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## Employment Discrimination Faced by the Immigrant Worker- A lesson from the United States and South Africa

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# EMPLOYMENT DISCRIMINATION FACED BY THE IMMIGRANT WORKER: A LESSON FROM THE UNITED STATES AND SOUTH AFRICA

*Sean M. Heneghan\**

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### *INTRODUCTION*

*“Why couldn’t they just tell him to leave rather than burn him? We are all Africans.”<sup>1</sup>*

Ernesto Alfabeto Nhamuave was a husband, father of three, a confidante of many, and a God-fearing man who was also a lay-preacher in his spare time.<sup>2</sup> He was a builder from an isolated part of Mozambique that did not offer him many opportunities to practice his trade.<sup>3</sup> And so, with Nhamuave unable to support his family and pay for his children’s schooling, he traveled to Johannesburg, South Africa looking for work.<sup>4</sup> This country has attracted many migrant workers who are unable to find employment elsewhere because of the limited number of opportunities offered by corporations or factories on other parts

1. Charles Molele & Simphiwe Nkwali, *“He Died in Johannesburg While Working There. Please Accept His Spirit. Let It Rest in Peace,”* SUNDAY TIMES (S. Afr.), June 8, 2008, at 15.

2. See Molele & Nkwali, *supra* note 1 (telling the story of Nhamuave’s life); see also Beauregard Tromp, *Family Claim and Name the Burning Man*, CAPE TIMES (S. Afr.), May 27, 2008, at 4 (explaining that Nhamuave was seeking a “better life”).

3. See Molele & Nkwali, *supra* note 1 (detailing Nhamuave’s trade as a builder, describing his hometown as remote, and explaining the reason people from Mozambique travel to South Africa); see also Tromp, *supra* note 2 (describing the stories Nhamuave heard about South Africa).

4. See Molele & Nkwali, *supra* note 1 (discussing the reasons that Nhamuave left his hometown and traveled to the Johannesburg); see also Tromp, *supra* note 2 (conveying the stories that Nhamuave heard about South Africa that enticed him to travel there).

of the continent.<sup>5</sup> Upon arrival in Johannesburg, Nhamuave found a job at a construction site, but after only three months of work, his life came to a tragic end.<sup>6</sup>

Nhamuave's stay in Johannesburg coincided with the anti-immigrant riots in May 2008. This explosion of violence began as a small attack on immigrants in Alexandra, South Africa, but quickly spread to other parts of the country.<sup>7</sup> The violence lasted weeks and only ceased when the South African army became involved.<sup>8</sup> In the wake of these riots, sixty-two people, including Nhamuave, were killed, many women were raped, at least 670 people were injured, and 100,000 people were displaced from their homes.<sup>9</sup>

Nhamuave's personal story is a particularly horrifying one. That day, an angry anti-immigrant mob brutally attacked Nhamuave while he was attempting to escape from the country.<sup>10</sup> He was beaten to his knees, doused with gasoline, and

5. See Paul Salopek, *In Africa, a Desperate Stampede; Thanks to its Neighbor's Economic Disaster, South Africa Grapples With One of the Largest—and Most Brutal—Illegal Migrations in the World*, CHI. TRIB., June 12, 2007, at C15 (illustrating the immigration of people from other African countries into South Africa looking for work); see also Molele & Nkwali, *supra* note 1 (quoting Nhamuave's cousin as saying "[t]he reason we migrate to South Africa is to find jobs because there are few corporations or factories where we can work").

6. See Molele & Nkwali, *supra* note 1 (chronicling the story of Nhamuave's life and death); see also Tromp, *supra* note 2 (telling the story of Nhamuave's family identifying his burned body).

7. See Int'l Org. for Migration, *Towards Tolerance, Law, and Dignity: Addressing Violence against Foreign Nationals in South Africa*, at 2, No. 01/2009, (Feb. 2009) [hereinafter IOM] (explaining the spark and subsequent spreading of violence on May 11, 2008); see also MICHAEL NEOCOSMOS, FROM 'FOREIGN NATIVES' TO 'NATIVE FOREIGNERS' 120 (2010) (stating that the violence started in Alexandra on May 11, 2008).

8. IOM, *supra* note 7, at 2 (describing how the violence took two weeks and the deployment of the army for the mayhem to be subdued). See Wilson Johwa, 'Ignorance, State Failure' at Root of Attacks, BUS. DAY (S. Afr.), Aug. 28, 2008, at 4 (noting the violence lasting weeks).

9. IOM, *supra* note 7, at 2 ("In its wake, 62 people, including 21 South Africans, were dead; at least 670 wounded; dozens of women raped; and at least 100,000 persons displaced."). See Johwa, *supra* note 8 (explaining that the event was "four weeks of unrest that left sixty-two people dead"); see also NEOCOSMOS, *supra* note 7, at 120 (reporting on the destruction caused by the attacks).

10. See Molele & Nkwali, *supra* note 1 (telling the story of Nhamuave's death by a mob).

lit on fire using a burning log from a nearby bonfire.<sup>11</sup> As he started to burn, other members of the mob placed clothes and a mattress on him to accelerate the blaze.<sup>12</sup> After Nhamuave's death, his brother asked: "[W]hy couldn't they just tell him to leave rather than burn him? We are all Africans."<sup>13</sup>

Although the United States is seemingly removed from these events, immigrants in the United States face comparable discrimination as those similarly situated in South Africa.<sup>14</sup> In the United States, one large anti-immigration group is called the Minutemen.<sup>15</sup> Members of the anti-immigrant lobby in the United States, as in South Africa, have also, on occasion, murdered in their rage against immigrants migrating to the United States.<sup>16</sup> Shawna Forde, a staunch supporter of the Minutemen American Defense, a border patrol group, murdered in her quest to rob immigrant homes that she thought contained drugs and money in order to fund her organization.<sup>17</sup> Before Shawna and an accomplice left the scene

11. *Id.* ("[Nhamuave] was bludgeoned to his knees as he succumbed to the blows. One of the killers took a blazing log from a nearby bonfire and doused him with petrol.")

12. *Id.* ("As he burst into flames, some of the thugs spread his clothes and a mattress over him so that the fire would spread faster.")

13. *Id.*

14. See Salopek, *supra* note 5 (stating that both South Africa and the United States have the same "vexing problems—flimsy borders, xenophobia and questions of national identity"); see, e.g., Elizabeth Aguilera, *Internal Divide Reduces Role of Minutemen: Embroiled in Lawsuits and Recrimination, Groups See Steep Declines in Membership*, SAN DIEGO UNION-TRIB., June 2, 2011, at A1 (describing the Minutemen movement in the United States aimed at stopping illegal immigrants from entering the United States).

15. See Aguilera, *supra* note 14, at A1 (explaining the Minutemen movement in the United States); see also *Bringing National Awareness to the Illegal Alien Invasion*, MINUTEMEN PROJECT (Nov. 11, 2011), [http://www.minutemanproject.com/action\\_article.php?=-2](http://www.minutemanproject.com/action_article.php?=-2) (last visited Jan. 3, 2011) (stating the "action" of the Minutemen Project as "bringing national awareness to the illegal alien invasion").

16. See Joseph Goldstein, *Murder Trial in Tucson Shows Rift in Minuteman Border Movement*, N.Y. TIMES, Feb. 11, 2011, at A16 (reporting Shawna Forde's trial); see also Krissah Thompson, *Case Spotlights Tension on Mexican Border*, WASH. POST, Feb. 6, 2011, at A3 (detailing the death of Briscenia and Raul Flores).

17. See Goldstein, *supra* note 16, at A16 (outlining Shawna Forde's plan to finance the Minutemen American Defense and the incident that occurred); see also Thompson, *supra* note 16, at A3 (discussing Shawna Forde's creation of the Minutemen American Defense and describing the way she planned on funding her group).

of one such home, the duo murdered nine-year-old Brisenia Flores and her father, Raul.<sup>18</sup>

The deaths of Nhamuave, Brisenia, and Raul are examples of discrimination based on a person's citizenship status. These acts of violence may constitute extreme examples, but discrimination of this kind occurs everyday in the labor and employment setting, as well as in other areas of life in South Africa and the United States.<sup>19</sup> This Note explains that even though the United States and South Africa have different approaches to employment discrimination law, they both fail to fully protect immigrants from discrimination based on their citizenship status.<sup>20</sup> Employment discrimination against immigrants in the workplace should fit neatly into the protected categories of "national origin" in the United States and "ethnic origin," or "birth" in South Africa, but these categories do not offer protection to immigrants.<sup>21</sup>

In the United States, citizenship status is not protected within the category of "national origin" because this class has been interpreted with a focus on formality.<sup>22</sup> Despite South Africa's recently enacted and progressive laws against

18. See Goldstein, *supra* note 16, at A16 (reporting on the robbery and murders); see also Thompson, *supra* note 16, at A3 (describing the death of Brisenia and Raul Flores).

19. See generally GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION, GAO/GGD-90-62 (1990), available at <http://archive.gao.gov/d24t8/140974.pdf> (providing an example of citizenship status discrimination in the United States); Kurt April & Amanda April, *Reactions to Discrimination: Exclusive Identity of Foreign Workers in South Africa*, in EQUALITY, DIVERSITY AND INCLUSION AT WORK: A RESEARCH COMPANION 216 (Mustafa F. Özbilgin ed., 2009) (demonstrating the discrimination of immigrants in South Africa).

20. See generally *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 87–96 (1973) (providing the interpretation of "national origin" by the United States Supreme Court); see also *Larbi-Odam v. Member of the Exec. Council for Educ.* 1998 (1) SA 745 (CC) at para. 19 (S. Afr.) (finding of the South African Constitutional Court that it is possible to protect against "citizenship status" discrimination even though it is not listed as a protected category).

21. See *Espinoza*, 414 U.S. at 88–89 (explaining that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage"); see also *Larbi-Odam* (1) SA 745 at para. 19 (noting that citizenship status is not found in any protected category).

22. See *Espinoza*, 414 U.S. at 88 ("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.").

employment discrimination, the protected category of “ethnic origin” and “birth” are still constrained in their effective enforcement by the country’s refusal to acknowledge discrimination of non-citizens, in particular, for their ethnic origin or birth status.<sup>23</sup>

Although creating an explicit category protecting immigrants from citizenship status discrimination is a start, in order to successfully protect immigrants from discrimination, the laws of both countries must go further.<sup>24</sup> When a judicial body determines the validity of an employment discrimination claim, the law must allow for consideration of the intersection of racial discrimination with citizenship status discrimination.<sup>25</sup> A deeper look into discrimination against immigrants in the United States and South Africa reveals that certain immigrants in both countries, mainly immigrants with racial characteristics in the United States and immigrants from African countries in South Africa, experience a multilayered form of discrimination because citizenship status and race discrimination intersect.<sup>26</sup>

Part I of this Note details each country’s lack of protection against citizenship status discrimination. Section I.A discusses the background, protection offered, and specific application of laws against citizenship status employment discrimination in the United States. Section I.B explores the same topics in the South African context. Part II further demonstrates both countries’ shortcomings in the protection offered to immigrants by showing the intersection of race in employment discrimination experienced by Hispanic and darker skinned immigrants in the United States and African immigrants in South Africa. Part III compares the state of employment discrimination in both the United States and South Africa and ultimately proffers a solution to fully protect immigrants facing citizenship status employment discrimination. This Note concludes that to fully protect immigrants from discrimination, both countries must

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23. See *Larbi-Odam* (1) SA 745 at para. 19. (discussing how the South African Constitutional Court has decided that citizenship status is an “unspecified category”).

