIA, CHICANO STUDENTS AND THE COURTS 22–49 (2008).

line because of the truncated definition of national origin.[104] In addition, the Court failed to take advantage of a case where it could develop a nuanced or "thick" analysis of the way that discrimination based on class, collective labor, and workplace issues intersect with national origin, race discrimination, sex discrimination, and immigration law. Legal scholars have explored these issues,[105] but the Court has been unable to do so because its narrow view of national origin in the *Espinoza* case has foreclosed this discussion.

The real, underlying issue in *Espinoza*, as Justice Douglas described in his dissent, was the extent to which Title VII's protection was going to be expanded to protect "Chicanos" and other outsiders within the United States. The majority refused to extend Title VII to protect this group when they were discriminated against for being foreign born. Despite the best efforts of amicus curiae, the Court in 1972 was not ready to confront the issue of how to treat Latino identity, *especially the role of migrant status*, and other markers of culture or ethnicity under "race" and "national origin." While the mainstream civil rights movement had drawn attention to the plight of discrimination against African Americans based on race, the treatment of Latinos and other immigrants, as well as the burgeoning Chicano civil rights movement, was simply not as well known or understood at the time. The Supreme Court could have advanced the discourse on these issues as they played out in the employment context, but it did not; instead, it created a legacy that divorced national origin discrimination from immigration status discrimination that needed to be addressed.

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104. In the Title VII employment discrimination field, courts have struggled with issues such as whether discrimination based on language and accent constitute national origin discrimination. For cases dealing with "english-only" policies, see Pacheco v. N.Y. Presbyterian Hosp., 593 F. Supp. (S.D.N.Y. 2009); EEOC v. Sephora, 419 F. Supp .2d 408 (S.D.N.Y. 2005); Garcia v. Spun Steak, 998 F.2d 1480, 1488 (9th Cir. 1993); Garcia. v. Gloor, 618 F.2d 264 (5th Cir. 1980). For commentary on these cases, see Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents*, 85 CAL. L. REV. 1347 (1997); Mark Colon, *Line Drawing, Code Switching, and Spanish as Second-Hand Smoke: English-Only Workplace Rules and Bilingual Employees*, 20 YALE L. & POL'Y REV. 227 (2002); and Natalie Prescott, *English Only at Work, Por Favor*, 9 U. PA. J. LAB. & EMP. L. 445 (2007). For cases dealing with accent discrimination, see In Re Rodriguez, 487 F.3d 1001 (6th Cir. 2007); Hassan v. Auburn Univ., 833 F. Supp. 866 (M.D. Ala. 1993); Fragante v. Honolulu, 888 F.2d 591 (9th Cir. 1989). For commentary on accent cases, see Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787 (1994); and Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument about Assimilation*, 74 GEO. WASH. L. REV. 365, 392-402 (2006).

105. Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization, in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 417 (Joanne Conaghan et al. eds., 2002).

D. Doctrinal Outcome: Three Confusing and Overlapping Approaches.

Currently, Congress and the courts have created a patchwork of laws that address how and when employment discrimination based on immigration status may be prohibited, under protections against race discrimination, national origin discrimination, or citizenship discrimination. These laws have conflicting definitions of race and national origin, provide inconsistent remedies, and apply to different actors. The three civil rights statutes or causes of action are Title VII, the Immigration Reform and Control Act of 1986 (IRCA),[106] and Section 1981 of the Civil Rights Act of 1866.[107] As described above, *Espinoza* has created a bright line rule that Title VII does not prohibit discrimination based on immigrant or citizenship status. Further, national origin under Title VII focuses on the geographic country of origin of the plaintiff. Title VII also prohibits discrimination based on race. This term is not clearly defined in the statute, but courts tend to include discrimination against groups who share "common physical characteristics or traits existing through ancestry, descent, or heredity."[108] Some courts have concluded that discrimination against someone for being "Hispanic" is a form of race discrimination prohibited by Title VII, while others treat Hispanic as an ethnicity that may or may not be the basis for a claim of discrimination based on national origin.[109]

