# ARE AMERICA'S CIVIL RIGHTS LAWS STILL RELEVANT?[1]

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**Abstract**

The federal government created America's historic 1964 Civil Rights Act during a period of low immigration. The primary goal was to create equal opportunities for African Americans by ending Jim Crow discrimination in the South. Focusing on the issue of employment discrimination, and specifically employer preferences for immigrants, this article shows how the current period of high immigration from Latin America and Asia has created new challenges and dilemmas for Title VII, the employment discrimination title of the Civil Rights Act. Specifically, sociological evidence indicates that U.S. businesses are engaging in race-conscious employment focused on the perceived value of *racial skills* (special abilities of certain racial groups at particular jobs) and *racial symbolism* (organizational benefits from displaying certain races on the work force). Businesses hire Asians and Latinos, and especially immigrant Asians and Latinos, because of the perceived racial skills of these groups at low-status jobs that require strong work ethics and obedient attitudes. Corporate employers seeking skilled workers do not necessarily prefer immigrants. Instead, they seek minorities for the symbolic value of their diversity, for their general racial skills at bringing new ideas to the workplace, and for their racial marketing skills for growing non-White markets. I assess these developments from a legal perspective, showing that a combination of a lack of litigation and some key court decisions have prevented Title VII from regulating racial skills and racial symbolism and/or from offering protection for immigrants themselves.

**Keywords:** Immigration, Discrimination, Civil Rights, Law, Employment, Race

## INTRODUCTION

"He milked cows for 10 hours a day for 54 days straight," said John Rosenow, a dairy farmer in Wisconsin, after hiring his first immigrant worker. "He wouldn't take a day off, even though we insisted. It turned my life around" (Pabst 2006, p. 1). A warehouse manager in New York stated, "There is a friend of mine who is a carpenter and . . . [he says] that all the Mexican guys he's come in contact with are incredibly good workers. You hear that enough times and then if a Mexican guy

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came here for work I'd probably hire him based on that" (Kasinitz and Rosenberg, 1996, p. 189). William Orton, a marketing director for MetLife, has declared, "You can't have an all-white, male-filled force and expect to be successful marketing to Asians, or Hispanics, or African Americans, or women. . . . That may seem obvious" (Rossman 1994, p. 120).

Lawmakers and administrators in Washington were not contemplating employer statements like these when they designed, passed, and implemented our nation's civil rights laws. They did their work in the context of Jim Crow discrimination in the Deep South. Their target was the system of open, vicious exclusion of Blacks and preferences for Whites. The Civil Rights Act of 1964 bears this stamp. Other observers have made this point, arguing that discrimination against African Americans is (and was always) much more complex than the Jim Crow imagery of obvious, purposeful discrimination. More subtle, structural forces deprive African Americans and others of equal opportunity, but the law does not easily reach such structural forces (Bonilla-Silva 2003).

The past two decades—a period of the greatest influx of immigrants since the Civil Rights Act came into effect—present new complexities and dilemmas that challenge the logic and appropriateness of U.S. discrimination law. I focus here on employment discrimination: immigrants' desires for a better life, coupled with employers' desires for cheap labor by vulnerable, diligent immigrant workers, appear to be transforming the overall U.S. job structure. Is the preference of employers for immigrants, a disadvantaged group, a civil rights issue? Is the exploitation of this often racially defined group a discrimination issue? At the same time, corporations seeking to market to newly diverse Americans or benefit from fresh ideas of a diverse workforce regularly use race as a factor in hiring or placement decisions. Is Title VII, the employment discrimination section of the Civil Rights Act, an anachronism for corporate America as well?

I will argue here that, as currently implemented, our civil rights laws have not stopped a massive ethnoracial sorting from occurring in the nation's job markets. Some of this has come about through employer discrimination that would look familiar to our 1960s civil rights law architects—except, that is, for the primary beneficiaries. Other phenomena might fit legal understandings of discrimination but are more difficult to fit under that label because they involve jobs that Americans might not have access to, but that they also might not want. Thus far, through a combination of inaction and possible retreat (particularly through some key court decisions), but without public debate, discrimination law has adapted to the changing U.S. workplace by adopting a laissez-faire position.

The significance of this *de facto* "hands-off" policy is not so much that it harms Whites. It appears that Black Americans are the most disadvantaged by preferences for immigrants (Bean and Stevens, 2003; Swain 2007). Indeed, if it is true that Blacks do not want jobs that immigrants fill, part of the reason may be the immigrant domination of these jobs. Moreover, it would be ironic, if not tragic, if decades after the United States moved to eliminate the race-stratified workforce of the Deep South, it created another one on a nation-wide basis, with employment sectors that limit opportunities for Blacks while simultaneously exploiting the greater desperation of immigrant Latinos and Asians. Finally, even the relatively benign racial hiring in corporate America should give us pause. At the least, hiring by race for marketing purposes threatens to limit or ghettoize non-White workers to these racialized jobs. And for those who still dream of a color-blind society, the corporate embrace of race-conscious hiring is a backward step, especially as the corporate logic can benefit—and is benefiting—Whites.

Rather than examining the impact of immigration from a macro, demographic, and economic perspective (Bean and Stevens, 2003), the approach here is befitting the focus on individual rights, and is more micro and qualitative. I first briefly describe Title VII and the context in which it was born. Second, focusing on both low- and high-skilled jobs, I show how private employers respond to immigration and the United States' increasingly multiracial, multiethnic society. Third, I examine these impacts from a legal perspective, highlighting some of the more compelling challenges to discrimination law. Though my focus is on the legality of employer preferences for immigrants, I conclude with an assessment of the justice of this system for immigrants themselves.

## CIVIL RIGHTS LAWS FOR 1960s AMERICA

The legal focus here is the most basic and far-reaching employment civil rights law, Title VII of the Civil Rights Act of 1964. When Congress passed this law, the United States obviously had significant experience with massive immigration, along with large populations of groups that affirmative action regulations would later define as *minorities*. However, Congress directed its attention overwhelmingly toward Black Americans, with congressional debates focusing almost entirely on this group. The substantive goal of Title VII was simple: reduce Black unemployment by creating equal opportunities (Graham 1990; Skrentny 1996).

In 1964, of course, immigration was very low. Immigration quotas against eastern and southern Europeans and bans against Asians, as well as migrant-worker demand in booming European economies, had all but ended entries from the eastern hemisphere. Immigration and Naturalization Services (INS) managed immigration from Mexico through the *Bracero* guest worker program for agriculture (Massey et al., 2002). There were new refugee populations of Hungarians in 1956 and Cubans in the early 1960s, but policymakers seemed to consider these populations as temporary (hence the decision to teach Cuban children in Spanish rather than through English immersion) (Skrentny 2002).

What did this mean for Title VII? The reality of massive, open discrimination against Blacks in the South meant that few saw it as a significant problem that Title VII did not define discrimination. Section 703(a) simply said that it was unlawful for an employer

> 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.

More specifically, it was unlawful

> 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.