24. See Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, 26 J. LAB. ECON. 345, 346 (2008) (describing the effect of skin color on salary of immigrants); April & April, *supra* note 19, at 224 (comparing the workplace experience of European and African immigrants).

25. See generally Hersch, *supra* note 24; April & April, *supra* note 19.

26. See generally Hersch, *supra* note 24; April & April, *supra* note 19.

explicitly protect against citizenship status discrimination, while allowing for consideration of how citizenship status and racial bias intersect.

## I. *NATIONAL ORIGIN EMPLOYMENT DISCRIMINATION LAW IN THE UNITED STATES AND SOUTH AFRICA*

When an employee suffers discrimination in the workplace because of their citizenship status, they must turn to the available laws to provide protection. This Part discusses the relevant history and laws that are implicated when an employee seeks a remedy for the discrimination they experience. Part I.A and Part I.B cover the essential components of employment discrimination law in the United States and South Africa respectively, focusing on federal laws against discrimination, the language of the laws and protections offered, and finally a discussion of those protected categories that may cover citizenship status employment discrimination.

### A. *The United States*

While there are a few federal laws that protect against employment discrimination in the United States, one of the major employment discrimination laws and focus of this paper is Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>27</sup> This Part provides an understanding of the creation and impact of Title VII in terms of citizenship status employment discrimination. It explains the historical, political, and social background of Title VII. It also offers an overview of the application of Title VII, with specific discussion regarding the term “national origin.”

#### 1. Historical, Political, and Social Background

Title VII’s creation can be traced to the Reconstruction era in the United States, when the US government began to address

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27. See 42 U.S.C. § 2000e-2 (2006) (listing race, color, religion, sex, and national origin as the protected categories); see also Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination: Question and Answers*, EEOC.GOV (2009) [hereinafter EEOC] (outlining the laws that prohibit job discrimination, and showing that Title VII of the Civil Rights Act of 1964 is one of the major laws that applies).

equality through constitutional amendments.<sup>28</sup> Although the Thirteenth and Fourteenth Amendments were passed immediately following the US Civil War, the US Congress did not pass an employment discrimination law until 1964.<sup>29</sup> Progress in the fight for equality, including workplace equality, took many decades to achieve.<sup>30</sup>

Shortly after the Civil War, Congress enacted the Thirteenth Amendment to the US Constitution abolishing slavery.<sup>31</sup> In response, the Southern states, which opposed the Thirteenth Amendment, enacted the “Black Codes.”<sup>32</sup> The “Black Codes” were laws that attempted to limit the rights of former slaves.<sup>33</sup> The US federal government then enacted the Fourteenth Amendment, which states: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>34</sup> Again unwilling to provide equal treatment to all, the Southern states next developed a policy of “separate but equal,” creating a racial divide among the citizens of each state in all aspects of public life.<sup>35</sup> It took the United States many years to strike this policy down.<sup>36</sup>

28. See, e.g., U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1; see also Leland Ware, *A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain*, 36 GA. J. INT’L. & COMP. L. 89, 95 (2007) (pointing out that three important constitutional amendments were enacted at the end of the Civil War, one of which was cited by the US Supreme Court to end the policy of “separate but equal”).

29. See § 2000c; see also Ware, *supra* note 28, at 95–96 (chronicling the birth of the Civil Rights Act of 1964).

30. See § 2000c; see also Ware, *supra* note 28, at 95–96 (discussing the struggle to create the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968).

31. See U.S. CONST. amend. XIII, § 1; see also Ware, *supra* note 28, at 95 (explaining US Congress’s enactment of US constitutional amendments at the end of the Civil War).

32. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against Racial Use of Preemptory Challenges*, 76 CORNELL L. REV. 1, 39–43 (1990) (pointing out that southern states reacted to the Thirteenth Amendment by creating the “Black Codes”); see also Ware, *supra* note 28, at 104 (describing the reaction of the southern states after the Thirteenth Amendment of the Constitution was enacted).

33. See Colbert, *supra* note 32, at 42 (conveying the impact and purpose of the “Black Codes”); see also Ware, *supra* note 28, at 104 (conveying that the Black Codes were “laws designed to severely limit the rights of former slaves”).

34. U.S. Const. amend. XIV §. 1.

35. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the policy of “separate but equal”); see also Ware, *supra* note 28, at 95 (“The Reconstruction civil rights laws

The practice of “separate but equal” continued until 1954, when the US Supreme Court decided *Brown v. Board of Education*.<sup>37</sup> Not only was this case, as well as the cases leading up to it, important for the larger issue of equality, it was pivotal in the development of US employment discrimination law.<sup>38</sup> *Brown*, relying on the Fourteenth Amendment, declared that the policy of “separate but equal” was unconstitutional.<sup>39</sup> This case and a series of others that followed helped spark the creation of equal treatment laws including “fair employment practice” laws in several states.<sup>40</sup> These “fair employment practice” laws served as the foundation for bills subsequently enacted by Congress, including Title VII of the Civil Rights Act of 1964.<sup>41</sup>

The effort of many people to create equality among races in the United States helped move the country toward the decision in *Brown* and the creation of Title VII.<sup>42</sup> In particular, Title VII was only enacted after many demonstrations, including the Civil Rights Movement of the 1950s and 1960s.<sup>43</sup> These efforts were

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were eviscerated by a series of Supreme Court cases decided from 1880–1900, including *Plessy v. Ferguson*, the decision that endorsed racial segregation. By the first decade of the twentieth century, the Fourteenth and Fifteenth Amendments were effectively nullified in the South. African Americans were disenfranchised, forced to reside in segregated neighborhoods, and limited to the lowest-paying, menial, and service occupations.”).

36. See *Brown v. Board of Education*, 347 U.S. 483 (1954); see also GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW* 4 (3d ed. 2010) (reporting the impact of *Brown v. Board of Education*); Ware, *supra* note 28, at 96 (describing the importance of *Brown v. Board of Education*).

37. See RUTHERGLEN, *supra* note 36, at 4 (explaining that *Brown* “was itself the culmination of a series of decisions eroding the doctrine of ‘separate but equal’”); see also Ware, *supra* note 28, at 96 (discussing the relevance of *Brown v. Board of Education*).

38. See RUTHERGLEN, *supra* note 36, at 4 (“That decision is rightly regarded as the foundation of modern civil rights law, including employment discrimination law.”).

39. See *Brown*, 347 U.S. at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

40. See RUTHERGLEN, *supra* note 36, at 4 (recounting the impact of the cases leading up to *Brown*, and *Brown* itself as influencing the enactment of “fair employment practice” laws in a number of states).

41. See *id.* (noting the influence of the “fair employment practice” laws particularly on Title VII).

42. See *id.* at 1 (explaining the role of the judiciary in creating employment discrimination law); see also Ware, *supra* note 28, at 96 (listing the efforts made that helped create equality in the United States).

43. See Ware, *supra* note 28, at 96 (describing the influence of “[t]he marches, boycotts, and demonstrations” of the Civil Rights Movement of the 1950s and 1960s on Congress).

rewarded as commentators have called the Civil Rights Act of 1964 “the most sweeping and important civil rights legislation ever enacted.”<sup>44</sup> However, the struggle to enact, and the ongoing resistance to expand Title VII, are important to note when comparing the laws of the United States to other countries’ laws.<sup>45</sup>

Since Title VII’s enactment, Congress has only occasionally changed employment discrimination laws.<sup>46</sup> And, on these occasions, Congress has not made any major changes.<sup>47</sup> An example of Congress’s resistance to substantially change Title VII is the Employment Non-Discrimination Act, which if adopted would prohibit discrimination against employees based on sexual orientation and gender identity.<sup>48</sup> However, Congress, for various reasons, has failed to adopt this Act despite the fact that some form of it has been introduced in almost every session of Congress since the early 1990s.<sup>49</sup>

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44. See Jarrett Haskovec, *A Beast of Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law*, 14 *TRANSNAT’L L. & CONTEMP. PROBS.* 1069, 1072 (2005) (citing MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 256 (5th ed. 2003)).

45. See Albic Sachs, *The Creation of South Africa’s Constitution*, 41 *N.Y.L. SCH. L. REV.* 669, 669–70 (1997) (chronicling the history of the passing of the Constitution in South Africa).

46. See RUTHERGLEN, *supra* note 36, at 5 (“After enacting the federal statutes prohibiting employment discrimination, Congress has returned only occasionally to revise judicial interpretation of its work.”); see also Sheryl Gay Stolberg, *After Fall of ‘Don’t Ask,’ Pushing for ‘I Do,’* *N.Y. TIMES*, Dec. 21, 2010, at A22 (explaining that the Employment Non-Discrimination Act “remains stuck on Capitol Hill”); David G. Taylor, *Expand the Employment Non-Discrimination Act to Include Sexual Orientation and Gender Identity*, *TAMPA BAY TIMES*, NOV. 26, 2010 (noting that some version of the Employment Non-Discrimination Act, which would add two protected categories, has been introduced “in almost every session of Congress since the early 1990s”).

47. See RUTHERGLEN, *supra* note 36, at 5 (describing the US Congress’s lack of attention to Title VII).

48. See Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011) (“To prohibit employment discrimination on the basis of sexual orientation or gender identity.”).

49. See Stolberg, *supra* note 46 (“Yet the Employment Non-Discrimination Act, first proposed in the Clinton years, remains stuck on Capitol Hill, in part because lawmakers are squeamish about language in it that would protect transgender employees.”); see also Taylor, *supra* note 46 (“A version of the [Employment Non-Discrimination Act] has been introduced in almost every session of Congress since the early 1990s. Rep. Barney Frank, D-Mass., sponsored a new version of the bill last spring. Sen. Jeff Merkley, D-Ore., followed shortly thereafter with a new version in the US Senate. Both bills have been stuck in committee and show no signs of moving any time soon.”).

A number of years before Title VII was enacted, there were a few historical discussions and laws involving “national origin” as it relates to the Act.<sup>50</sup> Early on, discriminating against a person because of her national origin was not only legal, but a policy of Congress.<sup>51</sup> In 1924, Congress used the term “national origin” when setting quotas to regulate the number of immigrants that could arrive from each country.<sup>52</sup> This government policy likely “fueled and sanctioned” national origin discrimination in the private employment setting.<sup>53</sup> In fact, US President Harry S. Truman is on record strongly criticizing this policy in 1952:

The idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better citizens than Americans with Italian or Greek or Polish names. It was thought that people of West European origin made better citizens than Rumanians or Yugoslavs or Ukrainians or Hungarians or Balts or Austrians. Such a concept is utterly unworthy of our traditions and our ideals. It violates the great political doctrine of the Declaration of Independence that “all men are created equal.”<sup>54</sup>

In spite of this criticism, these quotas were enforced in the United States for several more years, until 1965.<sup>55</sup> Still, congressional debates involving employment discrimination laws gave few insights into the meaning of the protected category

50. See EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, 3179–80 (1968) (detailing the discussion of “national origin” by Congressmen in the US government); see also Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 810–17 (1994) (illustrating the many ways “national origin” was used throughout the government from Congressional Acts to Presidential speeches).

