1-1-1990

Citizenship, Alienage, and Ethnic Origin Discrimination in Employment Under the Law of the United States

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> *The Lord spoke to Moses and said, . . . When an alien settles with you in your land, you shall not oppress him. He shall be treated as a native born among you, and you shall love him as a man like yourself . . . .*
>
> Leviticus 19:33 (New English Bible)

I. INTRODUCTION

This paper will survey the federal law of discrimination in employment based on ethnic origin, alienage, and citizenship.[1] There are a number of sources of this law, many of them overlapping. The federal constitution provides some protections, but only to governmental employees or applicants. The traditional centerpiece of employment discrimination law is Title VII of the Civil Rights Act of 1964.[2] The 1866 Civil Rights Act[3] also provides protection which overlaps with that provided by Title VII. Finally, the recently enacted

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[1] Only the federal, or national, law will be addressed. State and local law may well address similar issues. By virtue of federal law supremacy, (U.S. Const. art. VI) state and local law may not undercut or authorize any action proscribed by federal law. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). *See also* Johnson v. Mayor & City Council of Baltimore, 472 U.S. 353 (1985). However, so long as state and local statutes or common law developments do not conflict with established federal policies, such as prohibiting that which federal law desires to specifically authorize, state and local law can parallel or even exceed federal law in protecting civil rights. *See* California Federal Sav. & Loan Ass'n v. Guerra, 474 U.S. 1049 (1987). Frequently, discrimination proscribed by federal law may also violate state or local law, with remedies existing under the law of both jurisdictions. Moreover, it is possible that some forms of discrimination may receive more protection under state law than federal law, and may have a remedy not available under federal law.

[2] 78 Stat. 253,42 U.S.C. § 2000e-2000e-17 (1982).

[3] 42 U.S.C. § 1981 (1986).

Immigration Reform and Control Act of 1986[4] regulates both national origin discrimination, thus duplicating the protections of Title VII, and citizenship discrimination which received incomplete attention in the other statutory schemes.

This paper will survey each of these sources of protection. Despite all of these overlapping statutory protections, serious gaps still exist, particularly with respect to discrimination against aliens based on lack of citizenship.

II. THE UNITED STATES CONSTITUTION

A. "State Action" and the Analytical Model

It is axiomatic that the Constitution of the United States defines and limits the powers of governments; it does not regulate acts of purely private persons, individual or corporate.[5] The Fifth Amendment, one of the original Bill of Rights, prohibits the federal government from depriving persons of "life, liberty, or property without due process of law." The Fourteenth Amendment, which was a product of the post-Civil War Reconstruction, limits the powers of the States by providing that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws."[6] This language clearly indicates that these protections are not limited to citizens or residents of the States or of the United States, but are accorded to "any person." Even those who have entered the United States illegally can claim the protections of the Fifth and Fourteenth Amendments.[7]

[4] Pub. L. No. 99-603, 78 Stat. 253 (1986) (codified as amended in various sections of 8 U.S.C.).

[5] The Civil Rights Cases, 109 U.S. 3 (1883); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[6] The Fifth and Fourteenth Amendments share common "due process" language. The Fifth Amendment does not, however, contain language found in the Fourteenth Amendment which requires states to provide "equal protection of the laws," and the Fourteenth Amendment does not restrict the powers of the Federal government. Nonetheless, "due process" contains an "equal protection" component in that state action which would deny a person "equal protection of the laws" will probably (but not always) violate that person's right to "due process of law" and thus be protected against federal action. For example, racial segregation of schools by states infringes the right to equal protection of the laws; similar racial segregation by the federal government is a denial of due process of law. *See* Bolling v. Sharpe, 347 U.S. 497 (1954); Mathews v. Diaz, 426 U.S. 67 (1976).

[7] Plyler v. Doe, 457 U.S. 202 (1982). *See also* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

Simply because aliens are protected by the Constitution does not mean that the Constitution prohibits all governmental discrimination against aliens. "Due process of law" and "equal protection of the laws" under the Fifth and Fourteenth Amendments do not necessarily prohibit legislative or executive action restricting governmental employment of aliens. Determining the extent to which governments are limited in their employment practices requires a multi-step analysis, and to those not familiar with the American constitutional system, it may seem to be an unduly complex analysis.[8]

The concept of "equal protection of the laws" has led the Supreme Court to conclude that governmental classifications that discriminate against so-called "suspect classes" are subject to strict and searching judicial scrutiny, and the classification will be declared unconstitutional if the government cannot demonstrate compelling reasons for them.[9] On the other hand, governmental classifications that utilize non-suspect distinctions, such as those drawn in ordinary economic, tax, or social legislation, will be sustained unless the person challenging them can demonstrate the total irrationality or arbitrariness of the governmental action, a very heavy and usually impossible burden for a plaintiff to carry.[10] The analytical watershed therefore becomes one of identifying whether the governmental classification is "suspect."

B. Race and Ethnic Origin as "Suspect Classes"

Race, of course, was the first and most easily identified suspect classification requiring proof of compelling justifications for its use.

[8] Government employment is no longer considered a "privilege" which may be granted or withheld at will without being subject to constitutional scrutiny. Pickering v. Board of Educ. 391 U.S. 563 (1968). *Compare* McAulifee v. New Bedford, 155 Mass. 216, 220, 29 N.E. 517-18 (1892), where in sustaining the discharge of a policeman without any analysis of possible constitutional issues, Justice Holmes, in famous dicta stated, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." While no abstract "right" to public employment exists, that employment, like any other governmental action, may not be allocated along grounds that violate precepts of equal protection of the laws. Thus, an employee does not waive constitutional protections by becoming an employee. But, the government may have valid interests as an employer that would permit it to deny employment for conduct for which it could not constitutionally punish a non-employee. *Compare* Rankin v. McPherson, 483 U.S. 1056 (1987), *with* Connick v. Myers, 461 U.S. 138 (1983).

[9] Graham v. Richardson, 403 U.S. 365 (1971); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[10] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

Aside from the use of narrowly defined affirmative action plans designed to remedy identified racial segregation or to rectify "conspicuous racial imbalances in traditionally segregated job categories," the use of race by governmental employers in the hire, promotion, or discharge of workers will violate the Fifth Amendment (in the case of the Federal government) or Fourteenth Amendment (in the case of State or local governmental units).[11]

The Supreme Court similarly identified ethnic origin as a suspect classification. Like race, an ethnic origin classification required the government to establish compelling reasons for its use. It is virtually impossible for a government to establish a compelling interest in discriminating against ethnic minorities, such as Hispanics, Irish-Americans, Italian-Americans, or Polish-Americans.[12] However, as in the case of racial classifications, a governmental employer may adopt reasonable affirmative action plans based on ethnic background, provided that such plans affirmative action plans based on ethnic background, provided that such plans are designed only to increase the employment of ethnic groups who have been victimized by discrimination. For example, a government may attempt to increase the employment of Hispanics if past actions have resulted in significant underemployment of that ethnic class. It may establish a goal of having in each relevant job category a percentage of Hispanic employees similar to the percentage of qualified Hispanic persons in the relevant work-force population. It may utilize Hispanic origin in making individualized decisions, or even employ hiring ratios for qualified Hispanic workers. While such affirmative action plans utilize Anglo-American ethnic origin as a negative factor, they will pass constitutional muster as long as they are narrowly drawn, are remedial in character, and do not unduly trammel the rights of the majority. Such plans meet the standard of serving the compelling governmental interest of eradicating past segregation and discrimination. And while affirmative action plans can justify use of ethnic heritage in making hiring and promotion decisions to remedy historical discrimination, such plans cannot justify use of race or ethnicity in making termination decisions.[13]

[11] Regents of the University of California v. Bakke, 438 U.S. 265 (1978); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[12] Hernandez v. Texas, 347 U.S. 475, 477-79 (1954); Keyes v. School Dist. No. 1, 413 U.S. 189, 197 (1973).