Courts fleshed out this vague directive over the next few years, developing two main types of unlawful discrimination. The first, *disparate treatment*, refers to situations where an employer treats individuals differently because of their race, ethnicity,

sex, etc. This is the commonsensical understanding of discrimination, and this type of discrimination was rampant in the South when the law was passed. An employer who refused to hire or promote Blacks simply because they were Black was guilty of disparate treatment discrimination.

The other type of discrimination, *disparate impact*, refers to situations where an employer utilizes some practice that is neutral on its face, but impacts some protected category of workers more negatively than others, and the practice is not necessary for the job at issue. This kind of discrimination was also widespread in the South and elsewhere, especially when employers sought to circumvent Title VII. Determining this type of discrimination as unlawful was revolutionary because it relieved plaintiffs from having to find discriminatory intent in order to prove discrimination. The example from the case that laid out the basics of disparate impact theory, *Griggs v. Duke Power* (1971), involved an unreasonably complex ability test that a North Carolina energy company required of workers, including poorly educated Blacks who wanted to move up from the lowliest job categories. Other examples might be a height requirement or even a highly subjective selection tool such as an interview.

Title VII contained a loophole to allow some kinds of discrimination. Employers could consider various background factors in "those certain instances" where those factors were a "*bona fide* occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise." A BFOQ would allow a French cook at a French restaurant or a female locker room attendant for a women's locker room, but the BFOQ loophole did not extend to race.

The Jim Crow context was most apparent here. Members of Congress representing southern states tried to add race to this section of the law, but liberals rebuffed them. Advocates for the law doubted the southerners' motives and feared that employers would exploit the loophole, claiming that their White customers would not buy from Blacks, that their employees would not work with Blacks, or that only Whites could do certain jobs—for whatever reason—and therefore *Whiteness* was a BFOQ (U.S. Congress 1964, p. 7217). Congress, therefore, did not allow a race BFOQ.

Though Title VII was written with neutral language, it is clear from the record of the debates and discussions of the laws that the assumptions behind these laws were not. Whites were the employers in America. They sometimes denied equal opportunities to Blacks and other minorities and reserved them for White, usually male, workers. The only distinctions employers made were between Whites and Blacks, or Whites and non-Whites. And making these distinctions was wrong. Race was *never* relevant for jobs.

## THE NEW IMMIGRATION AND THE NEW AMERICAN WORKPLACE

The United States, as is said over and over again, is, and has always been, a land of immigrants. And whatever the assumptions of the authors of Title VII, racial, ethnic, and immigrant backgrounds have also long mattered in the workplace and were of great significance during earlier waves of immigration.

Theodore Hershberg and his colleagues clearly revealed the patterns of race and immigrant status in their comparative analysis of the job opportunity structure for three periods in Philadelphia: 1850 to 1880, when Irish and Germans were still making their way to the city; 1930, when Italians, Poles, and Russian Jews were the major ethnic newcomers; and 1970, when U.S.-born Blacks were the newest to arrive

on the scene, but the better jobs were disappearing. Another significant story here is that during both of the first two periods, Blacks in Philadelphia were excluded from manufacturing. Of course, manufacturing jobs at the time were no picnic—this was before both the Wagner Act and the Occupational Safety and Health Administration (OSHA). But as horrific as these industrial jobs sometimes were, they were often better than the jobs that Blacks were doing. Black workers were concentrated in the lowest of the low: menial service jobs and domestic help, while the industrial jobs were going to immigrants (Hershberg et al., 1979; Waldinger 1996).

This ethnicity and race stratification was not uniquely a Philadelphia phenomenon, nor was it merely a supply-side dynamic. In the early twentieth century, employers wanted certain groups in certain jobs. As Barrett and Roediger (1997) point out, employers in other major cities were choosing immigrants for industrial jobs. The science of the time supported a belief in different group aptitudes and racial skills, which then shaped the organization of the workplace, sometimes in elaborate ways, though not always consistently. One mill saw running the blast furnace as a "Mexican job," though another reserved it for "hunkies" (Hungarians or Slavs) because it was "too damn dirty and too damn hot for a white man" (Barrett and Roediger, 1997, p. 16). Sociologist E. A. Ross argued that some kinds of dirt "that would kill a white man" were harmless to Slavs because of special immunity (Barrett and Roediger, 1997, p. 17). A personnel manager at another plant determined the "racial adaptability" of thirty-six different ethnic groups for twenty-four different jobs varying in twelve different conditions. Views toward African Americans were the most basic and limiting: some employers saw Blacks as unfit for jobs requiring exposure to cold weather or to a fast pace (Barrett and Roediger, 1997).

Fast forward to the early twenty-first century. The United States is again in the throes of a great wave of immigration, with the number of immigrants at an all-time high and the percentage of foreign-born in the U.S. population near the all-time high at the turn of the last century. However, leaving aside a discussion of changes in the structure of the economy, there are significant differences and similarities when we look at the current situation. One difference is that there is now a large body of laws, regulations, and court decisions intended to bring equal opportunity to the workplace, as well as fair wages, safety, and rights for collective bargaining. Another change is that there is now a system of laws that define a large percentage of immigrants as undocumented, making it more difficult for these workers to assert their rights in the workplace. The Department of Homeland Security estimated that there were almost 11 million undocumented immigrants in the United States in March of 2005, about 30% of the population of foreign-born (Department of Homeland Security 2005; Passel 2006).

What seems to be the same, despite this new legal context, is that employers still prefer immigrants for certain jobs and also prefer certain races and ethnicities for certain jobs. Employer perceptions of the value of race can be found in practices such as employers offering mostly unskilled work to immigrants, but also in some of the United States' largest corporations' hiring of immigrants for high-skilled positions. In other words, far from moving toward a "color-blind" work force, race has acquired a meaning for employers in ways that are more sophisticated and complex than ever before.

Specifically, we can see that race has meaning for employers in two main ways: employers may see the value of *racial skills*, and they may see the value of *racial symbolism*. *Racial skills* refers to situations where employers perceive certain employees to have abilities or competence for a particular job or organization that others do not have because of their race. *Racial symbolism* refers to situations where employers

believe that there will be benefits from having others perceive different races play certain roles in an organization—or working for an organization in any capacity.

Racial meanings can be found in all sectors of the economy, but some patterns are apparent. In general, smaller employers, or employers of low-skilled labor, care less about racial symbolism and tend toward racial-skills hiring and placement, often in ways that may appear to be simple discrimination based on stereotypes. Corporate, White-collar employers tend toward racial skills, but in more sophisticated ways—a kind of targeted marketing mode, and a more general mode. These employers target some groups for specific jobs, as marketers to members of their own group, in a manner similar to the legally forbidden racial BFOQ. More generally, they tout the ability of diverse races to bring new ideas to any context. In addition, corporate employers, unlike many small operations, are more likely to care about their public image and so also use racial symbolism. Another difference is that immigrant status is more important for low-skilled jobs; in White-collar employment, an elaborate theory of racial difference (divorced from immigrant status) appears to be more common (with Latinos typically treated as a racialized group).