51. See Perea, *supra* note 50, at 811 (explaining congressionally created immigration quotas); see, e.g., Immigration Act of 1924, ch. 190, § 11, 12, 43 Stat. 153 (amended 1952).

52. See Immigration Act of 1924, ch. 190, 43 Stat. 153.

53. See Perea, *supra* note 50, at 811–12 (“To some extent, the quotas, government-sanctioned discrimination because of national origin, must have fueled and sanctioned discrimination because of national origin by private actors.”).

54. Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, PUB. PAPERS 441, 443 (June 25, 1952).

55. See *id.* (noting that Truman made the statement on June 25, 1952); see also Perea, *supra* note 50, at 812 (explaining that national origin quotas were in effect until 1965).

“national origin.”<sup>56</sup> Legislative history reflected that Congress extensively considered racial discrimination, perhaps discussing questions of “national origin,” but the debate in the House of Representatives did not contain any definition of the term “national origin.”<sup>57</sup>

Perhaps the most useful tool to uncover what Congress meant by the term “national origin” came from two congressmen who used the word in a narrow sense.<sup>58</sup> First, Congressman James Roosevelt stated: “May I just make very clear that ‘national origin’ means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country.”<sup>59</sup> Next, Congressman John H. Dent presented his understanding: “National origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated here from Great Britain and still be a colored person.”<sup>60</sup>

Besides the sporadic use of the term “national origin” in a few debates, there is little legislative guidance today on what is understood as “national origin” discrimination.<sup>61</sup> Although it is not fully settled because there was no consensus, where legislation lacked, the courts and law enforcement agencies have given some insight into the meaning of the term “national origin” in Title VII.<sup>62</sup>

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56. See Perea, *supra* note 50, at 817-18 (showing the lack of congressional discussion on the topic of “national origin”).

57. *Id.* (“The legislative history of the term ‘national origin’ in Title VII shows that references to the term were sporadic and relatively insignificant, certainly so in relation to the extensive consideration given to the problems of discrimination against African Americans. The debate in the House of Representatives yielded no definition or explanation of what national origin discrimination meant.”).

58. See *id.* at 818 (pointing out that two Congressmen stated their understanding of the term).

59. See EEOC, *supra* note 50 at 3179-80.

60. See EEOC, *supra* note 50 at 3180.

61. See *id.*; see also Perea, *supra* note 50, at 807 (“At the time, Congress gave no serious thought to the content of the national origin term nor to its proper scope.”).

62. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); see also *National Origin Discrimination*, EEOC, <http://www.eeoc.gov/laws/types/nationalorigin.cfm> (last visited Apr. 12, 2012) [hereinafter EEOC Definition] (providing the EEOC’s definition of “national origin”). The Supreme Court has only heard one case discussing “national origin” under Title VII. See *Espinoza*, 414 U.S. at 86 (1973); see also Perea, *supra* note 50,

## 2. Title VII

As discussed earlier, Title VII is one of the main pieces of legislation applicable to immigrants facing employment discrimination.<sup>63</sup> Although the US Constitution and some state laws have employment discrimination implications, this Note focuses on Title VII, a federal law.<sup>64</sup> Also, for simplicity, this Note focuses on intentional employment discrimination.

Title VII, as it is construed today, protects against unlawful employment discrimination of five categories: race, color, religion, sex, and national origin.<sup>65</sup> Although the statute defines “religion” and “sex,” it does not provide definitions of the other categories, including “national origin.”<sup>66</sup> Furthermore, to enable an employee to bring a Title VII claim, not only must the employee fit into one of the five protected categories, her employer must meet the definition of employer set forth in Title VII.<sup>67</sup>

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at 822 (noting the Supreme Court’s decision in *Espinoza* was the only case interpreting the term “national origin”).

63. See EEOC, *supra* note 27 (listing the laws that prohibit job discrimination and showing that only Title VII of the Civil Rights Act of 1964 applies, as well as the Immigration Reform and Control Act, which is discussed in Part I.A.3).

64. See, e.g., NY CLS Excc § 296 (1) (a) (1) (a) (Consol. 2012); WIS. STAT. § 111.31 (2011); see generally Ware, *supra* note 28 (discussing the importance of the Constitution in employment discrimination development).

65. 42 U.S.C. § 2000e-2(a) (2006) (“It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

66. *Id.* §§ 2000e(j)-(k) (presenting definitions for “religion” and “because of sex,” but failing to provide definitions of “race,” “national origin,” or “color”).

67. *Id.* § 2000e(b) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.”).

Title VII applies to employers “who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>68</sup> Thus, employers with less than fifteen employees do not meet this definition, nor do employers whose employees work less than twenty weeks in a year.<sup>69</sup> So an employee discriminated against by an employer with a small workforce, or larger, but seasonal workforce, would not have a cause of action under Title VII.<sup>70</sup>

Title VII makes a broad range of actions unlawful if they are done because of an individual’s race, color, religion, sex, or national origin.<sup>71</sup> Unlawful acts under Title VII include those that “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. . . .”<sup>72</sup> An employer is also liable for unlawful acts if they “limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.”<sup>73</sup>

The burden of proof is complex in a Title VII claim.<sup>74</sup> Using the burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, when a plaintiff brings a claim for intentional discrimination, the burden shifts as the case progresses.<sup>75</sup> If discriminated against, the plaintiff must establish a prima facie case to infer discrimination by demonstrating that she: is a member of a group protected by Title VII; applied and is qualified for the job to establish standing; was rejected despite qualifying; after rejection, the position remained open and the employer searched for a candidate with the same qualifications

68. *Id.*

69. *See id.* (stating the definition of “employer”).

70. *See id.* (showing that an employer with a small or seasonal workforce would not fall within the definition of “employer” under Title VII).

71. *See id.* § 2000e2(a) (listing the acts that are unlawful).

72. *Id.*

73. *Id.*

74. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (describing the many steps in meeting the burden of proof set out by the Supreme Court).

75. *See id.* (explaining the burden shifting scheme the US Supreme Court requires).

that the employee had.<sup>76</sup> If this is successfully established, the burden of production is placed on the defendant employer, and the defendant can rebut by showing a “legitimate non-discriminatory reason” for the rejection.<sup>77</sup> If the defendant is successful in this showing, the burden of proof shifts back to the plaintiff, where she must prove that the “legitimate non-discriminatory reason” was just a pretext for the discrimination.<sup>78</sup> The defendant employer may also assert a statutory defense.<sup>79</sup>

The major defense against a claim of employment discrimination listed in Title VII is bona fide occupational qualification.<sup>80</sup> This essentially means that an employer can choose an employee based on a certain characteristic that is normally discriminatory, like sex.<sup>81</sup> Bona fide occupational qualification is available against a claim of national origin employment discrimination, as well as sex and religious discrimination cases.<sup>82</sup> It is worth noting that claims of racial

76. *See id.* (“The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”).

77. *See id.* (“The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”).

78. *See id.* (describing what must be proven if the defendant is successful in showing a “legitimate nondiscriminatory reason” for the rejection).

79. *See* 42 U.S.C. § 2000e-2(c)(1) (2006) (defining what requirements are needed to use the defense bona fide occupational qualification).

80. *See id.* (“Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise...”).

81. *See id.* (defining what requirements are needed to use the bona fide occupational qualification defense). This is also available for “national origin” although it is rarely if ever used. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88–89 (1976); *see also* EEOC Definition, *supra* note 62; Perca, *supra* note 50

82. *See* 42 U.S.C. § 2000e-2(c)(1) (listing religion, sex, and national origin as possible bona fide occupational qualifications).

employment discrimination cannot use bona fide occupational qualification as a defense, which, some would argue, leads to an anomaly because of how similar race and national origin discrimination claims are at times.<sup>83</sup> This has never become a major issue because the US Supreme Court's interpretation of bona fide occupational qualification narrowed its use as a defense.<sup>84</sup> As for the defendant's use of bona fide occupational qualification defense in national origin discrimination claims in particular, the US Supreme Court has never recognized a proper use of a bona fide occupational qualification for national origin discrimination, although it has suggested in dictum that this use is possible.<sup>85</sup>

### 3. Different Ways to Define "National Origin" Create Differing Protection

US government bodies have interpreted the term "national origin" in a variety of manners. One way has been to adhere to a narrow and plain meaning of the term, which is construed as "discrimination because of the nation of one's birth or because of the nations of birth of one's forefathers and mothers."<sup>86</sup> The

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83. See RUTHERGLEN, *supra* note 36, at 143 (discussing the possible "anomaly" caused by the bona fide occupational qualification defense applying to claims of national origin discrimination and not race discrimination).

84. See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) ("We are persuaded—by the restrictive language of § 703(c), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the [bona fide occupational qualification] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." (footnotes omitted)); see also *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991).

85. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 189 n.19 (1982) (expressing "no view" on whether national origin "may be a bona fide occupational qualification"); see also RUTHERGLEN, *supra* note 36, at 143 (noting that the US Supreme Court has never upheld a bona fide occupational defense in a national origin discrimination claim and that the Court "has only suggested in dictum that the [bona fide occupational qualification] might justify a requirement that executives of a subsidiary of a Japanese corporation be of Japanese origin"); Tram N. Nguyen, *When National Origin May Constitute a Bona Fide Occupational Qualification: The Friendship, Commerce, and Navigation Treaty as an Affirmative Defense to a Title VII Claim*, 37 COLUM. J. TRANSNAT'L L. 215, 244–45 (1998) (explaining the lack of attention to the use of bona fide occupational qualification in national origin discrimination cases).

86. *Perca*, *supra* note 50, at 822; see *Espinoza*, 414 U.S. at 88 (1973) ("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.").

US Supreme Court indicated that this interpretation is supported even though there is a lack of legislative history defining the term.<sup>87</sup>

In *Espinoza v. Farah Mfg. Co.*, the US Supreme Court held that “national origin” does not prohibit an employer from requiring citizenship for hiring, as the Court focused on the particular place of birth of the employee or her ancestors rather than the employee’s citizenship status.<sup>88</sup> This definition is narrower because it excludes legal non-citizen aliens from protection, even though they are a less-assimilated group than others.<sup>89</sup> The definition is also in conflict with the definition used by the US Equal Employment Opportunity Commission (“EEOC”), which is the federal law enforcement body of employment discrimination claims.<sup>90</sup>

The EEOC has given a broader interpretation to the term “national origin” than the Supreme Court did in *Espinoza*.<sup>91</sup> The Commission defines national origin discrimination as “involv[ing] treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not).”<sup>92</sup> This range of protection is larger than the Supreme

87. See *Espinoza*, 414 U.S. at 88–89 (“The statute’s legislative history, though quite meager in this respect, fully supports this construction.”).

