Vanderbilt Law Review

Volume 41
Issue 6 *Issue 6 - November 1988*

Article 5

11-1988

Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986

Carlos A. Gonzalez

Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986

I. INTRODUCTION

On November 6, 1986, President Reagan signed into law the Immigration Reform and Control Act (IRCA),[1] proclaiming it to be the most difficult legislative undertaking in the previous three Congresses.[2] The Act's controversial centerpiece provides for sanctions against employers who knowingly hire, recruit, or refer for a fee undocumented aliens.[3]

---

1. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IRCA].

2. Statement by President Ronald Reagan upon signing S. 1200, 22 WEEKLY COMP. PRES. DOC. 1534, 1537 (Nov. 10, 1986) [hereinafter Signing Statement]; *see also* 131 CONG. REC. S7039 (daily ed. May 23, 1985) (statement of Sen. Simpson) ("three successive administrations have attempted to reform our Nation's immigration laws").

3. IRCA, *supra* note 1, § 274A(a)(1), at 3360. Prior to 1986 immigration law made it unlawful to transport or to harbor undocumented aliens, but not unlawful to employ them. 8 U.S.C. §

While these sanctions were heralded as the most comprehensive reform in immigration law in over thirty years,[4] opposition to them in Congress and among civil rights organizations was strong. These groups feared that employers seeking to avoid sanctions would discriminate in employment against Hispanics, Asians, and other ethnically or racially identifiable minorities,[5] whether or not these individuals were United States citizens or nationals, properly admitted aliens, or undocumented workers awaiting permanent residency under the IRCA's amnesty provisions.[6] In order to assuage this fear and directly confront the threat of discrimination, Congress included within the Act section 274B,[7] which protects employees against employers who discriminate on the basis of national origin[8] or alienage.[9] This section commonly is referred to as the Act's antidiscrimination provision.

Each month dozens of complaints alleging violations of section 274B are filed.[10] The status of the overwhelming majority of these complaints is uncertain. Most of the uncertainty concerns the standard of proof necessary to establish a violation of the antidiscrimination provision. Upon signing the Act into law, President Reagan issued a state-

---

1324(a)(4) (1982) (repealed 1986). Consequently, the economic incentives which encouraged illegal entry continued. As early as 1975, the House Judiciary Committee recognized that economics underlie the illegal alien problem:

> The Committee believes that the primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which aliens come, coupled with the chance of employment in the United States. Consequently, it is apparent that this problem cannot be solved as long as jobs can be obtained by those who enter this country illegally. . . .

H.R. REP. No. 506, 94th Cong., 1st Sess. 6 (1975).

4. *See* Signing Statement, *supra* note 2, at 1534.

5. *See* 132 CONG. REC. H9718 (daily ed. Oct. 9, 1986) (statement of Rep. Roybal) (stating that "[w]e are fearful that sanctions will definitely result in discrimination against the Hispanics and the Asians in this Nation"); *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 123 (1985) (statement of Richard Fajardo, Acting Associate Counsel, Mexican American Legal Defense and Education Fund).

6. *See* N.Y. Times, Oct. 15, 1986, at A1, col. 1 (stating that approximately 3.5 to 6 million undocumented aliens may be eligible for amnesty and ultimately citizenship under the IRCA). To qualify for amnesty an alien must have entered the United States before January 1, 1982, and resided here continuously since then. IRCA, *supra* note 1, § 245A(a)(2)(A), at 3394.

7. IRCA, *supra* note 1, § 274B, at 3375-80.

8. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973) (concluding that one's national origin is understood to refer to the "country where a person was born, or . . . the country from which his or her ancestors came" (footnote omitted)).

9. *See* 8 U.S.C. § 1101(a)(3) (1982) (stating that "[a]lienage" refers only to noncitizeuship, and does not denote any particular national origin or race). On discrimination against aliens, see generally Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Laws*, 35 U. PITT. L. REV. 499 (1974).