## Immigration and Racial Skills for Low-Skilled Jobs

For employers of the low-skilled, immigration is having a huge impact because of perceived differences in racial skills. Study after study finds employers willing to talk openly about the superiority of immigrant labor, especially that of Asian and Latino immigrants. Their most prized skills or abilities are simple: they can work long and hard at unstimulating tasks. The antithesis of the "good" Asian or Latino worker is the U.S.-born Black worker, whom employers tend to see as the least willing and the least able.

A multitude of interview studies with employers reveals the same patterns. In the late 1980s, sociologists Joleen Kirschenman and Kathryn M. Neckerman conducted 206 face-to-face interviews with Chicago and suburban-Chicago employers. Even though it is illegal to hire based on racial generalizations or stereotypes, they found that a surprising number of employers commented on the bad attitudes of Black workers, for example, about how they did not want to stay on the job or simply did not want to work (Kirschenman and Neckerman, 1991, p. 212). William Julius Wilson's study (1996), also in the Chicago area, found similar assessments of Black workers. He interviewed 179 employers, with 170 commenting on the traits of different racial groups. Nearly three-quarters (74%) of them expressed negative views about Black workers, that these workers' traits compromised or lowered job performance. One key trait was a lack of trustworthiness—employers had concerns that Black employees would tell friends where valuables were located or that they themselves would steal from the employer (Wilson 1996, pp. 111, 113).

These views are hardly limited to Chicago. In Los Angeles, Roger Waldinger and Michael Lichter found similar employer views, describing Blacks as "lazy," having an "attitude," and "scary." One employer stated that Black workers "don't try hard enough. They want everything to be handed down to them." In Los Angeles, some employers went beyond attitude and work ethic to more basic skills: Black workers, in their experience, were nearly illiterate (Waldinger and Lichter, 2003, pp. 171–173).

Aversion to Black workers is an old story in the United States. What also may be common, but was far from the minds of lawmakers in 1964, are employer preferences for immigrants, including non-White immigrants, over both native Blacks and native Whites. Interviews with employers reveal a ranking of the skills or abilities of the different groups. Kirschenman and Neckerman found that when

they asked employers about work ethic, 37.7% of employers ranked Blacks last, while only 1.4% ranked Latinos last (Kirschenman and Neckerman, 1991, p. 210). Similarly, Moss and Tilly (2001, p. 97), examining data from four large cities—Atlanta, Boston, Detroit, and Los Angeles—also found that 33.4% of employers perceived Blacks as having "lagging motivation," with a high of 45.9% in Los Angeles and a low of 15.8% in Boston.

Asians and Latinos were at the top of the employer preference scale. In all four cities in Moss and Tilly's data, Asians and Latinos had far fewer employers saying they had "lagging motivation," with the highest being 9.2% in Los Angeles; the average for Latinos was only 5.4%. Only 0.3% of employers thought Asians had lagging motivation (Moss and Tilly, 2001, p. 97). As one employer explained, "When we hear other employers talk, they'll go after primarily the Hispanic and Oriental first, those two, and, I'll qualify that even further, the Mexican Hispanic, and any Oriental, and after that, that's pretty much it, that's pretty much where they like to draw the line, right there" (Kirschenman and Neckerman, 1991, p. 228). Wilson's study also found a hierarchy in Chicago, with Asians at the top, followed by Latinos and Blacks on the bottom—as well as expressions of dislike for the skills that White workers brought to the job. One employer complained that "the black attitude is rubbing off on" the White workers. Another employer stated that the Asian worker "is much more aggressive and intelligent and studious than the Hispanic," but that native-born Blacks are "the laziest of the bunch" (Wilson 1996, pp. 112–113).

Looking at Los Angeles, Waldinger and Lichter (2003) present the richest evidence of employers' perceptions of both hierarchy and the weaknesses of Whites. They also found unabashed lauding of Latinos' ability at unskilled labor. What makes Latinos so desirable? Employers offered various explanations. According to one, "They have a loyalty towards the company that white workers don't have." Another said that Latinos are less rights conscious, and they "like to work"—they do not even take vacations (Waldinger and Lichter, 2003, p. 160). This perception of the Latino worker was not entirely flattering: since most of these jobs required little thought or refined talents, it was faint praise to be said to be good at them. Another employer was explicit: "The Hispanic will work on a repetitious basis," and "Latinos seem to be good with their hands." Another said that Latinos are happy to work without seeking promotions (Waldinger and Lichter, 2003, pp. 162–163).

Moss and Tilly's results for Latinos, with more positive than negative comments, were in sharp contrast to the findings for Blacks. Results were even more extreme for Asians, who had three positive comments for every negative comment (Moss and Tilly, 2001, p. 114). In their study, employers saw Asians as possessing the best work ethic, drive, and goals. Another employer—who may not have even considered Black workers—regarded Latinos less favorably than Asians: "[Hispanics] take a lot of pride in what they do, but they also can get very insulted. As a spectrum I see the Asians on the high end of work ethic and working hard and privately and quietly. I probably see Hispanics on the other end because of that pride in their culture" (Moss and Tilly, 2001, p. 117).

Though I emphasize here the racial skills of Latinos and Asians, it appears employers see value in both racial background *and* immigrant status. They see fewer racial skills in U.S.-born Latinos (Shih 2002). To illustrate, an employer at a Boston factory described the appeal of these workers as based mostly on their immigrant identity: "Your Asian workforce, because it's the newest immigrant in the country, and what I've seen with them is they have a completely different work ethic. You need them for seventy-two hours a day, they'll be there for seventy-two hours a day" (Moss and Tilly, 2001, p. 117).

Though there was some ambiguity at the top regarding who were the best workers (Asians or Latinos), and employers were clear that Blacks were at the bottom, they typically saw non-Latino Whites as almost as bad as Blacks. One Los Angeles employer explained, "I would say it's a little tougher to find today white workers with as high a work ethic as Asians. . . . I would say that twenty years ago there were [more]." Another did not mince words: "The white factory worker is a whining piece of shit. They [feel that they] never make enough money, they always work too hard, they never want to work over eight hours a day and they feel that, as soon as you hire them, you owe them" (Waldinger and Lichter, 2003, p. 158). In a very different context, dairy farmers in Wisconsin, also increasingly reliant on immigrant Latino labor, expressed similar views: "U.S.-born want the money but not the work," and "They are not punctual and work slow." Another stated, "We no longer pay attention to native applications; it's not worth it" (Valentine 2005, p. 47).

Though Shih's (2002) study in Los Angeles found otherwise, Holzer (1996) concluded these preferences are not about dollars and cents, at least not directly. Looking at the same multicity data as Moss and Tilly (2001), Holzer concludes that the preferences are not about wages, since Latinos' were not much lower than Blacks' wages. In his reading, employers prefer Latinos to Blacks regardless of skill or experience or level of job, but the preference is strongest in low-skilled jobs (both Blacks and Latinos find limited opportunities in jobs that require computers or math) (Holzer 1996, p. 93). Wilson's research also finds more support for preference based on race or nativity rather than wages. He found that Blacks' "reservation wage" of $6—the bottom level of pay for which they would be willing to work—was lower than that for Latinos—$6.20 for Mexicans and $7.20 for Puerto Ricans. Whites insisted on at least $9 (Wilson 1996, p. 140).