[13] *See* United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Johnson v. Santa Clara County Transp. Agency, 480 U.S. 616 (1987).

C. Citizenship and Alienage

Classifications distinguishing citizens from non-citizens, or alienage classifications, have been categorized as "suspect" and, at least theoretically, are subject to the same searching scrutiny as are racial and ethnic distinctions.[14] In reality, however, citizenship requirements for employment have not been subjected to the searching scrutiny given racial and ethnic classifications.

The federal government continues to require American citizenship as a qualification for federal civil service employment.[15] The citizenship qualification has been sustained under the strict scrutiny standard of the Fifth Amendment based on the unique interests of the federal government in regulating immigration and conducting foreign affairs.[16] At most, such justifications seem remote and speculative, significantly short of what one normally considers to be "compelling." Perhaps such decisions can be justified in terms of traditional judicial deference to constitutionally co-equal branches of government, particularly as to matters, such as citizenship and foreign affairs, which are constitutionally delegated to the political branches.[17]

State and local requirements of citizenship for governmental employment are subject to an even greater degree of complexity. The exclusion of aliens from all civil service employment is said to be a suspect rule subject to strict scrutiny under the Fourteenth Amendment. In applying that high level of scrutiny the Court has invalidated blanket requirements that ordinary state civil servants be American citizens.[18] Such a requirement was deemed to be overly broad and, unlike the similar requirement in the federal civil service, served no significant governmental interest.

Subsequently, however, the Court recognized that certain state officers "participate directly in the formation, execution, or review of broad public policy" or "perform functions that go to the heart of representative government."[19] A citizenship requirement for those

[14] Graham v. Richardson, 403 U.S. 365 (1971).

[15] 5 C.F.R. § 7.4 (1988). *See also* Hampton v. Mow Sun Wong, 426 U.S. 88 (1977).

[16] Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, Lum v. Campbell, 450 U.S. 959 (1981). *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[17] *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); Zemel v. Rusk, 381 U.S. 1, 17 (1965).

[18] Sugarman v. Dougall, 413 U.S. 634 (1973).

[19] Foley v. Connelie, 435 U.S. 291 (1978).

higher level or policy making officials is not deemed to be "suspect."[20] Since such a citizenship requirement for these higher officials is not subject to strict scrutiny, the requirement need only be rational to be deemed constitutional.

The problem then becomes one of identifying which offices qualify for the mere rationality level of scrutiny. If the job is deemed one of an ordinary lower-level civil servant, a citizenship requirement will be presumptively unconstitutional. Presumably, American citizenship cannot be required of clerical workers, manual laborers, transportation employees, or even professionals who do not implement public policy.[21] On the other hand, police officers[22] and school teachers[23] fall within the "public policy" level of employment for which citizenship credentials can be imposed.

D. A Note on Motive and Impact Under the Constitution.

In determining the level of scrutiny to be applied, the courts will first evaluate whether an express classification appears on the face of a statute or regulation or as part of a clearly admitted official policy. If so, the burden will be on the government to establish the compelling governmental interests served by the classification.[24] If there is no express classification, the question will be whether administrators were motivated by "suspect" considerations which are subject to heightened judicial scrutiny.[25] Only if the plaintiff proves that the defendant was motivated by such class considerations will the defendant have to carry the burden of establishing the compelling reasons for use of the suspect class. Absent proof that the action did in fact have such suspect motivations, the courts will analyze the

[20] *Id.*

[21] Sugarman v. Dougall, 413 U.S. 634, 643 (1973) (state civil service law requiring *inter alia* citizenship for sanitation workers, typists, and clerical positions violates equal protection since it sweeps indiscriminately and is not narrowly limited to accomplishment of substantial state interests). *Cf.* Truax v. Raich, 239 U.S. 33 (1915). *Contrast* In re Griffiths, 413 U.S. 717 (1973); Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976)(state could not exclude aliens from being licensed into professions).

[22] Foley v. Connelie, 435 U.S. 291 (1978); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[23] Ambach v. Norwick, 441 U.S. 68 (1979).

[24] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[25] Arlington Heights.v Metropolitan Housing Corp., 429 U.S. 252 (1977); Hunter v. Underwood, 471 U.S. 222 (1985).

classification as a traditional governmental decision which will be unconstitutional only if proved to be unreasonable.[26]

A classification is not entitled to special, heightened judicial scrutiny simply because it has an adverse impact on a protected class. Thus, even though a selection device, such as a test given in the English language, might adversely affect the employment of persons based on their citizenship or ethnic heritage, absent a specific intent on the part of the employer to secure a discriminatory result, the device will be unconstitutional only if the plaintiff proves that the device is unreasonable.[27]

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. A General Look at the Statute

The Civil Rights Act of 1964 was a multi-title statute prohibiting various forms of invidious discrimination in many areas of the national life: voting, education, use of public facilities, and, in Title VII of the Act, employment. Generally stated, Title VII prohibits employers, labor organizations, and employment agencies from discriminating on the basis of race, color, religion, sex, and national origin in any aspect of the employment relationship, including, hire, promotion, discharge, compensation, and all other terms and conditions of employment.[28] It applies to private employers and state

[26] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

[27] Washington v. Davis, 426 U.S. 229 (1976)(An objective test adversely affecting black applicants is not "suspect" and thus subject to scrict scrutiny merely because of that impact. To invoke strict scrutiny a plaintiff would have to prove improper motive in use of the test). Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)(A statutory preference for veterans had a devastating impact on the employment of women in the state civil service. Even though the legislature was aware of this impact in enacting the statute, this was still insufficient to prove that the legislature was motivated by considerations of gender.)

[28] Section 703(a) of Title VII provides:

> (a) It shall be an unlawful employment practice for an employer —
> (1) to fail or refuse to hire or to discharge any individual, or otherwise 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.