88. See *id.* at 95 (“Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.”).

89. See *id.* (finding that an employer discriminating against an employee because of his or her citizenship status is not illegal under Title VII); see also Perea, *supra* note 50, at 824 (noting that legal aliens are less assimilated than citizens).

90. EEOC Definition, *supra* note 62; see also *About the EEOC: Overview*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Apr. 12, 2012). (describing the EEOC as “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee” through the commission’s “authority to investigate charges of discrimination against employers who are covered by the law”).

91. Compare *id.* (providing the EEOC’s definition of “national origin”), with *Espinoza*, 414 U.S. at 88 (defining the term, “national origin”).

92. EEOC Definition, *supra* note 62; accord 29 C.F.R. § 1606.1 (2012) (“The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual’s, or

Court's holding in *Espinoza* because it goes beyond the particular country of birth of the person or his or her ancestors, and because it also protects "ancestry, culture, or linguistic characteristic common to a specific ethnic group."<sup>93</sup>

Although the EEOC uses a broad definition of "national origin," its definition does not go so far as to include discrimination of aliens.<sup>94</sup> In spite of this, others have argued that it is impossible to separate alien status and national origin because virtually all aliens have a non-native national origin.<sup>95</sup> Even the *Espinoza* Court did not unanimously agree to disregard the inclusion of alien status, as the dissent remarked: "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."<sup>96</sup>

The US government tried to address the difference in the treatment of "citizenship status" and "national origin" employment discrimination by revising the Immigration Reform and Control Act of 1986 ("IRCA").<sup>97</sup> The revisions protect

his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.").

93. See EEOC, *supra* note 27 (stating other practices that are illegal under Title VII). Compare *Espinoza*, 414 U.S. at 88 ("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."), with 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.").

94. See EEOC Definition, *supra* note 62 (including discussion of citizenship status discrimination on the website defining "national origin"); see also 29 C.F.R. § 1606.1 ("The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."); RUTHERGLEN, *supra* note 36, at 141 ("[S]tatus as an alien is inevitably intertwined with national origin because virtually all aliens have a foreign national origin.").

95. See RUTHERGLEN, *supra* note 36, at 141 (conveying the fact that being a non-national connects all aliens).

96. *Espinoza*, 414 U.S. at 97 (Douglas, J., dissenting) (internal quotations omitted).

97. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); see Darcy M. Pottle, *Federal Employer Sanctions as Immigration Federalism*, 16 MICH. J. RACE & L. 99, 138 (2010) (noting that Congress was trying to fill a "loophole"); see also RUTHERGLEN, *supra* note 36, at 144-45 (explaining Congress' purpose of revising the Immigration Reform and Control Act of 1986 ("IRCA")). IRCA created

against “citizenship status” employment discrimination, but not as fully as if it were read into Title VII’s protected category of “national origin.”<sup>98</sup> IRCA only covers citizenship status discrimination against “protected individuals,” which includes citizens and certain classes of aliens.<sup>99</sup> Also, IRCA does not prevent all types of employment discrimination because it applies only to hiring and firing and offers no protection to discrimination on the job.<sup>100</sup> Finally, IRCA allows an employer to prefer a citizen to a non-citizen if the two are equally qualified.<sup>101</sup> While helpful for immigrants, the protection offered is not as encompassing as a claim brought under Title VII.<sup>102</sup>

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civil and criminal penalties for employers who knowingly hired illegal aliens. *See* IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

98. *Compare* 8 U.S.C. § 1324b(a)(1) (2006) (applying to discrimination with respect to hiring, recruiting, or firing only), *with* 42 U.S.C. § 2000c-2(a)(1) (applying not only to discrimination with respect to hiring and firing but also to discrimination with respect to pay and other “terms, conditions, or privileges of employment”).

99. *See* 8 U.S.C. § 1324b(a)(3) (“As used in paragraph (1), the term ‘protected individual’ means an individual who (A) is a citizen or national of the United States, or (B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence . . . , is admitted as a refugee . . . , or is granted asylum . . . ; but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service’s processing the application shall not be counted toward the 2-year period.”). Even for a “legal alien” to receive protection, he or she must actively seek naturalization process within six months of eligibility. *See* 8 U.S.C. § 1324b(a)(3); *see also* Pottle, *supra* note 97, at 138 (discussing the scope of IRCA).

100. *See* 8 U.S.C. § 1324b(a)(1) (listing covered employment practices as “hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment”); *see also* Pottle, *supra* note 97, at 138 (noting the lack of protection for “discrimination on the job”).

101. *See* 8 U.S.C. § 1324b(a)(4) (allowing “a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified”).

102. *Compare supra* Part I.A.2 (discussing the protection offered by Title VII), *with supra* notes 99-101 and accompanying text (describing the protection offered by IRCA).

## B. *South Africa*

Like the United States, South Africa has extensive laws against employment discrimination. Employees in South Africa derive protection against employment discrimination through the South African Constitution and Employment Equity Act (“EEA”).<sup>103</sup> This Section provides an understanding of the creation and impact of these two documents in terms of citizenship status employment discrimination. Part I.B.1 discusses the recent background of South Africa’s laws against employment discrimination that developed after the country went through a revolution in 1994. Next, Part I.B.2 provides an overview of the major documents in South Africa that protect employees from discrimination, the South African Constitution and the EEA. Section 3 looks at how South Africa has handled citizenship status employment discrimination.

### 1. Historical, Political, and Social Background

On April 27, 1994, a new Constitution drastically changed South Africa.<sup>104</sup> This event is important in preventing employment discrimination because the Constitution, along with the EEA, impacted this area of law.<sup>105</sup> A very significant event occurred shortly before South Africa created these two documents: the end of apartheid.<sup>106</sup>

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103. See S. AFR. CONST., 1996; see also Employment Equity Act 55 of 1998 (S. Afr.). A third statute that provides protection from unfair discrimination is the Labour Relations Act, which has a small section on employment discrimination and was enacted before the European Economic Area. See Labour Relations Act 66 of 1995 § 5 (S. Afr.). This Note will focus on the South African Constitution and the European Economic Area.

104. See S. AFR. (INTERIM) CONST., 1993 (noting the date of commencement for the Interim Constitution of South Africa).

105. See generally *Hoffmann v. South Africa Airways* 2001 (1) SA 1 (CC) (S. Afr.) (demonstrating the use of the Constitution in an employment discrimination claim); Employment Equity Act 55 of 1998 (S. Afr.).

106. See Stephen Ellmann, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5 (1994) (giving background to the purpose and process of the creation of the South African Constitution); see also Albic Sachs, *The Creation of South Africa’s Constitution*, 41 N.Y.L. SCH. L. REV. 669, 669–70 (1997) (describing the “shift” in the country when South Africa moved from an era of apartheid).

A policy of South Africa's government for many years, apartheid segregated its people by race.<sup>107</sup> Albie Sachs, a judge on the South African Constitutional Court during the implementation of the new Constitution, explained that South Africa "introduced the word 'apartheid' to the English language."<sup>108</sup> He described the use of apartheid as "an organized system of repression that extended into every village and into every nook and cranny of society."<sup>109</sup> Once apartheid had ended, the country focused on moving forward and making changes, such as drafting a constitution to end the racism that engulfed the country and becoming a democracy that respected human rights.<sup>110</sup> According to Sachs, the ultimate goal was to transform South Africa into "a country where people of widely different backgrounds would respect each other, where everybody could live in dignity, and where social peace prevailed."<sup>111</sup> Ismail Mohamed, another member of the South African Constitutional Court when apartheid ended, demonstrated this sentiment: "No force can now stop or even delay our emancipation from the pain and the shame of our racist past."<sup>112</sup>

In the unanimous decision, *Hoffmann v. South African Airways*, the South African Constitutional Court discussed the historical, social, and political background that intertwined with the creation of the South African Constitution.<sup>113</sup> In deciding

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107. See *Apartheid*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/apartheid> (last visited Jan. 4, 2011) (defining apartheid as "racial segregation; *specifically*: a former policy of segregation and political and economic discrimination against non-European groups in the Republic of South Africa").

108. Sachs, *supra* note 106, at 669 (explaining that South Africa actually "introduced the word 'apartheid' to the English language and to international human rights discourse"). See MERRIAM-WEBSTER DICTIONARY, *supra* note 107 (defining the term "apartheid").

109. Sachs, *supra* note 106, at 669.

110. See Ellmann, *supra* note 106, at 5 (giving background to the purpose and process of the creation of the South African Constitution and discussing the challenges transitioning "from apartheid to democracy"); see also Sachs, *supra* note 106, at 669-70 (noting the "shift" in South Africa to a country that is "democratic and respect[s] human rights").

111. Sachs, *supra* note 106, at 169-70.

112. *Redesigning a Nation*, TIME, (Nov. 29, 1993), <http://www.time.com/time/magazine/article/0,9171,979696,00.html>.

113. See generally *Hoffmann v. South Africa Airways* 2001 (1) SA 1 (CC) (S. Afr.) (discussing how South Africa moved forward after a period of prejudice).

the case, the court recognized the importance of this background:

This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era—it is an era characterized by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place.<sup>114</sup>

South Africa has come a long way considering the country's new Constitution and other progressive legislation, but a panel of prominent Africans warned that problems still exist.<sup>115</sup>

In 2006, the African Peer Review Panel acknowledged that progress had been made in South Africa, but noted that this “should not lead to the premature conclusion that the country's process of democratic consolidation had been accomplished.”<sup>116</sup> One of the problems that the panel pointed out was the increasing presence of xenophobia, which the panel encouraged the country to address.<sup>117</sup> Sadly two years later, in 2008, the panel's fears were realized when it became clear that immigrants in South Africa not only faced discrimination but also violent attacks as a result of xenophobia.<sup>118</sup>

## 2. The Constitution and Employment Equity Act

As previously set forth, in South Africa, the Constitution and EEA are the two main documents that protect against employment discrimination, including possible citizenship status employment discrimination.<sup>119</sup> Although the EEA has provisions dealing directly with labor discrimination, the highest court in

114. *Id.* at 19–20 para. 37 (footnote omitted).

115. Brendan Boyle, *Xenophobia Threatens Stability*, SUNDAY TIMES (S. Afr.), Dec. 10, 2006, at 13 (explaining that although the country has come a long way, “[I]ngering racism and increasing xenophobia directed against other Africans threatens stability in South Africa and the region, the African Peer Review panel has warned”).

116. *Id.*

117. *See id.* (reporting the problem of xenophobia and recommending how to move forward).

118. *See supra* notes 1–13 and accompanying text (describing the plight of immigrants in South Africa during the attacks of May 2008).

119. *See supra* notes 104–105 and accompanying text (noting the importance of South Africa's Constitution and the European Economic Area).