A final note: for most of these studies, Black immigrants were not a significant part of the labor market. Waters's (1999) research suggests the importance of immigrant identities to employers by showing employer preferences for Black immigrants from the West Indies over U.S.-born Blacks. She finds the same types of laudatory comments described above for Latinos and Asians, but directed toward West Indians. For example, employers claimed that this group exhibits more "reliability," "willingness to do the job," and "a different drive" when compared to African Americans. These employers believe that U.S. Blacks "don't have the self-discipline to hold the job" (Waters 1999, pp. 116–119). What remains to be discovered is how employers view Black immigrants relative to Asian and Latino immigrants.

## Racial Skills, Referral Recruitment, and the Immigrant Economy

Employment dynamics for low-skilled jobs are actually more complex than implied above; it is not simply the case that White employers survey a multihued work force and pick the Asians and Latinos out of the crowd. There is complexity coming from recruitment methods, which are both a cause and a consequence of racial preferences, and also from the ethnic economy, ethnic networks, and dynamics of immigration.

In Chicago, Wilson found that over 40% of employers did not even advertise for jobs, and, when they did, the ads were often placed selectively in ethnic newspapers, targeting Mexican and Polish workers, the latter who have been spared the generally negative views of employers toward White workers (Wilson 1996, pp. 133–134). All researchers have found varying levels, but everywhere strong employer preferences for hiring by referral, a technique that involves tapping into immigrants' ethnic networks. The multicity data show similar recruitment techniques, with 25–30% of employ-

ees coming through newspaper ads and 35–40% through referrals from current employees or other informal sources (Holzer 1996, p. 51). Part of the reason that the referral mechanism is so important for race and employment is because immigrants typically use referral recruitment very aggressively to find jobs for their relatives or friends who have recently come to the United States and desperately need work. Their networks are coracial and so this process expands and reproduces a racial presence in the workforce. Of course, employers would not allow this racial reproduction and expansion to occur if they did not see valuable racial skills in the referring group.

But it is not only employee networks with potential other employees that are important. Many immigrants prefer to work in the ethnic economy, working for coethnic bosses, because doing so offers superior returns, just as, reciprocally, many of these bosses prefer coethnic employees, presumably because they perceive them as having valuable racial skills. For employees, it is often their primary option, but also a good option (Hum 2001, p. 80).

Traditionally, immigrant entrepreneurs put coethnics, including family members, to work for them. Light and Bonacich's (1988) interview study of 204 Korean entrepreneurs in Los Angeles found that these businesses averaged only 3.6 employees, and nearly 57% had nuclear or extended family employees; 37% of the businesses were all Korean, 21% were all "American," and 20% all Mexican. Though the businesses were small, their impacts on employment added up. Korean employers hired Koreans at a rate forty-seven times higher than if Korean workers were evenly distributed throughout the economy, and, thus, "The tiny Korean ethnic economy explains 57% as many Korean jobs as does the huge labor force of Los Angeles County," an ethnic preference that the authors attribute to "chauvinism" (Light and Bonacich, 1988, p. 186, 204). This may be a felt duty to help coethnics or it may be a perception of coethnics' skills.

However, recent research suggests that immigrant entrepreneurs hire for racial skills at attending to the local market. Lee (2001) found Korean store owners in Harlem hiring Blacks as "cultural brokers" to help them to interact with the local clientele. Significantly, these cultural brokers were almost always Black immigrants, not native-born Blacks. Similarly, Korean entrepreneurs in a Mexican neighborhood in Chicago desire Latinos with Latino cultural skills. And so both the Korean and the Mexican entrepreneurs hire local Mexicans; for the Koreans, these workers "help cater to a Hispanic clientele by acting as translators and mediators" (Raijman and Tienda, 2003, p. 790).

Language use within an organization also affects hiring, whether employers are immigrant entrepreneurs or non-Latino Whites. Once an employer hires some Spanish-speaking workers, for example, these workers tend to bring in more Spanish-speakers. Then there is a sort of tipping point, beyond which employers have to accommodate their Spanish-speaking work force with more Spanish-speakers and/or Spanish-speaking managers. Although Spanish is widely taught in U.S. schools, employers will most likely find Latinos to fill these jobs, which require fluency (Waldinger and Lichter, 2003, p. 68). As the workplace becomes more Spanish-speaking, Black and White workers find themselves increasingly isolated and in conflict with the Latino majority. As one employer explained, "The people that are not Hispanic don't last very long." Another said, "These people don't feel comfortable working in a minority situation" (Waldinger and Lichter, 2003, p. 192). Another sounded sympathetic: "When you are talking black-Hispanic differences, the black on the job will tend to feel very isolated because the Hispanic individuals cluster together, they speak their native language, and you or I or a black person would feel outside of that group automatically" (Moss and Tilly, 2001, p. 107).

In short, employers might hire certain workers for their racial skills at doing unstimulating, tiring work well, or because they relate to a local ethnic market or neighborhood well, and then rely on these workers to refer more like themselves to be employed at the firm. But employers then must hire for the skills of the employees to be able to work with *each other*. Employers then become limited to a racial subset of the overall city workforce.

## Racial Skills and Racial Symbolism for Corporate Employers' Skilled Jobs

The meaning and impacts of race and immigration are different in more skilled positions at larger and corporate employers, many of which have made a move from affirmative action to "diversity management" (Kelly and Dobbin, 2001). First, there is no ranking of races because "diversity" is a value that places all groups on equal footing. Second, the impact of immigration is different. Employers less often seek out immigrants *per se*, but they *are* responding to the growth of ethnic markets through immigration. Immigrants can benefit, but they benefit as members of ethnoracial groups, not as immigrants.

Rather than diligence at a boring and/or difficult manual task, the specific racial skill that employers seek from non-Whites is the ability to devise and implement marketing plans for coethnic or coracial markets. Consultant Taylor Cox, Jr., has argued that Asian and Latino national cultural identities remain even after three generations of citizenship, and therefore, "Firms may gain competitive advantage from the insights of employees from various cultural backgrounds who can assist organizations in understanding culture effects on buying decisions and in mapping strategies to respond to them" (Cox 1993, p. 30). While consultants may be the most articulate or sophisticated in describing these racial skills, leaders of top U.S. businesses talk as if the idea is common sense. Lou Gerstner, a chairman and CEO of IBM, explained matter-of-factly that his company's commitment to diversity arose because "we made diversity a market-based issue. . . . It's about understanding our markets, which are diverse and multicultural" (Thomas 2004, pp. 98–99).