IRCA includes prohibitions against discrimination based on both national origin and citizenship for employers with four or more employees.[110] Although this second provision would appear to solve the problem created by *Espinoza,* there are several reasons why it does not. First, the protection only prohibits discrimination on the basis of citizenship for "covered employees." Covered employees include citizens, permanent residents, refugees, asylees, or persons legalized under IRCA's legalization provision. In addition, in order to be covered, the employee must be an "intending citizen," which is defined as someone who has applied for citizenship within six months of the date they become eligible to apply for naturalization. If a person does not fall within this category, they are not protected.[111] In addition, preferences for U.S. citizens do not violate this provision of IRCA, when applicants are equally qualified[112] Finally, and most importantly, the

106. 8 U.S.C. § 1324b (1996).

107. Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2012)).

108. EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1026–28 (11th Cir. 2016).

109. Village of Freeport v. Barrella, 814 F.3d 594, 606–607 (2d Cir. 2016).

110. 8 U.S.C. § 1324b (a)(1), (a)(2)(A). In this way, IRCA's prohibition against discrimination based on national origin reaches more employers than Title VII, which only reaches employers with fifteen or more employees. 42 U.S.C. § 20003(b).

111. 8 U.S.C. § 1324b(a)(3); Bienvenido Antonio Thompson v. Sanchez Auto Servs., LLC, 12 OCAHO 1302, 2017 WL 2336378, at *5 n.10 (2017).

112. 8 U.S.C. § 1324b (a)(4).

discrimination protection only covers hiring and discharge decisions.[113] It does not reach discrimination in the terms and conditions of employment, such as harassment or discrimination in schedules or compensation. In this way, the definition of discrimination is narrow, focusing on exclusion and not exploitation.

Section 1981 prohibits discrimination in employment based on "race." Courts have interpreted this to include those groups that were considered separate races at the time of Civil War Reconstruction (i.e. Jews, Irish, etc.).[114] This opens the door for this type of claim to proceed when the discrimination is directed at certain ethnic or religious groups on the basis of race that is broader than the prevailing biological definition of race. Section 1981, then, focuses on ancestry or ethnic characteristics, not discrimination based on place or nation of origin.[115] The extent to which this protection extends to discrimination on the basis of citizenship and immigration status is unclear and in a state of flux.[116]

II. CASES CHALLENGING THE FRAMEWORK

Over most of the past half-century, courts have consistently held that, following *Espinoza*, a private employer that discriminates against immigrants on the basis of citizenship does not violate Title VII' s prohibition against national origin discrimination.[117] As the Seventh Circuit wrote in 2012, "[t]he question, then, is whether Title VII guards against alienage-based discrimination. It does not."[118] In addition, American workers who claimed that employers preferred to hire foreign visa workers or undocumented workers because of the immigration status have not been successful.[119] Recently, two lines of cases have begun to challenge these rules.

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113. 8 U.S.C. § 1324b (a)(1).

114. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). The Court uses the definition of race as it was understood in 1866, the year that § 1981 was passed. *Id.* at 610–11.

115. *See* Pourghoraishi v. Flying J., Inc., 449 F.3d 751, 756 (7th Cir. 2006).

116. *See, e.g.*, Rios v. Marshall, 530 F. Supp. 351, 360–61 (S.D.N.Y. 1981) (denying a discrimination case brought by U.S. citizens displaced by Jamaican visa workers under § 1981 because they were denied employment on the basis of citizenship, not race, and § 1981 does not cover citizenship). For a defense of why § 1981 prohibits discrimination based on alienage, see Leticia M. Saucedo, *Employment Authorization, Alienage Discrimination and Executive Authority*, 38 BERKELEY J. EMP. & LAB. L. 183 (2017). For a discussion of its limitations, see Hiroshi Motomura, *The Rights of Others*, 59 DUKE L.J. 1723 (2010) and Angela M. Ford, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 USC § 1981*, 49 U. KAN. L. REV. 457, 471 (2001).

117. *See* Rachel Bloomekatz, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1994 (2007) (citing 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) (concluding "no court has recognized discrimination based on immigration status as a valid claim under Title VII").