South Africa has also looked to the Constitution when deciding employment discrimination cases.<sup>120</sup>

The “Equality” Section of the South African Bill of Rights sets the tone for the country to protect against inequality and to further implement very strong employment discrimination protections.<sup>121</sup> This Section (Section 9) has a number of important features. First, it states that “[e]veryone is equal before the law.”<sup>122</sup> Second, it gives power to the legislature to “promote the achievement of equality.”<sup>123</sup> Third, it protects against discrimination of anyone because of: “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”<sup>124</sup> Finally, it states that discrimination on any of these grounds “is unfair unless it is established that the discrimination is fair.”<sup>125</sup> Although not explicitly in the Constitution, the South African Constitutional Court has determined that if discrimination is based on an unlisted ground, as opposed to one of the listed categories, the petitioner or plaintiff bears the burden of proof in showing unfairness.<sup>126</sup>

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120. See, e.g., *Hoffmann v. South Africa Airways* 2001 (1) SA 1 (CC) (S. Afr.) (analyzing the discrimination using the terms of South Africa’s Constitution).

121. See S. Afr. CONST., 1996 §§ 9(2), 9(4) (“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken . . . . No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”).

122. *Id.* § 9(1).

123. *Id.* § 9(2).

124. *Id.* § 9(3).

125. *Id.* § 9(5).

126. See *Harksen v. Lane* 1998 (1) SA 300 (CC) at 327 para. 47 (S. Afr.) (“The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness.”); see also Carolc Cooper, *A Constitutional Reading of the Test for Unfair Discrimination in Labour Law*, 2001 ACTA JURIDICA 121, 127–29 (2001) (discussing the South African Constitutional Court’s finding in *Harksen*). In one instance, the Constitutional Court found that “citizenship status” is a protected category even though it is an “unspecified ground.” See *Larbi-Odam v. Member of the Exec. Council for Educ.* (North West Province) 1998 (1) SA 745 (CC) at para. 19 (S. Afr.).

South Africa enacted the EEA in 1998, shortly after the creation of the Constitution.<sup>127</sup> The EEA specifically protects against employment discrimination, while South Africa's Bill of Rights protects against discrimination in a more general sense.<sup>128</sup> One of the two express purposes of the EEA is to "achieve equity in the workplace by . . . promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination[.]"<sup>129</sup>

The EEA comprises four key components. First, it provides for the prohibition of unfair discrimination as it "applies to all employees and employers."<sup>130</sup> Second, the categories that are protected, which are very broad and similar to those enumerated in the Constitution, are "race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."<sup>131</sup> Third, when there is an allegation of employment discrimination, the burden is put on the employer to prove that the employer's action was fair, even if discrimination is based on an "unspecified ground."<sup>132</sup> Finally, there is a positive duty

127. See European Economic Area 55 of 1998 (S. Afr.); see also S. AFR. CONST., 1996.

128. Compare S. AFR. CONST., 1996, § 6(1) (protecting against employment discrimination), with § 9(3) (protecting against inequality in a general sense).

129. European Economic Area 55 of 1998 § 2 (S. Afr.).

130. *Id.* § 4. Although this seems like absolute language, according to a guide to unfair discrimination by the South African Government, the EEA does not apply to members of the National Defence Force, National Intelligence Agency, and South African Secret Service. Department of Labour, Republic of South Africa, *Basic Guide to Unfair Discrimination*, <http://www.labour.gov.za/legislation/acts/basic-guides/basic-guide-to-unfair-discrimination/?searchterm=discrimination> (last visited Feb. 24, 2011).

131. European Economic Area 55 of 1998 § 6(1) (S. Afr.). Note that this list is even broader than the list provided in the Constitution, as the European Economic Area includes three additional categories: family responsibility, HIV status, and political opinion. Compare *id.*, with S. AFR. CONST., 1996, § 9(3).

132. See European Economic Area 55 of 1998 § 11 (S. Afr.) ("Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair."). This burden seems stricter than the one provided by the Constitutional Court for claims brought under the Constitution because in those situations the burden only shifts if a claim is brought under a listed category. See European Economic Area 55 of 1998 § 11 (S. Afr.); see also Cooper, *supra* note 126, at 145 (explaining that the European Economic Area shifts the burden to the employer even if the discrimination alleged is based on an "unlisted ground").

placed on the employer, requiring the employer to take steps to eliminate employment discrimination policies or practices.<sup>133</sup>

### 3. Protection Against Citizenship Status Discrimination

Although the previously discussed documents have a number of protected categories, citizenship status was not explicitly listed among them.<sup>134</sup> Nevertheless, the South African Constitutional Court found that citizenship status was an “unspecified ground.”<sup>135</sup> This finding makes a successful citizenship status discrimination claim challenging, but not impossible.<sup>136</sup>

The South African Constitutional Court recognized that, although there is no protected category of “citizenship status,” discrimination of this kind could be subject to a discrimination claim.<sup>137</sup> In *Labri-Odam v. Member of the Executive Council for Education*, the South African Constitutional Court rationalized that citizenship could be protected for several reasons.<sup>138</sup> “First, foreign citizens are a minority in all countries, and have little political muscle . . . . Second, citizenship is a personal attribute which is difficult to change.”<sup>139</sup> Finding that citizenship is an “unspecified ground,” as opposed to fitting into one of the listed categories, puts the burden of proof on the employee in bringing a claim under the South African Constitution.<sup>140</sup> By contrast, if citizenship status were read into “ethnic origin” or “birth,” the burden would fall on the employer.<sup>141</sup> Amplifying

133. See European Economic Area 55 of 1998 § 5 (S. Afr.) (“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”).

134. See *id.* § 6(1) (listing the protected categories); see also *Larbi-Odam v. Member of the Exec. Council for Educ.* 1998 (1) SA 745 (CC) at para. 19 (S. Afr.) (finding that “citizenship status” could be protected, although it is not listed).

135. See *Larbi-Odam* (1) SA 745 at para. 19.

136. See *id.*; see also Cooper, *supra* note 126, at 145, and accompanying text (explaining how a claim is proven if there is discrimination based on an unlisted category).

137. See *Larbi-Odam* (1) SA 745 at para. 19 (listing two reasons for allowing the category to be protected).

138. See *id.*

139. *Id.*

140. See *id.*; see also Cooper, *supra* note 126, at 145 (explaining how a claim is proven if there is discrimination based on an unlisted category).

141. See Cooper, *supra* note 126, at 145 (explaining how a claim is proven if there is discrimination based on a listed category).

this problem is evidence that there are institutionalized attitudes and practices in South Africa “that dehumanise foreign nationals . . . and exclude them from access to social protection and rights.”<sup>142</sup>

The Constitution of South Africa, however, does specifically reference immigrants in its Preamble, declaring that the country “belongs to all who live in it,” and not just citizens.<sup>143</sup> The Constitution also states that human rights are applicable to “all people in our country” and this includes “equality.”<sup>144</sup> Although the Constitution protects immigrants on some level, the affirmative action policies do not provide explicit help.<sup>145</sup>

South Africa has very progressive affirmative action policies, but immigrants derive no assistance from it, as the policy essentially puts them below every other possible worker.<sup>146</sup> The Department of Labour for South Africa published this exchange on the rules of affirmative action with the Labour Minister of South Africa, Membathisi Mdladlana:

Responding to a question on a vacancy for which there is a qualifying white South African but not a qualifying black South African available, whether it is permissible for an employer to refuse to fill the vacancy in the expectation of filling it with a black foreigner Mdladlana said, “Where a South African Black candidate is not available for a post, and if all things are equal, the South African White candidate should receive preference.”<sup>147</sup>

This application of the affirmative action policies in South Africa, combined with the reading of the country’s Constitution

142. IOM, *supra* note 7, at 8 (reporting the findings of the International Organization for Migration’s report).

143. See S. AFR. CONST., 1996, pmbl.

144. *Id.* §§ 7(1), 9.

145. Press Release, Dep’t of Labour, Foreign Nationals Versus Affirmative Action (June 23, 2010), available at <http://www.labour.gov.za/media-desk/media-statements/2010/foreign-nationals-versus-affirmative-action/?searchterm=discrimination>.

146. See *id.*; see also Linda Ensor, ‘Employ SA Whites Rather than Foreigners,’ BUS. DAY (S. Afr.), June 25, 2010, <http://www.businessday.co.za/articles/Content.aspx?id=112874> (reporting on the statement made by the Labour Minister of South Africa).

147. Press Release, *supra* note 145.

and EEA, offer protection to immigrants, but not equal to the protection offered to citizens.<sup>148</sup>

## II. *THE SHORTCOMINGS OF EMPLOYMENT DISCRIMINATION LAW IN THE UNITED STATES AND SOUTH AFRICA: ADDRESSING CITIZENSHIP STATUS DISCRIMINATION CLAIMS*

As set forth in Part I, both the United States and South Africa do not explicitly protect immigrants who are discriminated against based on their citizenship status.<sup>149</sup> In the United States, citizenship status is not protected, as the term national origin has been interpreted narrowly.<sup>150</sup> Despite South Africa's recently enacted and progressive laws against employment discrimination, the Constitutional Court has found that "citizenship status" is not read into any of the many protected categories.<sup>151</sup>

Further impairing the rights of immigrants is the intersection of citizenship status with race discrimination. Intersectionality is the theory that different forms of discrimination cannot be considered in isolation because they intersect in the experience of the employees.<sup>152</sup> This theory

148. See *supra* notes 135–148 and accompanying text (discussing South Africa's Constitution, the EEA, and affirmative action policies in regard to non-nationals).

149. See *supra* Parts I.A.3, I.B.3 (examining the laws in the United States and South Africa and pointing out the failures of both countries to properly protect immigrants when they are discriminated against because of their citizenship status).

150. See *supra* Part I.A.3 (describing the Supreme Court's narrow interpretation of "national origin" in *Espinoza*).

151. See *supra* Part I.B.3 (illustrating the lack of explicit protection for immigrant workers in South Africa).

152. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1242 (1990) [hereinafter Crenshaw, *Mapping the Margins*] ("The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences."). Crenshaw is generally credited with creating the theory of "intersectionality." This Note uses this theory to highlight the unique experience of colored immigrants when they are discriminated against in the workplace. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. CHI. LEGAL F.* 139 (1989) [hereinafter Crenshaw, *Demarginalizing*]; see also Leslie McCall, *The Complexity of Intersectionality*, 30 *SIGNS: J. WOMEN CULTURE & SOC'Y* 1771, 1771 n.1 (2005) (noting that the theory of intersectionality likely was started by Kimberlé Crenshaw).

argues that looking at race and citizenship status as two entirely separate claims distorts the issues faced by immigrants with racial characteristics in the United States and African immigrants in South Africa.<sup>153</sup> Under intersectionality, when immigrants are being discriminated against, a citizenship status discrimination claim should not be considered in isolation from race discrimination because these forms of discrimination intersect in the discrimination experiences of Hispanic and darker skinned immigrants in the United States and African immigrants in South Africa.<sup>154</sup>

The EEOC's Compliance Manual provides an instance where an employee is discriminated against because of national origin and race.<sup>155</sup> The manual gives the example: "Toni alleges that she was not hired for a server position in a Greek restaurant based on her Chinese ethnicity and physical features. Toni's charge should assert both national origin and race discrimination."<sup>156</sup> The discrimination in this example illustrates the intersection of race and national origin discrimination,

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153. See Crenshaw, *Mapping the Margins*, *supra* note 152, at 1242 (suggesting that an issue arises when two distinct forms of discrimination are combined); see also Crenshaw, *Demarginalizing*, *supra* note 152, at 142–43 (discussing how racism and sexism intersect in the experience of women of color).