It is difficult to know how widespread such beliefs are, and whether hiring really follows these beliefs, but the ubiquity of these statements and stories at least suggests a significant and widespread phenomenon. As chair and CEO of Dupont, Jack Krol recounted an incident in which a Latino manager suggested selling a drug with both English and Spanish instructions—a move that led to millions of dollars in sales. After this incident, Krol stated that "we have proof diversity improves our business performance" (Robinson and Hickman, 1999, p. 62). *Fortune* magazine reported in the 1990s how DuPont benefited from Black employees who developed new marketing plans focusing on Black farmers, and a multicultural team earned $45 million in new sales by finding new color patterns for Corian countertops that were attractive to overseas homeowners (Labich and Davis, 1996, p. 177). NYNEX Corporation (now part of Verizon) established "affinity groups," such as the Asian Focus Group and the Hispanic Support Organization, in part to help with marketing. For example, the Asian group reported that Koreans consider the number *4* to be bad luck, so the company tried to stop assigning phone numbers containing that digit to Koreans (Lynch 1997, p. 5). Linking these efforts to immigration, Avon CEO James E. Preston stated matter-of-factly that the United States has an "increasingly diverse marketplace," and asked, "Who can best understand and serve this changed and changing market? Certainly not the 'old boy network.' It takes a diverse work force at all levels of the company, including senior management" (Thomas 1991, p. xi).

The importance of race in corporate hiring is underscored by support given to it in court battles. Several major corporations have made arguments about racial marketing skills in *amicus curiae* briefs in support of affirmative action in high-profile Supreme Court cases. In the recent *Grutter v. Bollinger* (2003) affirmative action case, MTV Networks, a division of the media giant Viacom, had its lawyers tell the Court that "a diverse workforce is critical to the development and marketing of programming targeted to specific racial and cultural communities as well as developing a robust environment for other business initiatives" (*Grutter v. Bollinger* 2003, p. 2). A group of sixty-five Fortune 500 companies also submitted a brief in the case and made a similar argument: diverse employees "are better able to develop products and services that appeal to a variety of consumers and to market offerings in ways that appeal to those consumers," and "a racially diverse group of managers with cross-cultural experience is better able to work with business partners, employees, and clientele in the United States and around the world" (3M et al., 2003, p. 7).

In these accounts, it is *race*, not *immigrant status*, that seems most important in decisions to employ. However, big-business retailing appears to require the same kinds of racial skills that immigrant entrepreneurs required in Black or Latino neighborhoods (as discussed above). Moss and Tilly's multicity data, which included only small independents and chain stores, found that 70% of stores admitted that they try to match the race of employees with the race of their customers, though it is not clear if they wanted to exploit racial skills or racial symbolism (Moss and Tilly, 2001, p. 105). Ely and Thomas (2001) found racial marketing skills in their study of diversity in service firms. A retail operations manager at an inner-city bank, catering primarily to Black customers, explained the racial-skills position clearly. This manager stated that having people of color on the staff meant that there were workers "who actually know how to relate to. . .the people that are in the neighborhood, and what they actually *feel*, and, you know, how they actually communicate with one another, and those kinds of things" (emphasis in the original). This manager felt that an all-White bank would be limited by "the discomfort with the community, or not being able to relate to the borrowers or stand in their shoes so to speak" (Ely and Thomas, 2001, p. 244). Similarly, Barbara Stern, a vice president at Harvard Pilgrim Health Care, a Boston-area HMO, explained that her company had a "diversity imperative" because "many of these customers demand health care workers who aren't judgmental—and we have to make sure we provide them" (Labich and Davis, 1996, p. 177).

Corporate, White-collar employers also use racial skills in a more general way to obtain better ideas for all or any phase of firm operations. Perhaps the earliest public advocacy of these general racial skills came in the National Association of Manufacturers' amicus brief in *Local 28 of the Sheet Metal Workers v. Equal Employment Opportunity Commission (EEOC)* (1986), where the normally conservative organization extolled the "new ideas, opinions and perspectives generated by greater workforce diversity" (cited in *Harvard Law Review* 1989, p. 669, n. 61; see also Kelly and Dobbin, 2001). In that same year, the Bureau of National Affairs' survey of employment practices quoted a personnel executive for Cummins Engine Company, who explained that "cultivating differences" was "a key competitive advantage for our company," because "differences among people of various racial, ethnic, and cultural backgrounds generate creativity and innovation as well as energy in our work force" (Bureau of National Affairs 1986, p. 93).

Diversity consultants and academics have strongly promoted these general racial skills, again emphasizing racial background rather than immigrant status. Taylor Cox, Jr., argued that diversity leads to "creativity and innovation" (Cox 1993, p. 31).

Thomas and Ely (1996) are perhaps the most eloquent exponents of the general racial skills position, arguing that racial minorities

> bring different, important, and competitively relevant knowledge and perspectives about how to actually do work—how to design processes, reach goals, frame tasks, create effective teams, communicate ideas, and lead. When allowed to, members of these groups can help companies grow and improve by challenging basic assumptions about an organization's functions, strategies, operations, practices, and procedures (Thomas and Ely, 1996, p. 3).

As with racial marketing skills, there is evidence that these business leaders really believe in general racial skills: they fight for access to diverse employees. MTV Networks' brief in the *Grutter* case highlighted general racial skills, arguing, "The continual innovation required for success in the industry depends on heterogeneity in MTV's creative work-teams" (*Grutter v. Bollinger* 2003, p. 6). The brief from the Fortune 500 companies also claimed that "a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives" (3M et al., 2003, p. 7).

Corporate employers also use race through *racial symbolism*. As in the case of their use of racial skills, racially symbolic hiring by large employers does not boost immigrants, and unlike preferences for immigrants in low-skilled jobs, it does not appear to limit opportunities for African Americans. Again, immigrants or native-born Americans may benefit—though, to be sure, benefits can be meager. Racially symbolic hiring can be token hiring.

Firms sometimes will see racial symbolism as a simple and rational response to customer demands. For example, a Merrill Lynch vice president told the *New York Times* in 1998, "Our clients, our shareholders are demanding more and more that our employees look like them" (Truell, section 3, p. 1; see also Ramirez 2000). *Fortune* magazine stated similarly that "the idea that many minority customers are highly aware of a company's minority friendliness is more important than many executives think" and described how Union Bank of California benefited from the racial symbolism of a work force that is 54% minorities. Vice Chairman Rick Hartnack told the magazine proudly, "Walk into a branch in a Latino area, and you'll see lots of personnel who are Latino" (cited in Colvin 1999, p. 52). However, legal scholar David B. Wilkins sees this practice in legal firms as being a "numbers game" that does not lead to significant hiring of non-Whites: "My interviews are replete with examples of Black lawyers who have been trotted out to impress a Black politician or corporate counsel and then trotted back into the oblivion from whence they came, never to see the work that their diversity helped to procure" (Wilkins 2004, p. 1594).

Finally, it is important to point out that preferences for Whites are still common and that hiring based on racial skills or symbolism can benefit Whites. For instance, in Dávila's (2001) study of the Latino marketing industry, she found that some firms reserved spots for non-Latino Whites. For the management-level sales staff in the Latino entertainment industry, including giant firms such as Univision, "a Hispanic's authenticity . . . is a hindrance for entering and successfully operating within the inner circles of corporate America." Instead, it is Whites who "have the contacts and command the greatest authority," or who enjoy "legitimacy that is vested in them on the basis of their 'whiteness.'" One salesperson told Dávila that with Whites, clients "don't have to worry about saying the wrong or insensitive thing" (Dávila 2001, pp. 36–37).