42 U.S.C. § 2000e-2(a) (1982).

Sections 703(b) and (c) similarly restrict employment agencies and labor organizations. 42 U.S.C. § 2000e-2(b) and § 2000e-2(c).

and local government entities which have fifteen or more employees.[29] The non-discrimination provisions are also applicable to all employment actions taken by the federal executive branch.[30]

B. Motive and Impact

Title VII jurisprudence has established two models for finding liability: (1) treatment motivated by membership in one of the classes protected by the Act (race, color, religion, sex, or national origin),[31] and (2) use of factors which have an unjustified adverse impact on a class protected by the Act.[32] Of course, proof of a discriminatory motive will establish a violation of the Act, except in those cases where national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business."[33] Or, in the event that the employer had a valid reason for its treatment of the plaintiff, coupled with the motive made illegal

[29] 42 U.S.C § 2000e(b) (1982) defines "employer" to include "person", but exclude federal agencies. 42 U.S.C. § 2000e(a) defines "person" to include "governments and government agencies, political subdivisions." Excluded from the definition of "employee" are personnel who are on the staff of elected officials or who hold high, policy-making positions. Thus, discrimination against persons holding, seeking, or being removed from such positions does not involve an "employment" decision subject to Title VII scrutiny. *See* Rogero v. Noone, 704 F.2d 518 (11th Cir. 1983); Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985). For a description of Title VII coverage *see* Player, EMPLOYMENT DISCRIMINATION LAW, Sec. 5.06-.16 (1988).

[30] 42 U.S.C. § 2000e-16 (1982).

[31] *See e.g.*, Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989).

[32] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988); Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989).

[33] 42 U.S.C. § 2000e-2(e)(1) (1982). *See* Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989). The bona fide occupational qualification (BFOQ) defense is strictly construed and rarely successful. It requires proof that all or substantially all persons of the excluded class could not safely and effectively perform the essence of the job. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977). *See generally*, Player, *supra* note 29, sec. 529. The legislative history of Title VII indicates that ethnic atmosphere, entertainment, or authenticity in dramatic productions, modeling, or eating establishments might justify a preference for particular national origins. 110 Cong. Rec. 2549. Otherwise, it is difficult to envision a situation where all or substantially all persons of any particular ethnic or national origin could not perform. *Cf.* Kern v. Dynalectron Corp. 577 F.Supp. 1196 (N.D.Tex. 1983), *affd* 746 F.2d 810 (5th Cir. 1984). However, nationality may be a bona fide occupational qualification for high level executives of a foreign company doing business in the United States, based on the need for the executives to be conversant with the customs of the nation of the parent company. *See* Avigliano v. Sumitomo Shoji America, Inc., 638 F.2d 552 (2d Cir. 1981), *rev'd on other grounds*, 457 U.S. 176 (1982).

by Title VII, "defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [class membership] into account."[34]

Proof of discriminatory motive is not required under a disparate impact theory. The plaintiff first has the burden of proving that an ostensibly neutral factor adversely affects the employment opportunities of those of a particular race, gender, or national origin.[35] Assuming the plaintiff proves the exclusionary effect, the employer has the "burden of producing evidence of a business justification for his employment practice."[36]

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, ... At the same time there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . .[37]

If the defendant presents evidence of a "substantial justification" for the use of the device proved to adversely affect the plaintiff's class, and the plaintiff "cannot persuade the trier of fact on the question of [defendant's] business necessity defense, [plaintiff] may still be able to prevail . . ."

> To do so [plaintiff] will have to persuade the factfinder that "other tests of selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate hiring interests;" by so demonstrating, respondents would prove that "petitioners were using their tests merely as a pretext for discrimination."[38]

Impact analysis can thus be used to protect against effective national origin discrimination through the use of ostensibly neutral devices without having to carry the difficult burden of proving the employer's

[34] Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989).

[35] Connecticut v. Teal, 457 U.S. 440 (1982); New York City Transit Authority, v. Beazer, 440 U.S. 568 (1979); Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115 (1989).

[36] Wards Cove Packing Co. v. Atonio, 109 S.Ct. 2115, 2126 (1989).

[37] *Id.* at 2126.

[38] *Id.*, at 2126. *See also*, Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988). *Atonio* and *Watson* resulted in a dramatic alteration of the understanding of impact analysis from the perspective of who carries the burden of persuasion and the weight of that burden in terms of what was meant by "business necessity." For a pre-*Watson* and a pre-*Atonio* discussion of impact analysis *see* Player, *supra* note 29, at sec. 5.41.

national origin motivation. For example, a test that measures facility with the English language might be shown to disproportionately disqualify certain ethnic groups, particularly those whose heritage is non-English speaking. In such a case, the employer will have an initial obligation to present a business reason for the test. At this point, the plaintiff will have to convince the factfinder that the reason proffered by the employer either is not substantial, or that reasonable alternatives to the English test exist. Another example would be an employer who utilized a minimum height requirement, with the effect of disqualifying a disproportionately high number of persons from certain racial or ethnic groups. The employer would have to present evidence of a business reason for such a physical requirement. If the employer meets this burden, the plaintiff, to prevail, must demonstrate that the height requirement lacked any substance, or that reasonable, less discriminatory alternatives exist.

C. National Origin: Generally

The face of Title VII proscribes discrimination based on "national origin". Congress considered this somewhat ambiguous term to mean "the country from which you or your forebears came." A rough equivalent might be "ancestry."[39] Thus, it violates the Act to discriminate against so-called hyphenated Americans such as Italian-Americans, Polish-Americans, Mexican-Americans, and Irish-Americans.[40] It is also unlawful to discriminate against a person because of his Anglo-American heritage. In Puerto Rico, a Commonwealth subject to United States law, an employer who discriminates against mainland "Americanos" is engaged in proscribed national origin discrimination.[41]

It is national origin discrimination to make distinctions based on the name or surname of an employee or applicant, regardless of the actual ancestry of the individual. Thus, discriminating against one with an Hispanic or middle-eastern sounding name is illegal.[42] Similarly, discrimination on the basis of the perceived origins of the spouse or associates of an applicant or an employee is national origin

[39] 110 Cong. Rec. 2549 (1964); H.R.Rep. No. 914, 88th Cong., 1st Sess. 87 (1963).

[40] Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980).

[41] Earnhardt v. Commonwealth of Puerto Rico, 744 F.2d 1 (1st Cir. 1984).

[42] EEOC v. Safeway Stores, 611 F.2d 795 (10th Cir. 1979).

discrimination, even though the employer has no animus towards the origin of the employee or applicant.[43]

Discrimination because of the "foreign" appearance of an individual would be based on "color" as well as national origin. An employer cannot discriminate against an applicant because he speaks with a "foreign" sounding accent, or because the person speaks a foreign language and, thus, is presumed to be "foreign."[44]

D. Language Requirements as National Origin Discrimination: An Application of Impact Analysis

A requirement that employees be able to speak and understand the English language is not national origin discrimination on its face.[45] The employer is not necessarily excluding a person based on that person's national origin, but is discriminating on the basis of an objective fact of language competency. Obviously, however, the requirement, similar to that of a test using the English language to measure performance,[46] adversly affects the protected class of those who come from non-English-speaking nations. Nonetheless, fluency in English would be, for the English-speaking employer, a justified "business necessity."[47]

A requirement that employees be fluent in a language other than English, assuming it was imposed in good faith and not for the purpose of favoring a particular national origin, would no doubt adversely affect employment opportunities of the predominately monolingual Anglo-Americans. If that language requirement is related to a bona fide need of the employer, such as an ability to speak with customers, it would be considered a "business necessity" and sustained.[48] On the other hand, if the language requirement had no business purpose, it would be invalid given its adverse impact on those of Anglo heritage.