118. Cortezano v. Salin Bank & Tr., 680 F.3d 936, 940 (7th Cir. 2012).

119. Bloomekatz, *supra* note 117, at 1985 n.107 (citing, *inter alia*, Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975) (holding that U.S. workers did not have a claim under Title VII when rancher

A. Visa Discrimination Cases

During the last two years, U.S. workers displaced by H-1B visa workers have begun to experience success bringing national origin discrimination claims under Title VII. [120] In these cases, American workers seeking or performing high tech work have been passed over or discharged and the employer has hired an immigrant who has entered the country on a short-term guest visa. In some of these cases plaintiffs have direct evidence of disparate treatment. For example, in one case, a hiring manager testified that "we prefer South Asians" and said "there does exist an element of discrimination. We are advised to hire Indians because they will work off the clock without murmur and they can always be transferred across the nation without hesitation unlike [a] local workforce."[121] Another successful disparate treatment case presented gross statistical disparities, including a workforce that was 95% South Asian, compared to a South Asian population of one to two percent across the United States.[122]

More interesting, for this analysis, are the cases where the courts have allowed disparate impact cases to go forward based on the defendant's practice of using H-1B visa workers. In *Koehler v. Infosys Technologies Limited,* for example, the court found that the defendant's practice of "growing their U.S. offices by setting visa quotas for additional South Asian workers, budgeting for the associated expenses of securing the visas, and filling employment vacancies by assisting persons of the South Asian race to enter this country to work in the defendants' U.S. offices constituted a specific and particular employment practice for purposes of Title VII that resulted in a disparate impact on Caucasian Americans."[123]

These cases are important because they shift the focus for the definition of "national origin" from country of origin to a use of the immigration system. In the disparate treatment cases, the courts could have easily pointed to the visa or immigration status of the employees as the basis for discrimination, rather than their race or national origin. In the disparate impact cases, the court explicitly says that an immigration practice can be the cause of disparate impact leading to discrimination based on national origin. In these cases, the bright line has begun to dim. However, these cases still

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preferred to hire undocumented workers)). *See also* Scott v. Omega Protein, 989 So. 2d 827 (La. App. 3 Cir. 2008) (holding that employer's rehiring Mexican nationals rather than rehiring American fishermen, on grounds that employer was compelled to fulfill its obligations under visa program through which Mexican nationals were hired, or else suffer financial consequences, was not improper national origin discrimination).

120. For a discussion of these cases, see Maria L. Ontiveros, *H-1B Visas, Outsourcing and Body Shops: A Continuum of Exploitation for High Tech Workers*, 38 BERKELEY J. OF EMP. & LAB. L. 1 (2017).

121. Koehler v. Infosys Tech. Ltd., Inc., 107 F. Supp. 3d 940, 943–44 (E.D. Wis. 2015).

122. Heldt v. Tata Consultancy Servs., 132 F. Supp. 3d 1185, 1187–88 (N.D. Cal. 2015).

123. Koehler, 107 F. Supp. 3d at 948.

focus on discrimination as exclusion rather than exploitation because the plaintiffs are American workers who are not getting jobs.

B. EEOC Trafficking Cases

The EEOC has brought another significant lines of cases to protect trafficked workers, including those who are victims of sexual harassment. These cases are important because they expand the definition of national origin to focus on the discrimination based on the vulnerability of *immigrant* workers. In their brochure "EEOC Opens 'New Frontier' in War Against Human Trafficking," the EEOC explains the ways in which its jurisdiction over cases involving national origin and sex discrimination extends to protect victims of human trafficking:

> The EEOC enforces the law against treating workers differently based on their **national origin**. (Human trafficking thrives on exploiting the vulnerability of **immigrant workers** and often targets specific national origins, based on stereotypes about who best performs certain jobs or is less likely or able to complain about exploitation.)
>
> Even where forced commercial sex is absent (a requirement for a sex trafficking claim), trafficked women are often sexually assaulted or subjected to other severe **sexual harassment**. The EEOC has a wealth of experience in investigating and litigating sexual harassment cases, including cases brought on behalf of immigrant women workers.
>
> There are forms of labor exploitation that do not fall within the statutory definition of human trafficking, but which are every bit as severe and which often involve elements of **employment discrimination**. In those "less than trafficking" cases, the EEOC's role becomes particularly important, as it may be the only federal agency with jurisdiction over the employers' exploitation of workers.[124]

The EEOC has exercised its jurisdiction to bring two types of cases. The first type of case focuses on immigrants who have been trafficked into the United States to perform labor. The second line of cases have been brought on behalf of immigrant women who have suffered sexual harassment.