## DISCRIMINATION LAW, RACE, AND IMMIGRANT AMERICA

How do the practices described above fit with Title VII, the 1964 employment discrimination law? The answer is a complex one. First, though celebrated, corporate America's use of racial skills and racial symbolism has hardly been tested in court (Browne 1997; Estlund 2005). Supreme Court cases allowing "diversity" as a compelling purpose for racial preferences have been restricted to the diversity of students, not teachers, and thus diversity in admissions, not employment. The Supreme Court has not ruled on employers justifying racial preferences on the basis of the value of diversity, racial skills, or racial symbolism. The Third Circuit case *Taxman v. Piscataway Board of Education* (1996) involved a school district that laid off a White teacher while retaining a similarly qualified Black teacher because of the value that the Black teacher's racial diversity could add to the education process. But the court rejected this nonremedial justification for the preference, and though the case was appealed, it was settled before the Supreme Court could make a ruling.

Perhaps more vulnerable than the general racial skills ruled unconstitutional by the *Taxman* decision are the more specialized racial skills hiring that channels some non-White groups into specialized marketing positions. Not only does this approach threaten to limit these individuals to these special, racialized jobs, but this kind of hiring also most closely resembles the forbidden BFOQ for race. In a potentially significant development for these targeted racial skills, in cases involving the racial matching of non-White police officers in the appropriate nonwhite neighborhoods, courts have done an end run around the race-BFOQ prohibition, even carving out a constitutional defense of such hiring. In this view, the "operational needs" of a government employer can be a compelling justification for race-based hiring and placement.[2] At this time, however, there have been no moves to extend such allowances to private employment.[3]

At this point, then, the fit of our civil rights laws for corporate America's understandings of racial skills and racial symbolism is uncertain. For now, the lack of court, congressional, or administrative action can be construed as an adaptation of Title VII to the new national context. Inaction sends a message that these corporate efforts at race-conscious hiring and placement, which may benefit immigrants as well as native-born Americans, are acceptable.

What of the racial skills practices occurring at smaller firms and for low-skilled jobs, where employers prefer immigrant Latinos and Asians based on generalizations of these racial groups' superior work abilities? There are no cases (that I could find) where a court ruled on discrimination because the employer preferred immigrants or Latinos or both. There are cases of U.S. workers using Title VII to sue to stop preferences for non-citizens. However, in these cases, the litigants were charging that foreign firms preferred to hire conationals, such as in *Chaiffetz v. Robertson Research* (1986), where a British firm laid off only Americans when business went badly. In another case, *Bilka v. Pepe's* (1985), a Mexican restaurant chain dismissed a U.S.-born accountant. As the plaintiff told the Equal Employment Opportunity Commission (EEOC), the agency created to enforce Title VII, "I was informed that I was being fired because I was too American." Specifically, he had "too many American ideas," which included "union activities," "teaching the Mexican workers English," and teaching them "how to file tax returns etc." (*Bilka v. Pepe's* p. 1258, n. 7). However, this case was settled on another matter, and the alleged preference for immigrants was not made a matter of law.

Thus, despite research findings of widespread aversion to U.S. workers, and especially African American workers, cases challenging these preferences are rare.

Why? For one, as Deborah Malamud (2001) has pointed out, there is little incentive in these cases to litigate. At this poorly paid and transient sector of the U.S. labor market, it is simply not worth it for most workers to litigate, even if discrimination is obvious and severe.[4] Why hire a lawyer to fight for these kinds of jobs? On the other hand, the lack of litigation may itself be the result of immigrant Latino preferences. Shih's study of Los Angeles employers found that they often hire "timid" immigrant Latinos and avoid U.S.-born Blacks because Blacks are more likely to litigate once on the job. As one explained, "It's probably one of the reasons why people tend to discriminate in making hiring decisions and thinking 'yeah, I could hire this one, but I know it's gonna be a problem, nine out of ten times it is'" (Shih 2002, p. 110).

And what if the EEOC tried to litigate on behalf of Black workers frozen out of jobs by employers who favored Asian and Latino immigrants? In fact, the EEOC did try, and the results from two key cases [*EEOC v. Chicago Miniature Lamp Works* (1991) and *EEOC v. Consolidated Service Systems* (1993)] were instructive in two ways. First, employers were able to beat back EEOC charges by claiming that their racially unbalanced work forces were not the result of discrimination—instead, they claimed the statistical imbalances had emerged naturally. Second, the pattern of court decisions suggests an adaptation of civil rights law to immigrant America: it may be easier to defend employment practices that benefit Latinos and Asians at the expense of Blacks than practices that benefit Whites at the expense of Blacks.

Both cases involved referral hiring, the favored recruitment technique (described above) by many employers of low-skilled workers. In cases involving White employers who relied on referrals from the mostly White work forces, courts have found disparate-impact discrimination, as this method, though facially neutral, reproduced White work forces because Whites' networks were mostly populated with other White Americans.[5] The EEOC cases, both in Chicago, involved hiring that brought in mostly Asian and Latino workers.

The first case, *EEOC v. Chicago Miniature Lamp Works* (1991), dealt with the hiring practices of a small manufacturer of light bulbs that was located in a mostly Latino and Asian neighborhood on Chicago's North Side. The low-paying light bulb manufacturing jobs required little beyond some basic manual dexterity and, presumably, those abilities in attitude and effort in which, employers believe, Asian and Latino immigrants excel. Between 1970 and 1981, the percentage of Black workers at the firm increased from 4.5% to 6.5%, while the Latino presence increased from 40% to 66%, and that of Asians from 0% to 16.5%. Miniature Lamp hired on the basis of employee referrals, and Latinos and Asians used this recruitment strategy much more aggressively than did Blacks or Whites.

The court found no discrimination. Relevant issues were commuting distance and the extra desire of immigrants to pursue jobs where English fluency was not required. Most important, however, was that though African Americans were excluded from the coethnic networks, the court ruled that Miniature Lamp relied only *passively* on the referrals of immigrant Latinos and Asians. Though the disparate impact on Blacks was the same, the court ruled that it was not discrimination if employers simply allowed a recruitment technique to occur, even if it had very unequal results for different groups.

The idea that civil rights laws work differently when immigrants are involved became explicit in another Chicago case, *EEOC v. Consolidated Service Systems* (1993). Consolidated was a custodial service company owned by a Korean immigrant. Consolidated managed to have a work force that was 81% Korean, and an applicant pool that was 73% Korean, even though the county's labor force was less than 1%

Korean. Despite these glaring statistical anomalies, the court found no evidence of discrimination.

Though Consolidated's owner did advertise twice in the *Chicago Tribune* and once in a Korean language newspaper, he actually hired through referrals from his mostly Korean work force. One of Consolidated's expert witnesses, sociologist William Liu, said that it was "natural" (*EEOC v. Consolidated Service Systems* 1993, p. 237) for a recent immigrant to hire coethnics, because they share a common culture. The court saw this again as a passive reliance on a recruitment method, again saying it was acceptable, despite its obviously unbalanced results. But this time the court went further, affirming referral hiring as a good business strategy, because it is "the cheapest method of recruitment." The court dismissed the EEOC's argument that preferences based on common culture were discriminatory: "Well, of course. People who share a common culture tend to work together as well as marry together and socialize together. That is not evidence of illegal discrimination" (*EEOC v. Consolidated Service Systems* 1993, p. 237).