[43] *See* Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986).

[44] Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980 (6th Cir. 1980); Carino v. Univ. of Okla. Bd. of Regents, 750 F.2d 815 (10th Cir. 1984).

[45] Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).

[46] *See supra* note 27 and accompanying text.

[47] Vasquez v. McAllen Bag & Supply Co., 660 F.2d 686 (5th Cir. 1981); Stephen v. PGA Sheraton Resorts, Ltd., 873 F.2d 276, 280 (11th Cir. 1989); Fraganta v. City of Honolulu, 888 F.2d 591, 598 (9th Cir. 1989).

[48] *See* Smith v. District of Columbia, 29 FEP Cases (BNA) 1129, 1133 (D.D.C. 1982).

Some employers have prohibited the use of any language other than English during working hours. It may be difficult to prove the adverse impact of a rule requiring English to be spoken at all times.[49] Absent proof of impact, and assuming the employer's good faith, such a rule cannot violate Title VII.

Some authority has indicated, however, that adverse impact may lie presumptively in the insult to and humiliation of persons of non-Anglo heritage when they are denied the use of their native, and most natural, tongue.[50] In the alternative, such a blanket rule might be considered a form of express national origin classification, to be justified only by proof that the rule is a bona fide occupational qualification.[51] If such a rule is considered a form of express national origin discrimination, the defendant may have difficulty proving that it serves a significant business purpose.

E. Alienage or Non-Citizenship

Title VII clearly covers or protects non-citizens against discrimination proscribed by the Act.[52] Thus, an alien who is a victim of

[49] *See* Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980). The plaintiff may be able to prove such impact by showing that when invoked it fell solely, or disproportionately upon those of a particular ethnic heritage. *See* Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977); EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986), where an employer's actual result in the retirements forced by a no-spouse rule was sufficient to allow a finding that such a rule adversely affected women employees. *Cf.* Harper v. Trans World Airlines, 525 F.2d 409 (8th Cir. 1975), where an employer's experience with a similar rule was insufficient to prove its adverse impact.

[50] Gutierrez v. Municipal Court, County of Los Angeles, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 109 S.Ct 1736 (1989). Even if such impact is proved, the employer's reasons for its use may be legitimate. While *Gutierrez* indicated that no showing of "business necessity" was needed, given the Court's revisiting of the "business necessity" burden, (*see supra* notes 35-38 and accompanying text) it may be difficult for plaintiffs to prove the lack of any substance to such a rule. Clearly, if an employer has a reason for an "English only" rule, it will be sustained. *See* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987) (on air use of Spanish by announcer could be prohibited). *But see*, Karst, *Paths to Belonging: The Constitutional and Cultural Identity*, 64 N.C.L. REV. 303 (1986) (language and its use is a part of one's ethnicity deserving special legal protection).

[51] *Id. See also*, 29 C.F.R. § 1606.7(a) (1988). *See* Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MARSHALL L. REV. 667 (1982).

[52] Section 703(a)-(d) (42 U.S.C. §§ 2000e-2(a)-2000e-17 (1982) makes it unlawful "to discriminate against any *individual*", or classify "employees or applicants". Clearly, a non-citizen is an "individual", and can qualify as an "employee" or "applicant". *See* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). Moreover, Section

sex discrimination, race discrimination, religious discrimination, or discrimination because of ethnic origin has a claim under the Act. However, Title VII does not expressly proscribe discrimination based on citizenship or alienage. Nor does the protection against "national origin" discrimination necessarily encompass discrimination based on "nationality." It was argued before the Supreme Court that when an employer rejected an individual because of her lack of United States citizenship, or alienage, it was necessarily a rejection based on the national origin of the person.[53] Citizenship and national origin were alleged to be based on the same concept, namely, where the person or his parents were born.

In *Espinoza v. Farah Mfg. Co.*,[54] the Supreme Court rejected that argument and held that alienage and national origin are distinct concepts. The Court found that Congress intended to allow employers to demand American citizenship as a condition of employment. This perceived intent was based in large part on legislation involving federal employment where discrimination on the basis of ethnic origin or ancestry was clearly prohibited, but American citizenship had long been required. That distinction was presumably intended by Congress when it used the term "national origin". Given this narrow construction of "national origin," perhaps a better, more descriptive term for discrimination proscribed by Title VII is "ethnic origin."

While Title VII permits discrimination against all aliens, it does not permit discrimination between aliens based on the nation or region of their citizenship. Therefore, an employer who hired Canadian nationals but refused to hire Mexican nationals would be making a proscribed national origin distinction. A citizenship requirement, permissible in itself, may not be drawn along ethnic origin lines. Similarly, an employer who hired Canadians without regard to education, but

702 (42 U.S.C. § 2000e-1) provides that "this title shall not apply to any employer with respect to the employment of aliens outside any State." First, this precludes Title VII from having extraterritorial application, at least as to decisions made on foreign soil. *See* Bryant v. International School Services, Inc., 502 F.Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1982) (Title VII does reach decisions made in the United States even though services are to be performed extraterritorially). *Compare*, Section 4(h) of the Age Discrimination in Employment Act (29 U.S.C. § 623(h) (Supp. IV 1986)) which has considerable extraterritorial application to American companies doing business abroad. Second, this specific exclusion of the protection of aliens employed abroad confirms that aliens employed in the United States are protected by Title VII.

[53] Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

[54] *Id.*

required Mexican aliens to have a college degree would be in violation of Title VII.[55]

F. Citizenship Distinguished from Alienage: Discrimination Against U.S. Nationals

A significant and largely unresolved question is whether a foreign employer operating in the United States may discriminate against United States citizens on the basis of their citizenship. For example, may a Japanese company doing business in the United States prefer Japanese nationals to the exclusion of Americans? A quick, and perhaps superficial, conclusion might be that since Title VII does not equate national origin with citizenship, an employer may refuse to hire American nationals, so long as the distinction is based upon citizenship, and not upon ethnic or national origin.