The trafficking cases often involve workers who have arrived in the United States on "guest worker" visas. They are subject to dehumanizing conditions in terms of housing, pay, and abusive treatment. Often, they are unable to quit and return home because of physical, financial, and psychological threats. The presentation of these cases has evolved over time. An early EEOC case of this type, *Chellen v. John Pickle Company,*[125] discussed the discrimination against the plaintiffs solely in terms of adverse treatment taken against them because of their country of origin. The plaintiffs

124. *EEOC Opens "New Frontier" In War Against Human Labor Trafficking*, EEOC (August 2013), https://www.eeoc.gov/eeoc/publications/brochure-human_trafficking.cfm.

125. 434 F. Supp. 2d 1069 (N.D. Okla. 2006).

filed disparate treatment and workplace harassment claims based on actions taken against them because they were Indian.[126] They alleged disparate treatment in wages, testing requirements, classifications, job assignments, restrictions on freedom to leave, and substandard living conditions. Ruling for the plaintiffs, the court stated:

> Plaintiffs' disparate treatment claims in this case have been established by direct evidence. Defendants recruited Indian workers in India, brought them to the United States, housed and fed them separately from the non-Indian JPC employees, identified them as Indians and made numerous discriminatory comments about their ancestry, ethnic background, culture and country which leads to the conclusion that they treated the Chellen plaintiffs differently, and less favorably, due to their race and national origin.[127]

The court cited differences in testing requirements, assignment to lower job classifications and less desirable jobs, restrictions on their movement, and the provision of substandard house and subsistence rations of food, as well as lower pay in finding discrimination based on national origin.[128]

In support of the hostile work environment claims, the plaintiffs alleged that the employer described the workers as "my Indian animals I brought from India to work," and called them "Indian dogs" and "lazy Indians."[129] Supervisors also said, "You are an Indian. That is why they treat you this way, and that is all you expect here because they don't like Indians." The employer told the workers, "I don't like Indian guys. I'm going to send you back to India" and "He's an Indian. He's no good. And, you know, we'll send him back."[130] The plaintiffs were also threatened with deportation and faced problems with paying back huge fees that prevented them from quitting and returning home.[131] The court found that "there is no doubt that defendants based their harassment on the Chellen plaintiffs' national origin, ancestry and ethnicity."[132]

Later cases brought by the EEOC have not focused as sharply on the plaintiffs' country of origin. For example, in the 2006 Trans Bay Steel case, the allegations focused on trafficking and exploitation as a result of immigrant status, rather than simply the fact that the plaintiffs were Thai. In the EEOC press release issued after the case settled, the EEOC stated that it

> charged that the class of Thai nationals, contracted under H2B visas by Trans Bay and a third party agency, were held against their will, had their passports confiscated, had their movements restricted, and were forced to

126. *Id.* at 1080–86.
127. *Id.* at 1105.
128. *Id.*
129. *Id.* at 1086–87.
130. *Id*. at 1087.
131. *Id.*
132. *Id.* at 1106.

work without pay. Additionally, some workers were confined to cramped apartments without any electricity, water, or gas. At least 17 of the workers were told if they tried to leave the location where they were being forcibly held, the police and immigration officials would be called to arrest them. EEOC also contends that all the workers were made to pay exorbitant 'fees' to the recruiting company which kept them in involuntary servitude.[133]

The press release concludes that "the issues of human trafficking and slavery are an enforcement priority for the Commission."