Would the court look as approvingly at a White-owned company that preferred White employees because of shared culture? Not likely. In dicta, the *Consolidated* court highlighted the unique circumstances of immigrants:

> In a nation of immigrants, this must be reckoned an ominous case despite its outcome. The United States has many recent immigrants, and today as historically they tend to cluster in their own communities, united by ties of language, culture, and background. Often they form small businesses composed largely of relatives, friends, and other members of their community, and they obtain new employees by word of mouth. These small businesses—grocery stores, furniture stores, cleaning services, restaurants, gas stations—have been for many immigrant groups, and continue to be, the first rung on the ladder of American success. Derided as clannish, resented for their ambition and hard work, hated or despised for their otherness, recent immigrants are frequent targets of discrimination, some of it violent. It would be a bitter irony if the federal agency dedicated to enforcing the antidiscrimination laws succeeded in using those laws to kick these people off the ladder by compelling them to institute costly systems of hiring (*EEOC v. Consolidated Service Systems* 1993, 989 F .2d, pp. 237–238).[6]

In effect, the court was urging a separate application (or a nonapplication) of the Civil Rights Act for the emerging class of immigrant entrepreneurs.

Referral hiring hardly exhausts the potential disparate-impact discrimination linking immigrants and native-born Americans, especially African Americans. As Malamud (2001) reminds us, there are other phenomena that the law could conceivably regulate or even forbid. For example, she points out that if employers are correct that American-born workers will not work for certain wages or particular work conditions, then "employers essentially choose the ethnic composition of their workforce when they determine rates of pay and employment conditions," as well as "the choice of where to locate the business" (Malamud 2001, p. 335). In this view, Milkman's (2006) finding, that the deterioration of workplace conditions preceded transitions to immigrant-dominant work forces in several southern California job sectors, would suggest a civil rights violation.

An employer who lets his or her work force reach some tipping point, some critical mass of immigrants, can quickly or over a period of time impact native workers negatively. Most immediately, there is the issue of language. Though there are several civil rights cases and much discussion dealing with the discriminatory

effects of forbidding foreign languages to be spoken by employees (Colon 2002), there is a flip side: an environment that does not welcome native-born Americans into foreign-language dominant workplaces (described above).

It also appears that employers can drive away native workers by hiring mostly immigrants and having their jobs become defined—or stigmatized—as immigrant-only jobs (Massey et al., 2002, p. 41). There appears to be a kind of feedback loop in place in some of these job markets. As sociologists Portes and Bach (1985) have noted, "Employers find in immigrant workers a certain vulnerability that enforces low wages and work conditions unacceptable to the domestic working class" (Portes and Bach, p. 202). The employer preference for immigrants' racial skills and the poor quality of the jobs conspire to further devalue the jobs in the view of U.S. workers, thus decreasing their desire to accept the jobs (Portes and Bach, 1985, p. 202; see also Waldinger and Lichter, 2003, p. 40). Those U.S. workers who are hired make half-hearted efforts at these stigmatized and morale-draining jobs, further reinforcing employer views of U.S. workers as undesirable, leading to more immigrants being hired, and further reinforcing the reluctance of U.S. workers to take the jobs.[7] In the American cultural context, where work is very much a part of identity and status, redefinitions of some low-status jobs as *immigrant* low-status jobs can have a large and disparate impact, though there is no evidence that courts will ever define this disparate impact as illegal discrimination.

## NEW OPPORTUNITIES FOR IMMIGRANTS—OR NEW CENTERS OF EMPLOYMENT DISCRIMINATION AND EXPLOITATION?

Many of these issues come together in employment sectors that have made transitions in some cases to almost total immigrant hiring.[8] Perhaps most notable are the garment and food industries, especially meat-packing. The two cases are different, in that the production of garments has moved to a post-Fordist, small shop, flexible, subcontracting style of production. In other words, small garment sweatshops predominate rather than massive factories (Bonacich and Appelbaum, 2000; Su and Martorell, 2001). Meat-packing, on the other hand, looks more like a standard Fordist operation, with vertical integration and massive corporations working in a consolidating industry. But the two contexts are similar in terms of the jobs themselves: intense, repetitious, tedious, and poorly compensated work.

The meat-packing story represents perhaps the most dramatic changes and has received increasing amounts of attention from scholars (Champlin and Hake, 2006; Gouveia and Juska, 2002; Griffith and Runsten, 1992; Kandel and Parrado, 2005; Stanley 1992) and journalists (e.g., Pérez and Dade, 2007; Barboza 2001). Meat-packing used to be a unionized job, located in cities, offering solid pay and benefits. In the past twenty-five years, however, it has become none of these things. The industry has come to be dominated by just a few firms (e.g., Tyson, Cargill, and ConAgra) that have closed or sold unionized plants and built massive new facilities in the Midwest and the South. By 2000, there were sixteen different facilities that could each kill 1 million animals annually, whereas before 1986 there were none (Champlin and Hake, 2006, p. 58). These plants are modern and mechanized, but there are limits to automation: the variability in the shapes of animal carcasses requires manual labor for cutting. This labor is de-skilled and easily replaceable, and turnover rates average between 80% and 100% (Champlin and Hake, 2006, p. 54). From 1980 to 2002, wages declined in the industry from $10.30 to $6.46 (other estimates put the decline at 50%), line speeds doubled and injuries went up, to such an extent that

about one-third of workers suffer some injury in what has been called the nation's "most dangerous industry" (Champlin and Hake, 2006, p. 58; Stanley 1992, p. 108). Immigrants have been most concentrated in the workplaces with the worst conditions (Griffith and Runsten, 1992). Latin American immigrants make up about 70% of this work force, up to 50% of whom have been estimated to be undocumented (Champlin and Hake, 2006, p. 62; Gouveia and Juska, 2002, p. 376).

It is true that some of these changes to immigrant labor are the result of larger demographic shifts in the U.S. economy, such as the rise in the level of education of the work force (Kandel and Parrado, 2005). For example, though the Wisconsin dairy industry has seen some of the same moves toward factory-style production and a de-skilling of the work force, Valentine (2005) shows that even smaller farms have become dependent on immigrant labor as the rural youth work force has disappeared.

However, in meat-packing, there are factors that follow the logic of Malamud's (2001) suggested disparate-impact discrimination argument. Unlike the dairy farms, which have of course been in Wisconsin for years, meat-packers *chose* to build new plants where there were no native workers. The industry then lowered both the wages and the quality of the jobs, making them more monotonous and more dangerous at the same time [in at least one case, a plant raised wages to attract mostly Black local workers after an immigration raid caused it to lose 75% of its work force (Pérez and Dade, 2007)]. In addition, unlike the "passive" referral hiring that courts have ruled is acceptable even when it leads to a racially unbalanced work force, studies show that the meat-packers actively recruit immigrant Latino workers, specifically, undocumented workers (Champlin and Hake, 2006, pp. 54, 63), sometimes offering bonuses to workers who bring in family and friends (Stanley 1992, p. 112). The active nature of these efforts extends up to the federal government; these same firms lobby for continued access to immigrant labor (Gouveia and Juska, 2002, p. 376). Taken together, while these firms have offered new opportunities to immigrants, the meat-packing industry has also engaged in a series of practices that have arguably had an unlawful disparate impact on native workers. No court, and neither Congress nor the EEOC, has made significant efforts to bring civil rights law to bear on the industry's practices.