The conclusion that any employer may use citizenship as a valid factor does not necessarily follow from the Supreme Court's conclusion that an American company may discriminate in favor of United States nationals. The fact that Title VII allows an employer to discriminate against aliens does not necessarily mean that the law sanctions broad use of any citizenship requirement. The legislative history of Title VII emphasizes the fact that a company in the United States should be allowed to exclude all "aliens," distinguishing between alienage and origin. This critical legislative history did not sanction discrimination *against* United States citizens on the basis of their United States citizenship. Thus, a valid distinction could be made between alienage discrimination, which Congress was presumed to have permitted, and other forms of citizenship discrimination which Congress had no desire to permit. Indeed, it is almost inconceivable that the United States Congress intended to allow foreign companies to prefer foreign nationals to American citizens without violating the prohibitions against national origin discrimination.[56]

[55] *Id.* at 92 n.5, 95. *See also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

[56] *See* 110 Cong. Rec. 2549 and 7213 (1964). *See also* Linskey v. Heidelberg Eastern, Inc., 470 F.Supp. 1181 (E.D.N.Y. 1979).

Treaties between the United States and foreign states may specifically authorize foreign companies doing business in the United States to engage in some form of hiring preference for their own citizens. If that intent is expressed in the treaty, the treaty may be given priority over United States laws regulating national origin discrimination. *See* Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)(treaty was not applicable because a wholly owned subsidiary of a Japanese

Excluding all United States nationals most certainly would have an adverse impact on persons born within the territory of the United States. Unless the employer could present substantial business reasons for excluding those of United States origin, the practice would violate Title VII. Even if the employer had good, sound reasons for excluding United States nationals, based on an assumption of language or cultural knowledge, the rule would perhaps be overly inclusive in that some Americans may have the requisite knowledge. Thus, the plaintiff could present a lesser discriminatory alternative to the blanket exclusionary rule to demonstrate that the rule is unnecessary and invalid.[57]

G. A Note on Security Clearances: 703(g)

Employers engaged in military or security work for the United States government may be prohibited by federal law from employing anyone who has not obtained the requisite security clearance from the federal government. Obviously, the mere requirement that employees possess security credentials does not constitute a facial discrimination on the basis of national origin. Just as obviously, however, security requirements adversely affect opportunities for those whose origins are from nations traditionally hostile to the United States (*e.g.*, the Soviet Union, Cuba, the People's Republic of China, etc.), who will find it difficult to receive the necessary clearance. Notwithstanding this impact, the employer is under no obligation to present evidence of the "business necessity" of the security requirement. Section 703(g) of the Act provides an express "security" defense.[58]

corporation incorporated in the U.S. was not a "company of Japan" covered by the treaty); McNamara v. Korean Air Lines, 863 F.2d 1135 (3rd Cir. 1988) (treaty granting Korean Company the right to select executives "of their choice" allowed preference for Korean nationals, but did not authorize race discrimination). *See also*, Wickes v. Olympic Airways, 745 F.2d 363 (6th Cir. 1984).

[57] Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), specifically indicated that a claim would lie if an alienage disqualification adversely affected a particular national origin, but found that since 97% of the employees were of Mexican origin, a rule requiring citizenship had no impact on those having Mexican ethnic origins. *See* Chaiffetz v. Robertson Research Holding, Ltd., 798 F.2d 731 (5th Cir. 1986).

[58] 42 U.S.C. § 2000e-2(g)(1981).

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position . . . if —
>
> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be

IV: THE RECONSTRUCTION ERA CIVIL RIGHTS ACT (42 U.S.C. 1981).

A. Historical Introduction

Immediately following the American Civil War, Congress enacted a series of sweeping civil rights statutes. The Act of 1866 in part provides: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[59] It was assumed for nearly 100 years that this statute required some form of governmental action. In effect, only governmental action interfering with the right to contract was subject to the Act. In 1971 the Supreme Court reversed this assumption by holding that the 1866 Act covered purely private, individual acts of discrimination against persons in the making or termination of contracts; state action was not required.[60] The Court also concluded that the employment relationship, including hire and termination, was a "contract" within the language of the 1866 Act.[61] Recently, however, the Supreme Court limited the scope of section 1981 to situations where a contract was being denied, and held that mere harassment of an employee because of her race did not state a section 1981 claim.[62]

B. Protection: "Race"

The history and language of the 1866 Act clearly indicate that it proscribed racial discrimination.[63] Some authority in the 1970s gave a literal interpretation to the statute and concluded that the grant of contract rights to "all persons" prohibited contract discrimination

performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fullfilled or has ceased to fulfill that requirement.

[59] 42 U.S.C. § 1981 (1982).

[60] Griffin v. Breckenridge, 403 U.S. 88 (1971). This decision was largely preordained by the Court's decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), which held that a companion provision in the same 1866 Act (42 U.S.C. § 1982 (1982)) did not require governmental action.

[61] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) [generally followed lower court construction of the Act]. *See, e.g.*, Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970). No formal or written contract of employment was required. The relationship itself was sufficiently contractual to trigger the statute. *Id.*

[62] Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

[63] *Id.*

on the basis of alienage.[64] This authority has now been overruled based on a rereading of the legislative history.[65] The little authority that exists on this issue makes it clear that the 1866 Act regulates only racial discrimination, and, thus, does not protect against citizenship or alienage discrimination.[66]

National origin discrimination is not within the protections of the Act either.[67] Therefore, a difficult distinction is drawn between race discrimination, which is prohibited, and national origin discrimination, which is not. For example, is discrimination against Hispanics racial, and thus protected, or national origin discrimination that is unprotected?[68] Is discrimination against Jews religious or racial?[69]

These distinctions, which once plagued the courts, were made much easier to draw by the Supreme Court's broad construction of the term "race" in the companion cases of *Saint Francis College v. Al-Khazraji*[70] and *Shaare Tefila Congregation v. Cobb*.[71] In *Saint Francis College* it was argued that discrimination against a person of middle-eastern heritage was not "race," but a form of national origin discrimination. Similarly, *Shaare Tefila Congregation* addressed the argument that discrimination against Jews was either religious or national origin discrimination, but was not discrimination based on "race" within the scope of the 1866 Act. In both cases the Court appeared to confirm that the Act would not reach purely national origin, citizenship, or religious discrimination, but broadly defined

[64] Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).

[65] Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987)(en banc).

[66] *Id. Accord*, De Malherbe v. Int'l Union of Elevator Constructors, 438 F.Supp. 1121 (N.D.Cal. 1977).

[67] *See* Shah v. Mount Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981); Anooya v. Hilton Hotels Corp., 733 F.2d 48 (7th Cir. 1984).

[68] *See* Manzanares v. Safeway Stores, 593 F.2d 968 (10th Cir. 1979)(racial). Although both classes are protected by Title VII, the protection of the 1866 Act is important for two reasons. First, the complex procedures and limited time for filing claims under Title VII are not applicable to the 1866 Act. There are no procedural prerequisites and the time for filing suit is determined by the most appropriate state statute of limitation. Goodman v. Lukens Steel Co., 482 U.S. 656 (1987). Second, Title VII does not provide for compensatory or punitive damages. The 1866 Act allows for recovery of these "tort-like" damages. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

[69] *See* Wald v. Teamsters, Local 357, 24 FEP Cases 616, 25 EPD Para. 31,497 (C.D.Cal. 1980).