154. See Crenshaw, *Mapping the Margins*, *supra* note 152, at 1242 (suggesting that there is a problem when multiple forms of discrimination combine); see also Crenshaw, *Demarginalizing*, *supra* note 152, at 140 (discussing the intersection of discrimination that women of color face).

155. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL § 13 (2002), available at <http://www.eeoc.gov/policy/docs/national-origin.html> ("Title VII's prohibition against national origin discrimination often overlaps with the statute's prohibitions against discrimination based on race or religion. The same set of facts may state a claim of national origin discrimination and religious discrimination when a particular religion is strongly associated, or perceived to be associated, with a specific national origin. Similarly, discrimination based on physical traits or ancestry may be both national origin and racial discrimination. If a claim presents overlapping bases of discrimination prohibited by Title VII, each of the pertinent bases should be asserted in the charge.").

156. *Id.* The manual also gives an example of national origin and religious discrimination: "Thomas, who is Egyptian, alleges that he has been harassed by his coworkers about his Arab ethnicity. He also has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian. Thomas' charge should assert both national origin and religious discrimination." *Id.* For this paper, focusing on national origin and racial discrimination is better suited as a comparison between the United States and South Africa, but this comparison is also very viable.

which is similar to the intersection of race and citizenship status discrimination.

Part II.A demonstrates the intersectionality between race and citizenship status in the United States by discussing discriminatory practices and attitudes, and pay differences based on an immigrant's skin color. Part II.B looks at the intersectionality between race and citizenship status in South Africa by illustrating the differing treatment of European and African immigrants in the workplace and the application of South Africa's affirmative action policies.

#### *A. The Nature of Citizenship Status Discrimination in the United States*

Race and citizenship status discrimination are intertwined in the experiences of immigrants with racial characteristics in the United States.<sup>157</sup> First, it is necessary to establish that there is discrimination against immigrants. As discussed earlier, the United States enacted the Immigration Reform and Control Act of 1986.<sup>158</sup> It created civil and criminal penalties for employers who knowingly hired illegal aliens.<sup>159</sup> When IRCA was created, it required the US General Accounting Office ("GAO") to do a study on the effect of the Act.<sup>160</sup> The study found that the implementation of IRCA led to national origin and citizenship discrimination.<sup>161</sup>

The GAO reported that 461,000 employers in the survey population created practices in response to IRCA that discriminated against individuals because of their national origin.<sup>162</sup> Although the survey did not differentiate between

157. See generally GAO, *supra* note 19 (quantifying the intersection of national origin and race discrimination on Hispanic immigrants); Joni Hersch, *Profiling the New Immigrant Worker: The Effects of Skin Color and Height*, 26 J. LAB. ECON. 345 (2008) (demonstrating the intersection of national origin and race discrimination on darker skinned immigrants).

158. See Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

159. See *id.* § 247A(a).

160. *Id.* § 247A(j). The United States General Accounting Office, now known as the United States General Accountability Office ("GAO"), works for Congress and "investigates how the federal government spends taxpayer dollars." See *About GAO, US GOV'T ACCOUNTABILITY OFFICE*, (Jan. 20, 2012), <http://www.gao.gov/about/index.ht>

161. See GAO, *supra* note 19.

162. See *Immigration Reform: Employer Sanctions and the Question of Discrimination, Testimony Before the Comm. on the Judiciary* (Mar. 30, 1990) (statement of Charles A.

eligible and ineligible workers, it concluded that it was reasonable to assume “many eligible workers were affected.”<sup>163</sup> An estimated 227,000 employers created practices that avoided hiring employees with foreign accents or appearances that made them seem like illegal immigrants.<sup>164</sup> An estimated 346,000 employers applied IRCA’s required verification system discriminately by only using it for employees who appeared foreign.<sup>165</sup> The GAO estimated that an additional 430,000 employers “said that because of the law they began hiring only persons born in the United States or not hiring persons with temporary work eligibility documents,” even though both these practices are illegal.<sup>166</sup> Having demonstrated that discrimination against immigrants exists, the focus of the discussion now turns to the impact of racial discrimination.

A look at the interplay of race and citizenship status shows that when immigrants are discriminated against, racial characteristics are a factor. As part of the same study discussed above, the GAO performed a hiring audit of over 300 employers in Chicago, Illinois, and San Diego, California.<sup>167</sup> Potential employees were sent to employers to seek a job and the results showed that Caucasian applicants were offered more jobs than Hispanic applicants by fifty-two percent, showing the impact of racial characteristics.<sup>168</sup>

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Bowsher, Comptroller General of the United States) (“We estimate that 461,000 (or 10 percent of the 4.6 million employers in the survey population nationwide) began one or more practices that represent national origin discrimination.”).

163. *See id.* (“The survey responses do not reveal whether the persons affected by the discrimination were eligible to work. However, given that these employers hired an estimated 2.9 million employees in 1998, we believe it is reasonable to assume that many eligible workers were affected.”).

164. *See id.* (“An estimated 227,000 employers reported that they began a practice, as a result of IRCA, not to hire job applicants whose foreign appearance or accent led them to suspect that they might be unauthorized aliens.”).

165. *See id.* (“Also, contrary to IRCA, an estimated 346,000 employers said that they applied IRCA’s verification system only to persons who had a ‘foreign’ appearance or accent.”).

166. *Id.* at 7.

167. *See id.* at 6–7.

168. *See id.* (“Finally, our hiring audit of 360 employers in Chicago, Illinois and San Diego, California, showed that the ‘foreign-appearing, foreign-sounding’ Hispanic member of the matched pairs was three times more likely to encounter unfavorable treatment than the Anglo non-foreign-appearing member of the pairs. For example, the Anglo members received 52 percent more job offers than the Hispanics.”).

Other racial characteristics impact discrimination among immigrants, as lighter skinned lawful immigrants earn a larger income on average than darker skinned lawful immigrants. According to a survey, “[i]mmigrants with the lightest skin color earn on average 17% more than comparable immigrants with the darkest skin color.”<sup>169</sup> Joni Hersch, an economist, studied these figures and found that height also provides a correlation to pay but she said that this was explainable because height can reflect “health capital” and thus create higher wages, while skin color is less likely to reflect more productivity.<sup>170</sup> Hersch concludes that this discrimination based on skin color intersects race and citizenship status discrimination, as she says that “[t]he results indicate that any such discrimination is not merely ethnic or racially based nor due to the country of birth.”<sup>171</sup>

As demonstrated by the GAO, discrimination against immigrants is a problem, but it appears not to occur evenly based on the differences in treatment of Caucasian and Hispanic applicants and pay between lighter and darker skinned immigrants.<sup>172</sup> The experience of immigrants with racial characteristics, like skin-color, is more complex than a claim of either citizenship status discrimination or race discrimination.<sup>173</sup>

### *B. The Nature of Citizenship Status Prejudice in South Africa*

South Africa also struggles with discrimination against immigrants. This problem goes beyond citizenship status, as there is a racial discrimination component.<sup>174</sup> Therefore, it is important to understand the basis of the discrimination faced by immigrants.

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169. Hersch, *supra* note 157, at 346.

170. *Id.* at 375 (“Height above the U.S. average also has a positive effect on wages of immigrants. While height may reflect greater amounts of health capital and thereby have a direct positive effect on wages, it is less likely that skin color reflects any attribute related to productivity.”).

171. *Id.* at 378 (demonstrating the intersection between race and citizenship status discrimination faced by an immigrant in the workplace).

172. *See generally* April & April, *supra* note 19 (demonstrating the racial impact on discrimination against immigrants).

173. *See generally* Hersch, *supra* note 157.

174. *See generally*, April & April, *supra* note 19 (explaining the intersection of race and citizenship status discrimination faced by African immigrants in South Africa).

In May 2008, angry mobs in South Africa turned their rage towards the immigrants in the country.<sup>175</sup> This was not the first time that xenophobic violence had broken out in South Africa, but its extent was particularly horrifying.<sup>176</sup> As stated earlier, the path of destruction left sixty-two people dead, at least 670 people wounded, “dozens of women raped,” and “at least 100,000” people displaced.<sup>177</sup> Animosity towards immigrants based on their citizenship status reflects the blame that South Africans place on non-citizens for the jobs they are perceived of taking away from citizens.<sup>178</sup>

A study by Professors Kurt April and Amanda April entitled “Reactions to Discrimination: Exclusive Identity of Foreign Workers in South Africa,” demonstrates that the sentiment of the angry mobs carried over into the workplace environment.<sup>179</sup> One of the areas the study focused on was “the negative psychological effects which foreign employees experience” in the South African workplace.<sup>180</sup> This study also concluded that citizenship status discrimination is overlooked in the South African workplace.<sup>181</sup>

The Aprils’ study found a major theme of “[a]nxiety distancing by the foreign employee towards the South African

175. See IOM, *supra* note 7, at 7 (describing the attacks in May 2008); see also Molele & Nkwali, *supra* note 1 (presenting the story of Nhamuave and the reason for his subsequent death).

176. See IOM, *supra* note 7, at 7 (“Violence against foreign nationals did not begin with the May 2008 attacks. Since 1994, hundreds of people have been harassed, attacked, or killed because of their status as outsiders or non-nationals.”).

177. See *id.* at 2 (“In its wake, 62 people, including 21 South Africans, were dead; at least 670 wounded; dozens of women raped; and at least 100,000 persons displaced.”); see also Johwa, *supra* note 8 (describing the event as “four weeks of unrest that left 62 people dead.”).

178. S. AFR. HUMAN. RIGHTS COMM’N, REPORT ON THE SAHRC INVESTIGATION INTO ISSUES OF RULE OF LAW, JUSTICE AND IMPUNITY ARISING OUT OF THE 2008 PUBLIC VIOLENCE AGAINST NON-NATIONALS 8 (2010) (“Non-nationals resident in South Africa are all the more likely to fall prey to violence, as South Africans often blame them for crime and *unemployment*, and view them as responsible for depriving ‘more-deserving’ citizens of *jobs*, housing, and other economic goods.”) (emphasis added); see April, *supra* note 173, at 217 (presenting research on the experiences of immigrants in the South African workplace).