10. As of August 1, 1988, over 200 complaints alleging violation of § 274B have been filed (source on file with Author).

ment declaring that Congress intended that only intentional discrimination would constitute a violation of section 274B.[11] The provision's author, Representative Barney Frank, immediately protested, calling the President's interpretation "intellectually dishonest, mean spirited" and inaccurate.[12] According to Representative Frank, Congress intended that both intentional and unintentional discrimination would constitute a violation of section 274B. In the midst of this continuing controversy,[13] others questioned the necessity of section 274B, convinced that existing law was adequate to protect aliens threatened with employment discrimination. These individuals believe that section 274B is burdensome and, therefore, call for its repeal.[14]

The status of complaints filed under section 274B will depend in large measure on the substantive theories of antidiscrimination law that the plaintiff is required to satisfy.[15] The objective of this Note, therefore, is to determine the intended theory of liability and corresponding standard of proof required to show a violation of section 274B. President Reagan determined that the theory is disparate treatment,[16] while the bill's author determined that the theory is disparate impact.[17]

In order to assess the relative merits of each position, this Note will analyze section 274B in the context of its legislative history along with its relationship to other antidiscrimination laws. More specifically, Part II describes the coverage of section 274B. Part III discusses the framework of Title VII, section 703(a), of the Civil Rights Act of 1964 (Title VII),[18] and Title 42, section 1981, of the United States Code. Title VII is examined because it provides the theoretical model on which section 274B is based. Section 1981 is examined because it is possible that it renders section 274B redundant by protecting those individuals already adequately covered by section 274B. Part IV extends the discussion of Title VII by considering its various theories of liability. Unlike most statutes, Title VII permits plaintiffs to proceed essentially under one of three theories—each theory containing a different burden of proof stan-

---

11. Signing Statement, *supra* note 2, at 1535.

12. N.Y. Times, Nov. 7, 1986, at A12, col. 1.

13. *See, e.g.*, Guttentag, *Immigration-Related Employment Discrimination: Prohibition and Remedies Under the Immigration Reform and Control Act of 1986*, 16 IMMIGR. NEWSL., Mar.-Apr. 1987, at 5, 22 (arguing contrary to the President's position).

14. IRCA, *supra* note 1, § 274B(K)(2), at 3379. Section 274B(K)(2) of the IRCA provides that § 274B shall automatically terminate in the event no significant discrimination results from employer sanction, or if § 274B creates "an unreasonable burden on employers" hiring legal aliens. *Id.* Any repeal of § 274B will require a joint resolution of Congress.

15. *See infra* notes 103-10 and accompanying text.

16. Signing Statement, *supra* note 2, at 1535; *see infra* notes 111-26 and accompanying text.

17. N.Y. Times, Dec. 9, 1986, at B14, col. 3 (statement of Rep. Frank); *see infra* notes 127-41 and accompanying text.

18. 42 U.S.C. § 2000e-2(a) (1982).

dard. These differing standards turn on whether the plaintiff is required to prove discriminatory intent, or simply the existence of a discriminatory impact from an allegedly nondiscriminatory practice. Part V compares the advantages and disadvantages of requiring a plaintiff to prove either discriminatory intent or discriminatory impact. Part VI reviews the President's position that only intentional discrimination is prohibited by section 274B. Following this discussion, Part VII considers the legislative history of the Act's antidiscrimination provision. Part VII asserts that the President's reading of the provision is misguided and not anchored in the Act's legislative history. This Note concludes in Part VIII with a brief consideration of the future of litigation under section 274B.

II. THE ANTIDISCRIMINATION PROVISION

Section 274B makes it unlawful to discriminate against any individual, other than an unauthorized alien, because of that individual's national origin or citizenship status.[19] This prohibition extends to hiring, recruitment, referral for a fee, or discharge.[20] Persons protected from discrimination on the basis of citizenship status include persons who are United States citizens, nationals, or aliens classified as "intending citizens."[21] An intending citizen is, generally, an alien lawfully admitted for either permanent or temporary residency, or granted asylum under the Act's amnesty program.[22] In order to receive section 274B's protections, a person granted residency status must show a clear intention to become a United States citizen by executing a declaration to that effect.[23] Failure to seek naturalization within six months of eligibility, or a grant of citizenship within two years of making application, removes an individual from the protected class unless the applicant can establish due diligence in pursuing naturalization.[24]

The IRCA places limitations on the scope of section 274B. For in-

---

19. IRCA, *supra* note 1, § 274B(a)(1)(A), (B), at 3374. The IRCA provides in part:

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

Id.