[70] 481 U.S. 604 (1987).

[71] 481 U.S. 615 (1987).

the term "race" to protect discrimination on the basis of distinct ethnic heritage.

The Court rejected the modern "scientific" division of race into broad caterories of Caucasoid, Mongoloid, and Negroid, but held that "race" should be given the meaning that Congress gave it in 1866 when it enacted the statute. Thus, the Court consulted dictionaries and the literature of the mid-Nineteenth Century for the definition of "race" and concluded that all ethnic groups such as Basques, gypsies, and Jews were considered to be distinct "races". Moreover, the court even found that groupings that we now think of as nationalities were considered separate races. These included the "English race," the "German race," the "Spanish race," etc. They were distinct races, not because of any distinctive physiognomy, but because of their identifiable and distinct ethnic heritage, which Congress in 1866 considered to be racial. In *Saint Francis College*, the Court concluded:

> Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended section 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory . . . If [plaintiff] can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion, he will have made out a case under section 1981.[72]

The Court applied this standard in *Share Tefila Congregation*, and concluded that harassment of Jews constituted a "racial" conspiracy within the protection of the 1866 Act.[73]

In his concurring opinion in *Saint Francis College*, Justice Brennan noted that the "line between discrimination based on 'ancestry or ethnic characteristics,' and discrimination based on 'place or nation of . . . origin' is not a bright one. . . . Often . . . the two are identical as a factual matter: one was born in the nation whose primary stock is one's own ethnic group." [74]

[72] Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987).

[73] Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987). In this case the issue was not employment discrimination but vandalism of a house of worship that was made actionable by another section of the 1866 Act.

[74] Saint Francis College v. Al Khazraji, 481 U.S. 604, 614 (1987).

To illustrate this difficulty, discrimination against one because she is non-Christian is religious discrimination and not actionable under the 1866 Act. Discrimination against her because she is Jewish, or because she is an Arab, or Iranian Persian (and thus perhaps a Muslim) would be "racial" and thus actionable. Discrimination against a person because he comes from the Union of South Africa would be non-actionable national origin discrimination. Discrimination against him because he is of Dutch-Afrikaner heritage presumably is "racial." Such fine distinctions will require careful pleading, particularly since Title VII does not distinguish between race and national origin, but protects both.[75]

V. THE IMMIGRATION REFORM AND CONTROL ACT OF 1986.

A. Historical Background: Why the Legislation?

An irony of American immigration law prior to 1986 was that while it was illegal for an alien not authorized to work in the United States to secure employment, it was not illegal for an employer to hire illegal aliens.[76] This resulted in an economic "pull" into the United States of readily available employment, with only minimal legal risks to the illegal alien.[77] In an attempt to stem the flood of illegal entry, the Immigration Reform and Control Act of 1986 [78] imposed civil penalties on employers for hiring or recruiting aliens not authorized to work in the United States, and for failing to verify each employee's eligibility for employment. The idea was that if aliens were not hired in the United States because employers feared statutory sanctions, the economic "pull" of illegal entry would be reduced.

Civil rights groups, particularly those representing Hispanic interests, generally opposed the employer sanction approach to immigration reform on the grounds that employers might avoid the sanctions

[75] For example, a plaintiff bringing both a Title VII claim and an 1866 Act claim based on his Greek heritage would need to allege national origin discriminaton within the meaning of Title VII and racial discrimination within the meaning of the 1866 Act.

[76] 8 U.S.C. §1324(a)(3)(1982). *See* Cohodas, *Congress Clears Overhaul of Immigration Law*, 44 CONG. Q. 2595 (Oct. 18, 1986).

[77] Simpson, *Immigration Reform and Control*, 34 LAB. L. J. 195 (1983); Comment, *The Anti-Discrimination Provisions of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1062-63 (1988). Of course, there was also a "push" factor of economic decline and political turmoil in their native countries. *Id.*

[78] Pub. L. No. 99-603, 100 Stat 3359 (codified at 8 U.S.C. § 1324 (Supp. 1987)).

and problems of documentation by simply refusing to hire any alien, or any applicant with a non-Anglo name or appearance.[79]

As pointed out earlier, it would violate Title VII of the 1964 Civil Rights Act for an employer to discriminate on the basis of surnames or "foreign" appearance,[80] forms of "national origin" discrimination, but it would not violate Title VII for an employer to simply refuse to hire any non-citizen.[81] Therefore, in order to protect the lawful alien against the potential overreaction of employers, the Immigration Act proscribed discrimination on the basis of both "national origin" and "citizenship status."[82] When the employer refuses to hire illegal aliens, or discharges them when he discovers their status, this is not proscribed citizenship discrimination. At the same time, the employer cannot, in an overly broad sweep, simply refuse to hire all aliens.

B. Scope of the Act

1. Unauthorized aliens

The face of the statute discloses that the protections accorded to aliens are relatively limited. First, and quite logically, the statute specifically provides no protection for the "unauthorized alien."[83] Thus, even national origin discrimination against illegal aliens is not protected by this Act.[84]

2. "Intending Citizens"

All persons legally residing in the United States are protected against national origin discrimination. But only United States citizens and

[79] Comment, *supra* note 77, at 1069 and 1073-74. For a good summary of the legislative history *see* N. MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986 3-22 (BNA 1987) [hereinafter MONTWIELER].

[80] *See supra*, notes 42-44 and accompanying text.

[81] Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

[82] It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to hiring, or recruitment or referral for a fee, for the individual for employment or the discharge of the individual from employment . . .

(A) because of such individual's national origin,

(B) in the case of a citizen or intending citizen (as defined in paragraph (3)), because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1) (Supp. 1987).

[83] *Id.*

[84] Does this suggest that national origin discrimination against an unlawful alien has also been excluded from the protections of Title VII? Note that the Supreme Court has held that the protections of the National Labor Relations Act are applicable to illegal aliens. Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984). *See also*, Patel v. Quality Inn, 846 F.2d 700, 702-05 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 1120 (1988). (The Fair Labor Standards Act held to apply to illegal aliens).

"intending citizens" are protected against citizenship discrimination.[85] Thus, by protecting United States citizens against discrimination, but not aliens, the Immigration Act closes a potential gap in Title VII.

"Intending citizens" are given the same protection as "citizens", but the former has a narrow and parochial definition. "Intending citizen" does not include all residents who have a subjective desire to become United States citizens. An "intending citizen" must first fall into one of four categories of lawful domicile: (i) lawful admission into the United States as a permanent resident, (ii) temporary residency under the amnesty provisions of this Act, (iii) a refugee, or (iv) an asylee.[86]

If the alien falls into one of these categories of legal domicile, the alien must also evidence an intent to become a citizen of the United States through formal completion of a declaration of intention filed with the Immigration Service.[87] Moreover, the Act creates stringent time limitations that define whether the person will be considered "intending" to become a citizen. The idea is that if a person does not promptly seek citizenship, or, after promptly seeking, does not pursue the goal of citizenship, that person is not an "intending citizen" entitled to the protections against citizenship discrimination. The alien must apply for naturalization within six months of the date of becoming a permanent resident.[88] During this six month period, the alien is protected against citizenship discrimination. Even if the alien makes a timely application for citizenship, (s)he will not be considered an "intending citizen" if (s)he has not been naturalized as a citizen within two years after application.[89] Thus, if a lawfully admitted alien neglects to file a formal citizenship application within

[85] *See* 8 U.S.C. § 1324b(a)(3)(Supp. 1987).