179. See April & April, *supra* note 19, at 217.

180. See *id.*

181. See *id.* at 226; Sue Blaine Day, *Foreigners from Europe ‘Less Subject to Xenophobia,’* BUS. DAY (S. Afr.), Aug 6, 2009, available at <http://www.businessday.co.za/articles/Content.aspx?id=77855> (reporting on the findings of April’s study).

employer.”<sup>182</sup> Foreign workers felt so distrustful that they would “physically” and “mentally” distance themselves from their employers because of the mistreatment that occurred to immigrant employees.<sup>183</sup> While the distrust was directed towards the employer, foreign employees also distrusted South African co-workers, as well.<sup>184</sup> The interviews showed that “one bad experience with a South African colleague meant that foreign workers tended to expect the same from other South Africans, creating a long-term gulf of distrust and paranoia.”<sup>185</sup>

The problem in the workplace was directly related to the immigrant’s citizenship status.<sup>186</sup> Many of the immigrant employees surveyed “felt that the language barrier and cultural difference meant that they were not regarded as individuals but as company workers, with set tasks to fulfil.”<sup>187</sup> The immigrants felt that the South Africans were very disinterested in their “history and culture.”<sup>188</sup> The lack of discussion about cultural differences can hurt the immigrants because they felt unwanted, and also because they were not able to communicate that the norm in South African culture can be perceived as offensive in their culture.<sup>189</sup>

Xenophobia is a fear of immigrants, but not all immigrants are discriminated equally in the workplace because race of the immigrant impacts the severity of the discrimination.<sup>190</sup> The Aprils’ study found that South African immigrants from other African countries faced more discrimination in the workplace than European immigrants.<sup>191</sup> The authors explained that “[b]ased on the interviewee responses, the South African workplace was more accepting of, and less psychologically

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182. *Id.* at 218.

183. *See id.* at 217.

184. *See id.* at 218.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* The study found that some of these immigrant employers actually felt that not being noticed was more effective. *See id.*

189. *See id.* at 221.

190. *See id.* at 222–25 (distinguishing the experience of the African immigrant worker from the European immigrant worker).

191. *See id.* at 224 (concluding that foreign workers of European descent are more accepted in the workplace than foreign workers of African descent); *see Day, supra* note 181 (reporting on the findings of the April study).

damaging to, foreign workers from Europe as opposed to foreign workers from other regions, especially Africa.”<sup>192</sup> Although some South Africans were not welcoming of the culture and customs of African immigrants, they “appeared extremely interested in all things European.”<sup>193</sup> As the authors explained, this interest “in all things European” stemmed from the similarity between Europeans immigrants and the dominant senior management class, white men.<sup>194</sup>

The Labour Minister of South Africa, Membathisi Mdladlana, provided more evidence of the divide between “white” and “black” immigrant workers in his statement on the country’s affirmative action policies, as discussed in Part II.B. Mdladlana, said: [w]here a South African Black candidate is not available for a post, and if all things are equal, the South African White candidate should receive preference.”<sup>195</sup> This statement by the Labour Minister recognized that there was a racial element involved in the discrimination against non-citizens, as he said “a black foreigner,” referring to immigrants from Africa, and not immigrants from Europe.<sup>196</sup>

This Part presents different evidence showing where citizenship status discrimination in South Africa and the United States was linked to race discrimination in the experience of Hispanic and dark skinned immigrants in the United States, and African immigrants in South Africa. The experience of the immigrants appears more complex than considering race and citizenship status separately.

### III. *COMPARING THE UNITED STATES AND SOUTH AFRICA TO ACHIEVE A PROPORTION AGAINST EMPLOYMENT DISCRIMINATION OF IMMIGRANTS*

Examining the United States’ older employment discrimination laws, and even older Constitution, and South

192. See April, *supra* note 19, at 224.

193. *Id.* at 218.

194. See *id.* at 224; see also Day, *supra* note 181 (summarizing April’s study and explaining why European immigrants are looked at differently than African immigrants).

195. Press Release, Dep’t of Labour, *supra* note 145 (reporting the statement made by the Labour Minister).

196. See *id.*

Africa's new Constitution and even newer employment discrimination laws, shows that both countries fail to offer protection against citizenship status employment discrimination.<sup>197</sup> This analysis of each country's respective laws, along with the racial underpinnings of discrimination against immigrants, points to an effective way to protect against citizenship status discrimination.<sup>198</sup> In the United States, not only should the country create a protected category of "citizenship status," or expand the narrow definition of "national origin" to include citizenship status discrimination, but it should also allow a consideration of the intersection of race in the discrimination claim.<sup>199</sup> Similarly, South Africa should also explicitly protect against citizenship status discrimination while allowing a consideration of the intersection of race to assist African immigrants in bringing an effective claim.<sup>200</sup>

Section III.A compares the employment discrimination laws of both countries and discusses how the EEA offers better protection. Part III.B focuses on the lack of protection for immigrants discriminated against because of their citizenship status and the importance of the intersection of race shown by both countries. Finally, Part III.C discusses a way for both countries to make improvements and offer full protection to the immigrant workforce.

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197. *See supra* Parts I.A and I.B (describing the employment discrimination laws in the United States and South Africa and their application, or lack of application, to immigrants).

198. *Id.* (discussing the laws and impact of race on citizenship status discrimination claims).

199. *See supra* notes 92-102, 171-187 and accompanying text (going through the different interpretations of the term "national origin," and illustrating the intersection of racial and citizenship status discrimination in the United States).

200. *See supra* Parts I.B.3, II.B (illustrating the lack of an explicit category protecting against citizenship status discrimination and the treatment of non-nationals in the Constitution and affirmative action policies, and the intersection of racial and citizenship status discrimination in South Africa).

*A. Employment Equity Act Offers Better Protection Than Title VII*

The United States' Title VII and South Africa's EEA offer a different span of protections.<sup>201</sup> The United States has not had much movement in terms of employment discrimination law since Title VII established the five protected categories, and so it is antiquated when compared to countries with newer and progressive laws.<sup>202</sup> The US Congress has consistently denied adding new protected categories such as sexual orientation and gender identity.<sup>203</sup> In comparison, South Africa's employment discrimination legislation, the EEA, is relatively new and more progressive.<sup>204</sup> As a whole, the EEA is considerably more employee-friendly than is Title VII.<sup>205</sup>

At the outset, there are a few key differences in the procedures available in each country if an immigrant is discriminated against in the workplace. The first difference is the scope of protected categories.<sup>206</sup> In the United States, the list includes: race, color, religion, sex, or national origin.<sup>207</sup> This is quite narrow when compared to South Africa's protected categories include: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.<sup>208</sup> In addition, South African courts can also consider unlisted

201. Compare *supra* Part I.A.2 (describing the facets of protection offered under Title VII), with *supra* Part I.B.2 (explaining the different aspect of protection offered by the EEA).

202. See *supra* notes 27,132 and accompanying text (listing the protected categories of Title VII in the United States and comparing it to the listed categories of the EEA in South Africa).

203. See *supra* notes 49–54 and accompanying text (describing the struggle to pass the Employment Non-Discrimination Act, which would add to more protected categories, “sexual orientation,” and “gender identity”).

204. See *supra* notes 68–90, 128–43 and accompanying text (explaining the protection offered and the parts of each country's laws that impact a claim, such as the proper burden of proof and the available defenses).

205. See *id.*

206. See *supra* notes 27, 141 and accompanying text (discussing the protected categories of Title VII in the United States and comparing it to the listed categories of the EEA in South Africa)

207. See *supra* note 70 and accompanying text (listing the five categories protected by Title VII).

208. See *supra* note 132 and accompanying text (listing the eighteen categories protected by the EEA).

categories like “citizenship status.”<sup>209</sup> This broader protection makes it easier for a person facing employment discrimination to find a claim that applies to their situation.

Second, if the suit were brought in the United States, Title VII would only protect an immigrant if the employer had fifteen or more employees.<sup>210</sup> In South Africa, the EEA applies to the immigrant’s employer no matter how many employees were working for the employer.<sup>211</sup> Therefore, the EEA protects more employees discriminated against because of their citizenship status than Title VII.

Third, there are very important differences between the United States and South Africa in the procedure of the claim and the burden of proof.<sup>212</sup> In the United States, there is the *McDonnell Douglas* burden-shifting scheme, which makes the burden of proof complex and more difficult for a plaintiff.<sup>213</sup> If the plaintiff proves there was unlawful discrimination, the burden-shifting scheme allows the defendant the opportunity to establish a “legitimate non-discriminatory reason” for the rejection. If the defendant can do so, the plaintiff then has the burden to prove that this reason was simply a pretext for the discrimination.<sup>214</sup> In South Africa, the burden of proof for an unfair discrimination claim is put on the employer.<sup>215</sup> Thus, an immigrant would have an easier time bringing a successful claim in South Africa. This is slightly tempered because if a claim is brought for discrimination of an unlisted category using the South African Constitution, the burden to show unfairness rests

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209. See, e.g., *supra* note 136 and accompanying text (describing the process if there is a claim of discrimination based on an unlisted ground using South Africa’s Constitution).

210. See *supra* notes 68, 73–76 and accompanying text (looking at the text of Title VII and the impact of this requirement on a person facing employment discrimination).

211. See *supra* note 131 and accompanying text (quoting the EEA as applying “to all employees and employers”).

212. See *supra* notes 74–79, 141–42 and accompanying text (explaining the different approaches to burden in an employment discrimination case in the United States and South Africa).

213. See *supra* notes 74–79 and accompanying text (examining the burden-shifting scheme established by the Supreme Court in *McDonnell Douglas*).

214. See *id.*

215. See *supra* note 133 and accompanying text (noting that if an employment discrimination claim is brought in South Africa under the EEA, the burden is on the employer to prove that it is fair).

on the employee.<sup>216</sup> The EEA however, seems to always apply the burden to the employer, even if the alleged discrimination falls within an unlisted category.<sup>217</sup> Again, South Africa's protection is superior.

A fourth point of comparison is that the United States has a bona fide occupational qualification defense and South Africa does not.<sup>218</sup> However, this difference is marginalized, as it is rarely, if ever, applied to national origin discrimination claims in US courts, but it is a difference worth noting because it is still available and thus could be used.<sup>219</sup>

Although these differences may seem like small nuances on the surface, they can have a large impact if an immigrant were to bring a claim of discrimination. South African law certainly seems to help the employee because it includes more protected categories, applies to all employers, puts the burden on the employer, and does not provide for any available defenses like bona fide occupational qualification.<sup>220</sup> These differences are understandable considering how new and progressive South Africa's laws against employment discrimination are compared to the United States, but they both lack enough protection for employment discrimination of immigrants specifically.<sup>221</sup>

### B. *Lack of Protection for Immigrants*

Both of these countries approached the creation and development of laws against employment discrimination from similar perspectives. Both countries created their employment

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216. See *supra* note 127 and accompanying text (noting the process if there is a claim of discrimination based on an unlisted ground using South Africa's Constitution).

217. See *supra* note 133 and accompanying text (discussing the process if there is a claim of discrimination based on an unlisted ground using South Africa's EEA).

218. See *supra* notes 80–84 and accompanying text (reviewing the use of bona fide occupational qualification and its availability to a claim of national origin discrimination).

219. See *supra* notes 84–85 and accompanying text (pointing out that the Supreme Court limited the use of bona fide occupational qualification, although it is still possible in a claim of national origin discrimination).