20. *Id.* § 274B(a)(1), at 3374.

21. *Id.* § 274B(a)(3)(A), (B), at 3374-75.

22. *Id.* § 274B(a)(3)(B)(i), at 3375.

23. *Id.* § 274B(a)(3)(B)(ii), at 3375.

24. *Id.*

stance, employers who employ three or fewer workers are exempt,[25] as are claims of discrimination based on national origin if the aggrieved party already is covered by Title VII.[26] If discrimination based on citizenship is required by law, executive order, or federal, state or local government contract, no action can be maintained under the Act.[27] Additionally, if the Attorney General determines that it is essential for an employer to retain only American citizens in order to conduct business with the United States government, the provision prohibiting discrimination because of citizenship status will not apply.[28] Finally, an employer does not violate section 274B by employing a United States citizen in preference to an alien if the two individuals are equally qualified.[29]

A person adversely affected by discrimination prohibited under the Act may file a complaint with the newly created Office of Special Counsel in the Department of Justice.[30] The Special Counsel is charged with investigating complaints of unfair immigration-related employment practices, and, if warranted, prosecuting these complaints before an administrative law judge (ALJ).[31] Upon receiving a complaint the Special Counsel has 120 days within which to determine whether the charges are meritorious and, therefore, warrant prosecution.[32]

A complaint may not be filed with the Special Counsel if the same complaint, based on the same facts, is filed with the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII.[33] In the event,

---

25. *Id.* § 274B(a)(2)(A), at 3374.

26. *Id.* § 274B(a)(2)(B), at 3374. Title VII's protection against national origin discrimination extends to employees working for an employer who hires over fifteen workers and employs them for over twenty weeks a year. 42 U.S.C. § 2000e-2(a)(1) (1982).

27. IRCA, *supra* note 1, § 274B(a)(2)(C), at 3374.

28. *Id.*

29. *Id.* § 274B(a)(4), at 3375. The equally qualified exception applies only to hiring and does not affect the prohibition against discriminatory discharge in § 274B(1). Moreover, the burden of proof is on the employer to show that the two individuals were equally qualified. 132 CONG. REC. H9768 (daily ed. Oct. 9, 1986) (statement of Rep. Lungran, sponsor of the provision).

30. IRCA, *supra* note 1, § 274B(b)(1), at 3375. The Special Counsel is appointed by the President, and approved by the Senate, for a four year term. *Id.* § 274B(c)(1), at 3375-76. The Act also provides for the establishment of regional offices within the Office of Special Counsel. *Id.* § 274B(c)(4), at 3376.

31. IRCA, *supra* note 1, § 274B(d)(1), at 3376.

32. *Id.*

33. *Id.* § 274B(b)(2), at 3375. Claims based on national origin discrimination are now divided between the Equal Employment Opportunity Commission (EEOC) and the Special Counsel. The EEOC retains responsibility under Title VII for investigating claims of national origin discrimination against employers with fifteen or more employees. The Special Counsel is responsible for enforcing the IRCA's prohibition against national origin discrimination in cases involving employers with four to fourteen employees. Allegations of discrimination based on citizenship status remain the sole prerogative of the Special Counsel. *But cf.* 132 CONG. REC. H9769 (daily ed. Oct. 9, 1986) (statement of Rep. Sensenbrenner) (questioning the need for an additional bureaucracy and warn-

however, that the EEOC dismisses a complaint because it falls outside the scope of its jurisdiction, the aggrieved party may refile with the Special Counsel.[34] Likewise, if the Special Counsel dismisses a complaint for being outside the purview of section 274B, the aggrieved party may refile with the EEOC.[35] Thus, Congress has prohibited overlap between the EEOC and the Special Counsel, while at the same time insuring that a dismissal of a complaint because it falls outside the jurisdictional domain of either agency does not jeopardize a party's right to file with the other.