[86] Section 274B(3). The term "citizen or intending citizen" means an individual who —

(a) is a citizen or national of the United States or

(b) is an alien who —

(i) is lawfully admitted for permanent residence, is granted status for temporary residence under section 1255a(a)(1) [guest worker provisions of the Act], is admitted as a refugee under section 1157, or is granted asylum under section 1158, including lawfully admitted persons of permanent residence and asylees who have indicated a formal intent to become citizens of the United States.

[87] 8 U.S.C. § 1324b(3)(B)(ii). *See* 28 C.F.R. § 44.101(c)(2)(ii)(1989), which requires the filing of INS Form N-315 or I-772.

[88] A lawful, permanent resident alien will become eligible for citizenship after five years of permanent residence in the United States. 8 U.S.C. § 1427(a)(1982).

[89] *Id.* Time consumed by the INS in processing the application shall not be counted toward the two year period. *Id.*

six months of eligibility, the employer may use alienage as a basis of discrimination even if that person is legally entitled to seek employment in the United States.[90]

Similarly, an alien that promptly files for naturalization upon becoming eligible will be protected against alienage discrimination, but only for two more years. If the alien fails to become naturalized within that time, (s)he will lose the protection against citizenship discrimination; that is, employers may refuse to hire, or may discharge, the alien based on that alienage.[91]

3. Citizenship "Preference"

The Act specifically provides that it is lawful "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."[92] Thus, in theory, United States citizenship can be a "tiebreaker" between otherwise equally qualified applicants. In reality, this may authorize or encourage subtle discrimination against the alien.

C. Exclusions and Exemptions

1. Small Employers

Employers of three or fewer employees are not subject to the nondiscrimination provisions, even though they may be subject to the prohibitions on hiring undocumented aliens.[93] Title VII covers only employers of at least 15 employees.[94] Thus, at least as concerns national origin discrimination, the Immigration Act expands protection to groups of between three and fifteen employees.

2. Title VII Coverage

National origin discrimination covered by Title VII is not subject to the Immigration Act.[95] Thus, for those employers of fifteen or

[90] It is unclear whether an alien will be protected once the declaration of intent is filed, or having failed to promptly file the declaration upon becoming eligible, the alien will be protected against citizenship discrimination only upon nationalization.

[91] As long as the alien is authorized to work in the United States, the alien continues to be able to claim protection against national origin discrimination, but the employer is free to discharge the alien based on lack of citizenship.

[92] 8 U.S.C. § 1324b(a)(4).

[93] 8 U.S.C. § 1324b(a)(2)(A).

[94] 42 U.S.C. § 2000e(b).

[95] 8 U.S.C. § 1324b(a)(2)(B).

more employees, Title VII, and its provision for national origin being a "bona fide occupational qualification,"[96] is the sole remedy for national origin discrimination.

3. Law, Regulation, Executive Order, Government Contracts

As previously discussed, federal and state law often require citizenship as a condition of employment.[97] The Immigration Act allows those laws to provide an override to the prohibitions against citizenship discrimination,[98] provided that such laws are otherwise constitutional.[99] On the other hand, if a decision-maker ultra vires decided to use citizenship as a basis for employment, without the authorization of law, presumably that action would be subject to the Act.

Moreover, if laws specifically authorize private employers to use citizenship as a basis for hiring, such laws are given a priority over the Act. Likewise, citizenship requirements imposed on private employers by virtue of a government contract will not fall within the prohibitions of the Act.[100] Finally, the Attorney General is authorized to grant to employers the power to make citizenship distinctions as a condition of doing business with any agency of a federal, state, or local government.[101]

4. "With Respect to Hiring, or Recruitment, . . . or the Discharge . . .."

Title VII uses sweeping language to prohibit discrimination in virtually all aspects of the employment relationship — "compensation, terms, conditions, or privileges of employment"[102] — or "to limit, segregate, or classify . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee."[103] By contrast, the Im-

[96] 42 U.S.C. § 2000e-2(e). This leaves the question of whether national origin will ever be a bona fide occupational qualification for those employers subject only to the Immigration Act, those of between four and fifteen employees.

[97] *See supra* notes 16-23 and accompanying text.

[98] 8 U.S.C. § 1324b(a)(2)(C).

[99] Of course, to the extent laws excluding aliens are unconstitutional, they would be null and void. The statutory exemption for legislative or contractual preferences for citizens, or the disqualification of aliens, would not be applied, and the basic provisions precluding citizenship discrimination would be applied.

[100] 8 U.S.C. § 1324b(a)(2)(C).

[101] *Id.*

[102] 42 U.S.C. § 2000e-2(a)(1)(1982).

[103] 42 U.S.C. § 2000e-2(a)(2)(1982).

migration Reform Act is more narrow. It is illegal "to discriminate with respect to hiring, or recruitment, or referral for a fee, . . . or the discharge of the individual from employment . . . ."[104] Noticeably absent from the language of the Immigration Act are prohibitions against compensation discrimination. Presumably, therefore, while an employer may not reject qualified "intending citizens" who applied for work on the basis of their alienage, the employer is free to pay aliens less than citizens.

Moreover, it is a clear violation of Title VII for an employer to segregate its work force along ethnic lines or to harass workers on the basis of ethnic origin by giving them more onerous assignments or by subjecting them to jokes, insults, or ethnic slurs.[105] It is not so clear whether such treatment of protected "intending citizens" violates the Immigration Act.[106]

C. Impact of Neutral Devices on National Origin and Citizenship.

Title VII will subject neutral devices which adversely affect a protected class to a scrutiny which tests the "business necessity" of such a device.[107] Conversely, the 1866 Civil Rights Act is violated only by actions proved to have been motivated by considerations of "race;"[108] mere impact upon a particular "race" is insufficient to establish liability under that Act.[109]

The unresolved question is whether the Immigration Act is violated only by a plaintiff proving a citizenship or national origin motivation

[104] 8 U.S.C. § 1324b(a)(1)(1988).

[105] *See* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); Rogers v EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *Cf.* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (such harassment will not violate 42 U.S.C. § 1981).