220. See *supra* notes 131–34 and accompanying text (going through the important aspects of the EEA).

221. See *supra* notes 92–102, 171–89, 200 and accompanying text (discussing the lack of protection for immigrants under the current laws in the United States and South Africa).

discrimination laws after times of political and racial turmoil.<sup>222</sup> The United States created employment discrimination laws in 1964, with the Civil Rights Movement preceding it.<sup>223</sup> At the time, it was considered very advanced.<sup>224</sup> In South Africa, the EEA was adopted in 1998, two years after the South African Constitution.<sup>225</sup> Similar to the United States' Civil Rights Movement, South Africa went through a revolution by ending apartheid shortly before the Employment Equity Act was created.<sup>226</sup> In this respect, each country's history points to a lack of attention to national origin employment discrimination.<sup>227</sup> Title VII and the EEA were created for the purpose of protecting against discrimination, but not necessarily citizenship status discrimination, as both countries focused on race.<sup>228</sup> These similar backgrounds within South Africa and the United States provides insight as to why citizenship status discrimination is not as protected as other categories in each of the country's respective laws against employment discrimination, even though both acts were considered progressive. The foci of the laws were on discrimination against members of the country and not outsiders.

A problem with both countries and how each country interpreted who was protected was that neither country

222. See *supra* notes 33–50, 106–122 and accompanying text (going through the history immediately before the United States and South Africa's employment discrimination laws were enacted).

223. See *supra* notes 33–50 and accompanying text (discussing the history of the creation of the employment discrimination laws in the United States).

224. See *supra* note 44 and accompanying text (noting that commentators have called the Civil Rights Act of 1964 "the most sweeping and important civil rights legislation ever enacted").

225. See *supra* note 128 and accompanying text (noting that the Constitution was adopted in 1996 and the EEA was adopted in 1998).

226. See *supra* notes 106–122 and accompanying text (describing South Africa's moving away from apartheid with a new Constitution).

227. See *supra* notes 61–62 (explaining that the focus of the debates in Congress on Title VII were focused on racial discrimination and not national origin discrimination), 114–17 and accompanying text (showing that the focus of post-apartheid South Africa was moving away from the racist separation policies that engulfed the country, as opposed to focusing on discrimination based on national origin).

228. See *supra* notes 61–62 and accompanying text (describing the legislative history of Title VII); see also *supra* notes 107–10 and accompanying text (showing the focus of post-apartheid South Africa and the purpose of South Africa's affirmative action policy to protect black nationals, but not for immigrants).

specifically protected immigrants.<sup>229</sup> It seems logical that discrimination against immigrants falls in the protected category “national origin” in the United States and the protected categories “ethnic origin,” or “birth” in South Africa, but it appears that neither country has followed this view.<sup>230</sup> This makes an immigrant’s employment discrimination case hard to prove in both countries.<sup>231</sup>

In the United States, the Supreme Court decided that “national origin” did not encompass citizenship status in *Espinoza v. Farah Co. Mfg.*<sup>232</sup> In South Africa, although there are a few categories that could include citizenship status, the Constitutional Court has found that this is an unlisted category.<sup>233</sup> An immigrant can attempt to utilize these laws for protection, but would have an uphill battle proving his or her case because of this.

Both the United States and South Africa protect against racial discrimination.<sup>234</sup> The United States specifically protects against racial discrimination by listing race as a protected category.<sup>235</sup> South Africa provides a number of terms in the EEA to prevent racial discrimination such as: race, ethnic or social origin, color, culture, language, and birth.<sup>236</sup>

Racial discrimination intersects with citizenship status discrimination in the United States and South Africa, but it

229. See *supra* notes 92–102, 171–87 and accompanying text (discussing the lack of protection for immigrants under the current laws in the United States and South Africa).

230. See *supra* notes 92–102, 171–87 and accompanying text (demonstrating both countries’ refusal to read immigrants into their protected categories).

231. See *supra* notes 92–102, 171–87 and accompanying text (showing the increase in difficulty for an immigrant bringing a successful claim).

232. See *supra* notes 88–89 and accompanying text (explaining the narrow approach in interpreting “national origin” taken by the United States Supreme Court in *Espinoza*).

233. See *supra* note 135 and accompanying text (discussing the South African Constitutional Court’s finding that “citizenship status,” although unlisted, could be a protected category).

234. See *supra* notes 65, 132 and accompanying text (listing the protected categories of Title VII in the United States and comparing it to the listed categories in South Africa’s EEA).

235. See *supra* note 65 and accompanying text (listing the protected categories of Title VII in the United States).

236. See *supra* note 132 and accompanying text (listing the protected categories of the EEA of South Africa).

appears that neither country allows a court to consider this intersection.<sup>237</sup> An analysis of both countries demonstrates why the intersection of citizenship status and race discrimination is important to consider.<sup>238</sup> In the United States, there is clear evidence of discrimination provided by the GAO.<sup>239</sup> Moreover, this Office demonstrated the racial impact of citizenship status discrimination by reporting the differing treatment between Hispanic and Caucasian immigrant applicants.<sup>240</sup> The evidence of a disparity in pay among dark and light skinned immigrants also exemplifies this disparity.<sup>241</sup> This shows how the intersection of citizenship status and race can create complex problems for immigrant workers in the United States.<sup>242</sup> In South Africa, there is the social problem of xenophobia rampant in the country, which is demonstrated by the attacks on immigrants for the perception they take away jobs from citizens, and the study by Kurt and Amanda April showing discrimination against immigrants in the workplace.<sup>243</sup> The Aprils' study also shows that not only does discrimination against immigrants occur, but it impacts African immigrants far worse than European immigrants.<sup>244</sup>

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237. *See supra* Part II and accompanying text (discussing the intersection of citizenship status discrimination and race in the United States and in South Africa and detailing how there is no means of considering this in either country).

238. *See supra* Part II (showing the intersection of race and immigrant status discrimination through the experience of darker skinned immigrants in the United States, and African immigrants in South Africa).

239. *See supra* notes 161–67 and accompanying text (explaining the GAO's study on discrimination faced by immigrants).

240. *See supra* note 168–69 and accompanying text (explaining how the GAO found differing rates of success among Caucasian and Hispanic applicants).

241. *See supra* notes 170–72 and accompanying text (explaining Joni Hersch's research on the pay difference between immigrants with lighter skin color compared to immigrants with darker skin color).

242. *See supra* Part II (highlighting the double discrimination colored immigrants face in both countries).

243. *See supra* notes 178–97 and accompanying text (discussing the cause of the xenophobic sentiment throughout the country and the impact these feelings had on immigrants in the workplace).

244. *See supra* notes 194–97 and accompanying text (distinguishing the treatment of European immigrants and African immigrants in the workplace).

*C. The History, Laws, and Facts about Discrimination Against Immigrants in South Africa and the United States Points to a Better Approach*

To prevent discrimination against immigrants, the United States should implement many of the legal aspects of South Africa's laws against employment discrimination. This includes applying protections to all employers and shifting the burden of proof to the employer.<sup>245</sup>

Nevertheless, both countries need to implement many more vital changes to protect against citizenship status employment discrimination. Immigrants in South Africa and the United States face a great deal of discrimination in the workplace.<sup>246</sup> As it stands now, the listing of the protected categories "national origin" in the United States, and "ethnic origin" or "birth" in South Africa has not provided protection to immigrants.<sup>247</sup> South Africa and the United States need to approach the protection of immigrants from employment discrimination more broadly. Ideally, the two countries should enact two changes to their laws. First, they should have a protected category of "citizenship status." Second, they should allow the consideration of how citizenship status intersects with race discrimination.

Adding a protected category of "citizenship status" will offer substantial protection for immigrants in the workplace. Neither country has read one of their protected categories as including citizenship status, and so a new category would greatly help.<sup>248</sup> Even though a "citizenship status" claim is possible in South Africa, if "citizenship status" were an expressly protected category, any immigrant facing employment discrimination would know that they have a clear remedy and could bring a claim with confidence.<sup>249</sup>

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245. See *supra* notes 131–34 and accompanying text (detailing important aspects of the EEA).

246. See *supra* notes 158–99 and accompanying text (discussing the discrimination faced by immigrants in both countries).

247. See *supra* notes 92–102, 150–52 and accompanying text (showing how these terms have been construed narrowly, failing to consider immigrants).

248. See *supra* notes 92–102, 150–152 and accompanying text (describing the resistance of courts of both countries to read citizenship status into their laws).

249. See *supra* notes 138–39 and accompanying text (discussing South African Constitutional Court's decision allowing claims of "citizenship status" discrimination).

Beyond simply adding a category for citizenship status discrimination, the protection afforded to immigrants would greatly increase if the countries allowed consideration of the intersection between different forms of discrimination, particularly citizenship status and race discrimination.<sup>250</sup> This approach would allow a broader analysis of the discrimination faced by immigrants, particularly Hispanic and darker skinned immigrants in the United States and African immigrants in South Africa.<sup>251</sup> In the United States, the courts could look at the intersection between the protected categories of race and citizenship status, and in South Africa the courts could look at any number of the protected categories along with citizenship status.

Implementing these two changes is an ideal solution to help prevent employment discrimination faced by immigrants not only because of their citizenship status, but also because of their race. As the United States has demonstrated, adding new protected categories is a challenge politically, but it is a necessary change to protect immigrant workers.<sup>252</sup> Allowing courts to consider the intersection of various forms of discrimination would also afford greater protection. This would allow immigrants faced with two forms of discrimination—citizenship status and race—a better chance to make a successful claim. A court should not view their discrimination in isolation.

### CONCLUSION

In South Africa, African immigrants are especially likely to face employment discrimination, and in some cases, even physical injury and death. Nhamuave was killed as a result of citizenship status discrimination, which still goes unlisted in South Africa's Constitution and EEA. He made the ultimate sacrifice to find a job and support his family, as he was killed at the hands of an angry mob because he entered the country

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250. *See supra* Part II (discussing the intersection of citizenship status discrimination and race in the United States and in South Africa and detailing how there is no means of considering this in either country).

251. *See supra* Parts II.A, II.B (describing the intersection of racial and citizenship status discrimination in the United States and South Africa).

252. *See supra* notes 48–49 and accompanying text (discussing the trouble in passing the Employment Non-Discrimination Act in the United States).

looking for work. South Africa needs to offer men and women like Nhamuave better protection overall, and a good place to start is by protecting them from discrimination in the workplace. Adding a protected category of “citizenship status” and considering the intersection of other forms of discrimination would be a major step in making the country turn even further from its apartheid past by addressing the dangerous issue of xenophobia.

In the United States, there is also a struggle with fear of immigrants, as demonstrated by the Minutemen and the death of Brisenia Flores and her father, Raul. If Congress were to expand the definition of “national origin” from the interpretation of the Supreme Court or add “citizenship status” as a protected category, and allow the consideration of the intersection of race and citizenship status discrimination, the United States would take a huge step towards the creation of equality. It would help a group of individuals who the United States Government has recognized as the focus of discrimination in their own study.

Although very different in many ways, both South Africa and the United States need to better protect immigrants faced with both citizenship status and racial discrimination because these people are very vulnerable to injustice in the workplace. There is no reason immigrants should have less access to employment discrimination laws, considering the vulnerability of these people in both the United States and South Africa.