## CONCLUSION

Congress created U.S. employment discrimination laws with a focus on the massive and open discrimination perpetrated by White employers against Black citizens, especially in the southern states. I have shown that, due to massive immigration over the past several decades, the United States in 2007 looks very different than it did in 1964, and, correlatively, discrimination now also looks different. Some of this discrimination, on the part of large-scale corporate employers, can benefit all groups, including African Americans, because *diversity* means *everybody*. Firms try to benefit from the racial skills of individuals of particular races marketing to coracials, or from their all around diverse ideas or the racial symbolism of having them occupy visible positions. This might be discrimination, and it might have both downsides and benefits (Frymer and Skrentny, 2004; Malamud 1997), but for now it is not unlawful.

However, for employers hiring for less-skilled jobs, African Americans are at the bottom of a sometimes explicit employee ranking. Employers often see Asian and Latino immigrants as having racial skills for these dull, monotonous, and/or dangerous jobs, with native-born White and Black workers as having the least. Though this looks like discrimination, and the kind that Congress intended to stop, it appears to

be widespread and largely unlitigated because such jobs are for most citizens not worth fighting for in an expensive court battle. In cases where the EEOC has stepped in on behalf of Black workers, courts have beaten it back, limiting the idea of disparate impact in contexts where the alleged discrimination benefits immigrants or non-White groups. In effect, without public debate, the courts may be adapting the Civil Rights Act for immigrant America by getting civil rights law out of immigrant hiring altogether.

There are even some large firms and industries that show an obvious and heavy dependency on immigrant labor, specifically, Latino immigrant labor. The meat-packing industry in particular shows that the choices that employers make—whether under market pressure or not—appear to have significant effects on the ethnic or racial makeup of their work forces. Decisions regarding where to locate their business, what conditions to provide for workers, and what wages to pay them appear to shape the ethnic and racial makeup of the work force. Following the logic of disparate-impact theory in discrimination law, this may be discrimination.

But is this *really* discrimination? One may protest that it is not, because what distinguishes today's racial stratification from that in the Jim Crow South, while simple, is crucial: choice. Native-born workers *choose* not to work in particular jobs, and immigrants *choose* to work. In a typical disparate-impact case, the facially neutral practices (such as a height requirement or an ability test score) that have differing impacts on different workers will operate even if great numbers of the affected groups seek employment at these establishments. But, in the cases of jobs dominated by immigrants, native workers are not clamoring to get in. In *EEOC v. Consolidated* (1993), the court even commented on the lack of witnesses willing to testify for the EEOC regarding their desire to work for the Korean immigrant-owned company. They are rejecting bad jobs of the "secondary labor markets" (Massey et al., 2002; Piore 1979) that have been around for a long time. It therefore seems a stretch to claim that having secondary labor markets is discriminatory. Arguably, it is more an issue of globalization—the "race to the bottom" comes to the United States—than of discrimination.

In this view, the proper policy response for today's United States may be to train and move these native-born Americans to better jobs (or to maintain the current policy of just assuming that they will move to better jobs), rather than worrying about whether discrimination law should be opening up bad jobs for all citizens. This option is appealing on many levels because it suggests upward mobility for the nation's poor. But we should be aware that ceding low-skilled, poorly paid jobs to millions of immigrants would in effect be to sanction an ethnoracially stratified work force—while allowing conditions and standards of the bottom levels to sink to lows the country may not have seen since the turn of the last century.

In this article, I have mostly avoided discussing whether the immigrants themselves are victims of discrimination. On this point, it is worth quoting at length from Bonacich and Appelbaum, who, in surveying the immigrant-dominated garment industry, make a striking historical analogy:

> In many ways southern California resembles the old South, where African Americans were also a disenfranchised population. In the South, the major marker for disempowerment was race. In Los Angeles, it is a combination of race and immigration status. Immigration status alone marks off a segment of the population as unprotected by the basic laws of the land, but the effect is exacerbated by race because, of all undocumented immigrants, Latinos carry a special burden as the target of anti-immigrant movements. The racism of the system in south-

> ern California is more subtle than that in the South because it is hidden under a layer of legalese. In southern California, the combination of race and immigrant status is used to create a work force without rights. Employers are the major beneficiaries of undocumented immigration from Mexico and Central America. They have under their control a highly exploitable work force. They can pay illegally low wages and get away with it (Bonacich and Appelbaum, 2000, p. 25).

Revealingly, Bonacich and Appelbaum do not discuss Title VII in their study, and the words *discrimination* and *civil rights* do not appear in the index of their book. The reach of employment discrimination law in the new immigrant America, it appears, is very short.

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## NOTES

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2. *Patrolmen and Benevolent Association v. City of New York* (1999). Also see *Detroit Police Officers' Association v. Young* (1979), *Talbert v. City of Richmond* (1981), and *Reynolds v. City of Chicago* (2002).
3. The Equal Employment Opportunity Commission (EEOC) sued Walgreens, the drugstore chain, for assigning African American workers to low-performing stores in Black neighborhoods. Walgreens's record at employing Black managers and pharmacists was significantly better than the industry average, and their apparent goal was to match the race of the employees to the customer to provide better service. However, stores in Black neighborhoods tended to underperform compared to stores in White neighborhoods, and since promotions were based in part on sales, this practice hurt the Black employees. Walgreens settled the case in July 2007, agreeing to pay $20 million to nearly 8000 employees affected by company practices (Florida Employment Law Letter 2007; Knowles 2007).
4. In a case described below, *EEOC v. Consolidated Service Systems* (1993), the EEOC sued a custodial company for discrimination against non-Koreans, but had considerable difficulty finding witnesses for the trial.
5. See, for example, *Domingo v. New England Fish Co*., 727 F .2d 1429 (Ninth Circuit 1975); *NAACP v. Evergreen*, 693 F .2d 1367 (Eleventh Circuit 1982); *Barnett v. W. T. Grant Co*., 518 F .2d 543 (Fourth Circuit 1975).
6. Though discussing mostly the situation of immigrants, the court added, "There is equal danger to small black-run businesses in our central cities. Must such businesses undertake in the name of nondiscrimination costly measures to recruit nonblack employees?"
7. As Glenn Loury has shown (2002), a similar feedback loop has had especially negative effects on the work prospects and work ethic of Black workers.
8. Immigrant penetration in certain labor markets is very uneven, constituting, in California, 17% of the work force, but 36% of service workers, 42% of factory operatives, and about one-half of other laborers (Lichtenstein 2002, p. 267).

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