The EEOC explains the connection between the abusive treatment suffered by trafficked workers and discrimination based on national origin:

Trafficking cases often involve discrimination on the basis of national origin or race. Even when employees are legally brought into this country, employers may discriminate on the basis of national origin or race through the use of force, fraud, or coercion. This discrimination may include harassment and setting different terms and conditions of employment.[134]

The second type of case being brought by the EEOC involves the sexual harassment and abuse that is often inflicted upon female workers who are victims of trafficking. This is how the EEOC makes the connection to its jurisdictional charge, focusing here on its obligation to prevent and remedy discrimination based on sex. It says:

> Many labor trafficking cases involve sexual exploitation. Trafficked women are sometimes sexually assaulted or subjected to other severe sexual harassment. The EEOC is the federal agency charged with preventing, investigating and remedying sex discrimination, including sexual harassment. The EEOC has experience investigating and litigating sexual harassment cases generally, including cases brought on behalf of immigrant women workers.[135]

These cases are the latest in a line of cases brought by the EEOC to protect immigrant women, especially farm working women, against sexual harassment.[136] These cases were important to overcome the argument that the harassment was based on unprotected immigration status and to establish that the sex-plus doctrine could apply to harassment based on sex plus immigration status.[137]

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133. Press Release, EEOC Resolves Slavery and Human Trafficking Suit Against Trans Bay Steel for an Estimated $1 million, EEOC (Dec. 8, 2006), https://www.eeoc.gov/eeoc/newsroom/release/12-8-06.cfm.

134. *Human Trafficking*, EEOC, https://www.eeoc.gov/eeoc/interagency/trafficking.cfm (last visited Oct. 4, 2017).

135. *Id.*

136. William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 UC DAVIS L. REV. 1075 (2000); Maria L. Ontiveros, *Harassment of Female Farmworkers: Can the Legal System Help?*, *in* WOMEN'S LABOR IN THE GLOBAL ECONOMY 103 (Sharon Harley, ed.) (2007).

137. Maria L. Ontiveros, *Female Immigrant Workers and the Law, in* THE SEX OF CLASS (Dorothy Sue Cobble, ed.) 235, 242–43 (2007).

In both of these cases, the underlying cause of the exploitation is the immigration system, coupled with the national origin and/or sex of the plaintiffs. Interestingly, in these cases, the EEOC does not bring causes of action for human trafficking per se. However, they clearly exist at the intersection of trafficking violations and discrimination based on national origin. In another case, the judge explained the connection:

The EEOC's claims in this lawsuit allege that Defendants discriminated against the Claimants on the basis of their race and national origin. However, the underlying premise is that the Defendants intentionally hired Thai guest workers believing that they could subject them to undesirable and unfair working practices, as compared to the Mexican workers, and the Thai guest workers would be too fearful to complain about their working and living conditions.[138]

In the case, the judge had to rule on whether information on a trafficking visa was relevant and discoverable. She found that it was because the two issues were related. She stated,

Consistent with the statutory requirements for obtaining a T-Visa, [Claimant] would have 'describe[d] and document[ed] all factors relevant to his or her case.' . . . [A] Claimant's description of human trafficking would necessarily include discussion of . . . Defendants' treatment of that particular Claimant: the treatment of Claimants by Defendants is highly relevant to the EEOC's employment claims. Therefore, the T-Visa applications are a non-privileged matter that is relevant to a party's claims or defenses.[139]

These cases are particularly interesting for two reasons. First, they change the focus of "discrimination" from exclusion to exploitation and treatment. Second, they finesse the definition of "national origin" and link it to immigrant status or the use of the immigration system.