[106] While such harassment standing alone may not be illegal, if the employee is forced to leave the job because of the treatment he receives, in all likelihood such a resignation would be deemed a "constructive discharge" by the employer. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984); Holsey v. Armour & Co., 743 F.2d 199 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985). *See generally*, Player, *supra* note 29, sec. 5.47, for a summary of the constructive discharge concept. Plaintiff may have to prove that the harassment, which was not on its face illegal, was done for the purpose of causing the employee to resign, and the reason why the employer wanted the employee to resign was because of the employee's alienage. *Id.*

[107] *See supra* notes 35-38 and accompanying text.

[108] "Race" is defined broadly to include virtually all ethnic origins. *See supra* notes 68-73 and accompanying text.

[109] General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

for the employment decision, or whether ostensibly neutral devices adversely affecting persons of certain nationality or national origin can also violate the Act. For example, does a rule requiring English to be spoken by the employee, or prohibiting languages other than English to be spoken on the premises, violate the Immigration Act? Such rules are not facially drawn along origin lines, but they probably can be shown to adversely affect aliens and those citizens whose origins are non-Anglo. If the Immigration Act reaches only intentional discrimination, the plaintiff would have the considerable burden of proving some form of bad faith or animus in the defendant's adoption or enforcement of the rules. On the other hand, if the Immigration Act finds violations premised upon adverse impact, there may be an insufficient relationship between such rules and job requirements to meet even a relaxed form of "necessity."

In signing the Act, President Reagan indicated that the Act reached only intentional discrimination, and did not reach practices which only adversely affected employment of aliens or persons of non-Anglo heritage.[110] As would be expected, the Interpretations subsequently issued by President Reagan's Attorney General similarly construe the Act.[111] The Act itself did not so qualify the phrase "to discriminate" with the adverb "intentionally" which was inserted by the executive

[110] Statement by the President, 22 Weekly Comp. Pres. Doc. 1534, 1535 (Nov. 6, 1986), *reprinted in* MONTWIELER, *supra* note 79, at 537-43.

> [A] facially neutral employee selection practice that is employed without discriminatory intent will be permissible under the provisions of [the Act]. For example, the section does not preclude a requirement of English language skill or a minimum score on an aptitude test even if the employer cannot show a "manifest relationship to the job in question" or that the requirement is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," so long as the practice is not a guise used to discriminate on account of national origin or citizenship status. Indeed, unless the plaintiff presents evidence that the employer has intentionally discriminated on proscribed grounds, the employer need not offer any explanation for his employee selection procedures. *Id.*

For a discussion of this statement and the amount of judicial deference that should be accorded thereto, *see* Comment, *Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. MIAMI L. REV. 1057 (1987).

[111] 28 C.F.R. § 44.200(a)(1989). "It is an unfair immigration-related employment practice for a person or other entity to *knowingly and intentionally discriminate* or engage in a pattern of (sic) practice of knowing and intentional discrimination." *Id.* (emphasis added).

department.[112] Moreover, no clear legislative history supports such an addition.[113] Nonetheless, the sweeping language of Title VII, broadly prohibiting all "classifications" which "in any way tend to deprive individuals of employment opportunities," prompted the Supreme Court to conclude that Title VII reached neutral practices adversely affecting employment opportunities of protected classes.[114] When such broad language is absent the Supreme Court has tended not to use impact as a premise of liability.[115] As pointed out above, not only does the Immigration Act lack the sweeping regulation of "classifications" which "tend to deprive individuals of employment opportunities," it is decidedly narrow in the types of activity that it does regulate.[116] It remains for the judiciary to resolve whether it will

[112] In the provisions outlining the powers of the Special Counsel (the entity created by the Act to enforce the nondiscrimination provisions) the Act indicates that a charge should allege "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity". Section 274b(d)(2). First, this provision describes only the role of the Special Counsel; it does not articulate a standard of liability. The standard of liability is found in subparagraph (g) of the Act, which provides only that to order a remedy the administrative law judge must find that "any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice." Note that the qualifier "intentional" is not present. (But perhaps "such" refers back to the descriptive "intentional" found in subparagraph (d)).

Second, subparagraph (d) allows liability to be established by proof of a "pattern or practice of discriminatory activity". Even if the disjunctive "or" can be said to qualify the standard of liability, the standard is free from any "intentional" qualification.

Finally, the terms "knowing and "intentional" are themselves ambiguous. They do not necessarily mean that the defendant was motivated by considerations made illegal by the Act. They could mean nothing more than intentionally doing the act which is illegal. Title VII has "intentionally" language similar to that found in subparagraph (d) of the Immigration Act. *See*, 42 U.S.C. § 2000-5(g). Yet, the Supreme Court has given "intentionally" a very limited construction, meaning no more than the defendant knowingly, as opposed to accidentally, engaged in the action upon which liability was based. "Intentionally" did not import into liability an element that the defendant must have been moved to action because of the particular class membership of the plaintiff. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

[113] *See* Comment, *supra* note 77, at 1101-04.

[114] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Connecticut v. Teal, 457 U.S. 440 (1982).

[115] General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (42 U.S.C. § 1981); Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (construing the Fourteenth Amendment). *See also*, Guardian's Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), which emphasized the importance of statutory language and history in determining the role of impact in construing Title VI of the 1964 Civil Rights Act.

[116] *See supra* notes 81-90 and accompanying text.

accept the construction offered by the executive or whether it will recognize a broader purpose to the Act, and to construe it in a way that reaches a result similar to that reached under Title VII.[117]

VI. CONCLUSION

The law protecting against employment discrimination based on national origin, ethnic origin, and alienage is not clean and well-defined. It could be described as a patchwork that fails to cover all the holes.

The Constitution places considerable limits on the ability of governments to use ethnic origin as a qualification, but relatively minor restrictions on governmental use of alienage qualifications. Title VII broadly protects against national origin classifications under the same standards as applied to race and gender classifications, but in a rather glaring gap provides only limited protection to alienage classifications. The 1866 Civil Rights Act at one time was thought to protect aliens in their right to make and enforce contracts the same as "white citizens," but recent decisions have undercut such a construction. The Act does, however, protect against intentional discrimination because of race, which has been broadly construed to include virtually all ethnic origins (or "race" in the lexicon of the 19th Century). The Immigration Reform and Control Act of 1986 protects against citizenship discrimination, but only of citizens and a relatively confined group of legal residents who can be defined as "intending citizens." Even this discrimination is limited to intentional discrimination in hiring and discharge, leaving unprotected compensation and employment condition discrimination.

Perhaps this protection is better than none. The alien is provided full protections against sex, race, and national origin discrimination. But the limited protection the alien receives against being victimized because of that alienage is far from the Biblical injunction to treat the alien who "settles with you in your land as a man like yourself."

[117] *See* Note, *Standard of Proof in § 274B of the Immigration Reform and Control Act of 1986*, 41 VAND. L. REV. 1323 (1988). Since the alleged victim has a private right to file a charge before an administrative law judge, (2) and (h), thus commencing a process that will ultimately culminate in judicial review, the mere refusal of the Special Counsel to process a complaint that did not allege "intentional" discrimination would not preclude litigation of that issue. *Id.*