III. LOOKING FORWARD: OVERRULING *ESPINOZA V. FARAH*

A case from almost half a century ago stands as the only U.S. Supreme Court case to address Title VII's prohibition against discrimination based on national origin, and it has created incorrect, confusing, and destructive law. A bright line rule states that discrimination based on citizenship is not considered discrimination based on national origin because national origin focuses on the country where a person came from and not immigrant status. The most successful Title VII national origin cases address policies that exclude workers because of their country of origin, rather than those that address exploitation of immigrant workers because of their immigrant identity. This narrow textual reading of discrimination and national origin is not correct and never was. Recent cases have created a path to redefine

138. EEOC v. Global Horizons, Inc., 2013 WL 3940674, at *5 (E.D. Wash. July 31, 2013).

139. *Id.*

national origin discrimination in a way that better mirrors the types of discrimination experienced by workers. Both the cases of Americans displaced by guest workers and trafficked workers exploited because of their immigration status provide sympathetic plaintiffs that could create a better understanding of what "discrimination" based on "national origin" means. This redefinition will require a reconsideration or even an outright reversal of *Espinoza.* In order to explore that possibility, this section analyzes the standards that must be met to overturn *Espinoza* and analyzes the likelihood that they could in fact be met.

A. The Standards for Overturning Precedent

The standards for reversing precedent have been evolving in the last thirty years. In 1989, in *Patterson v. McLean Credit Union*, the Supreme Court directly addressed the question of whether to overturn a twenty-year-old case regarding the scope of Section 1981.[140] In deciding not to overturn the case, the Court considered several factors. First, it looked to whether there had been any shifts in the intervening development of law, through growth of judicial doctrine or further action taken by Congress.[141] The Court was especially concerned where the later law had rendered the decision in question irreconcilable with competing legal doctrines or policies.[142] The Court articulated a second justification as when the precedent is a "positive detriment to coherence and consistency in law, either because of inherent confusion created by an unworkable decision . . . or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws."[143] Finally, the Court stated that it will overrule precedent when it has become outdated and, after being "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare."[144]

In recent years, the Court has not adhered to these traditional principles in evaluating whether to overturn a decision. In 1992, in *Planned Parenthood v. Casey*,[145] the Court declined to overturn its seminal decision on abortion rights, *Roe v. Wade*.[146] The factors it utilized in deciding whether to overturn the decision included whether the rule has become unworkable, whether it could be removed without causing serious inequity or hardship due to reliance on the precedent, and whether the law or facts have changed in the

140. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (considering whether to overturn Runyon v. McCrary, 427 U.S. 160 (1976)).

141. *Id.* at 173.

142. *Id.*

143. *Id.*

144. *Id.* at 174.

145. 505 U.S. 833 (1992).

146. 410 U.S. 113 (1973).

intervening years to render the decision anachronistic.[147] More recently in 2003, in *Lawrence v. Texas,*[148] the Court did overturn its precedent[149] that had allowed for the criminalization of homosexual conduct. The factors the Court examined in *Lawrence* included whether the foundations of the decision had been eroded by subsequent decisions, whether it had been subject to substantial and continuing criticism, and whether it had induced reliance that would cause hardship if overturned.[150]

Overall, three factors emerge from this trio of cases that the Supreme Court is likely to consider in determining whether to overrule established precedent. The first two standards articulated in *Patterson*, the first and third factors in *Casey*, and *Lawrence*'s first factor all appear to focus on *whether the law has developed or changed in such a way that the original precedent has caused confusion or become unworkable. Patterson*'s last factor and *Lawrence*'s second factor look to *whether the ruling has been subject to intense criticism*. Finally, *Casey*'s second and *Lawrence*'s third factor both examine *whether the precedent has created reliance such that significant harm would be caused by changing the rule*.

B. The Standard Applied

Under this analysis, there are strong arguments for overturning *Espinoza.* The law has developed and changed in ways to make the doctrine confusing and unworkable. Action taken by Congress, in passing IRCA with its prohibition on citizenship discrimination, and the courts in expanding Section 1981 have signaled an interest in expanding protection against discrimination. These laws and precedents have rendered the *Espinoza* decision irreconcilable with competing legal doctrines or policies and created confusion. Further, as discussed in Part I.D of this essay, the precedent has become a positive detriment to coherence and consistency in law because of inherent confusion created by the various laws (Title VII, Section 1981 and IRCA), all of which can be used in different yet incomplete ways to address discrimination based on immigration status. [151]

Chellen illustrates these problems. In that case, the plaintiffs brought claims for race discrimination under 42 U.S.C. Section 1981, as well as claims for discrimination on the basis of race and national origin under Title VII. The court had to untangle whether the treatment of the Indian visa workers was based on race, national origin, or alienage in order to determine

147. *Casey*, 505 U.S. 833, 854–55.

148. 539 U.S. 558 (2003).

149. Bowers v. Hardwick, 478 U.S. 186 (1986).

150. *Lawrence*, 539 U.S. 576–77, 587.

151. *See supra* notes 106–114 and accompanying text.

which statute applied because of the different remedies available under each.[152] It reasoned:

> Obviously, plaintiffs would prefer to recover under Section 1981 to avoid the statutory damages cap applicable to Title VII claims. Defendants assert that 42 U.S.C. Section 1981 was enacted for the purpose of eliminating intentional discrimination on the basis of race, and that Section 1981 does not encompass claims of discrimination based on national origin. Further they contend that there was no evidence produced, whatsoever, that the Chellen plaintiffs are of a race different than the Caucasian race. . . . The United States Supreme Court has rejected 'the assumption that all those who might be deemed Caucasian today were thought to be of the same race when Section 1981 became law in the 19th century.' Accordingly, courts have struggled with the distinctions between race and national origin in the context of Section 1981 claims. Some merely recite that Section 1981 does not prohibit discrimination based solely on national origin . . . . However, it is appropriate to analyze Section 1981 claims in terms of ancestry and ethnic characteristics where discrimination is not based solely on national origin. . . [because] "often the line between discrimination based on race and discrimination based on national origin is 'not a bright one.'"[153]

Thus, the first standard for overturning precedent can be met.

Additionally, *Espinoza* has come under criticism as discussed in the second criteria for overturning precedent. The best example of this criticism rests on international treaty standards that bar discrimination based on immigrant or migrant status. The International Labor Organization prohibits discrimination based on "national extraction or social origin" and focuses extensively on discrimination based on migrant status.[154] In cases such as Lawrence v. Texas[155], Roper v. Simmons,[156] and Graham v. Florida,[157] the Supreme Court explicitly looked at international law and treaty obligations when overturning established precedent.

Finally, there has not been detrimental reliance on the finding. Employers have not had to change their hiring policies to bar noncitizens from working for them and have not arranged their hiring practices to only hire United States citizens. There is no harm that will result from prohibiting discrimination based on immigrant or migrant status.

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152. Chellen v. John Pickle Co., 434 F. Supp. 2d 1069, 1103–04 (N.D. Okla. 2006).

153. *Id.* at 1104–05.

154. Maria L. Ontiveros, *Employment Discrimination*, *in* HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS 210 (James Gross and Lance Compa eds., 2009); Shauna Olney & Ryszard Cholewinski, *Migrant Workers and the Right to Non-discrimination and Equality*, *in* MIGRANTS AT WORK 260 (Cathryn Costello & Mark Freeland eds., 2014) (explaining international standards under the ILO conventions).

155. 539 U.S. 558, 573 (2003) (striking down Texas anti-sodomy law).

156. 543 U.S. 551, 575-78 (2005) (barring capital punishment for individuals less than 18 years old).

157. 560 U.S. 48, 80-82 (2010) (prohibiting the sentence of life without the possibility of parole for individual less than 18 years of age).

CONCLUSION

In 1972, workers and civil rights activists understood that discrimination based on immigrant status and citizenship was a form of discrimination based on national origin. Unfortunately, the United States Supreme Court was unwilling or unable to understand that reality enough to translate it into the doctrine of Title VII. As a result, there has been nearly half a century of cases where immigrants have not been able to prove claims of discriminatory workplace treatment, especially when that treatment arose from exploitation based on immigration status, rather than exclusion because of their country of origin. Recently, cases brought by American workers displaced by H-1B and trafficked workers have begun to establish the possibility of bringing cases under Title VII for discrimination based on national origin when that discrimination focuses on immigration status. Following in the footsteps of civil rights lawyers who crafted a litigation plan in the 1960s for equal rights, the time has come to build on these cases and to overturn *Espinoza v. Farah*.