The Act also provides for a private right of action in the event that the Special Counsel decides not to file a charge. Congress has limited this right of action to "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity."[36] The private litigant must file his complaint with an ALJ within 90 days of the expiration of the 120 days allowed the Special Counsel.[37] Under no circumstances may a complaint be filed if the complaining party waits in excess of 180 days from the alleged discriminatory event before submitting a charge to the Special Counsel.[38]

Section 274B provides the ALJ with several options if discrimination is found to exist. In addition to issuing cease and desist orders,[39] the ALJ is empowered to compel reinstatement of adversely affected individuals,[40] award back pay,[41] and levy civil fines of not more than

---

ing of potential bureaucratic confusion).

34. IRCA, *supra* note 1, § 274B(b)(2), at 3375.

35. *Id.* Parties who choose to refile with the EEOC must meet all Title VII statutory requirements before they will be allowed to do so.

36. *Id.* § 274B(d)(2), at 3376.

37. Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,402, 37,411 (1987) (to be codified at 28 C.F.R. § 4.303).

38. IRCA, *supra* note 1, § 274B(d)(3), at 3376. It is unsettled whether failure to comply with the 180 day statute of limitations will absolutely extinguish the claim. The courts and the ALJs may turn to Title VII case law to reach an answer. Under Title VII a person who waits in excess of the 180 day statute of limitations is ordinarily estopped from maintaining a cause of action; however, this is a flexible requirement and may be extended for equitable reasons. *See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) (holding that untimely filing with the EEOC does not raise a jurisdictional defect, but results in treatment analogous to that under a statute of limitations, and is subject to waiver, estoppel and equitable tolling); *see also* Kobdish, *Section 102 of the Immigration Reform and Control Act of 1986: An Analysis of the Act's Employment Discrimination Provision*, in THE NEW SIMPSON-RODINO IMMIGRATION LAW OF 1986, at 148, 177-76 (1986).

39. IRCA, *supra* note 1, § 274B(g)(2)(A), at 3377.

40. *Id.* § 274B(g)(2)(B)(iii), at 3378.

41. *Id.* The liability of an employer for back pay is limited to a two year period prior to the date of filing the discrimination charge with the ALJ. Additionally, money earned or earnable by the aggrieved party "with reasonable diligence" during the two year period will reduce the back pay otherwise allowable. *Id.* § 274B(g)(2)(C), at 3378.

one thousand dollars for each individual discriminated against.[42] Apart from these options, the ALJ also is empowered to order employers who normally retain information only on those individuals actually hired to maintain extensive records of all job applicants.[43] The ALJ, at her discretion, may award attorneys' fees if it is determined that the losing party's argument is without merit.[44] The Special Counsel cannot be awarded fees.[45]

III. Existing Antidiscrimination Law

By enacting section 274B a majority in Congress generally acknowledged that existing antidiscrimination law is ill-suited to prohibit discrimination based on alienage. Specifically, the majority's concern was that Title VII and 42 U.S.C. section 1981 were insufficient to protect potential victims of unfair immigration-related employment practices.[46] Members in the minority[47] and the Administration,[48] however, did not share the majority's concern over the need for additional protections. Opponents of section 274B considered it duplicative of existing law,[49] while proponents argued that the extension of protections was absolutely essential if employer sanctions were not to have a deleterious ef-

---

42. IRCA, *supra* note 1, § 274B(g)(2)(B)(iv)(I), at 3378. If the employer has previously been convicted of unfair immigration-related employment practices a civil penalty can be imposed as high as $2,000 for each individual discriminated against. *Id.* § 274B(g)(2)(B)(iv)(II), at 3378.

43. IRCA, *supra* note 1, § 274B(g)(2)(B)(i), at 3377 (stating that the employer is required to maintain records of the applicant's name and address for up to three years).

44. *Id.* § 274B(h), at 3378; *see infra* note 211 and accompanying text.

45. IRCA, *supra* note 1, § 274B(h), at 3378.

46. H.R. Rep. No. 682, 99th Cong., 2d Sess., pt. 1, at 70 [hereinafter H.R. Rep. No. 682], *reprinted in* 1986 U.S. Code Cong. & Admin. News 5649, 5674 [hereinafter 1986 U.S. Code]. In reporting the IRCA to the full House, the Judiciary Committee reiterated this concern when it stated:

> It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status. Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

Id.

47. *Id.* pt. 2, at 47, *reprinted in* 1986 U.S. Code, *supra* note 46, at 5785 (minority views on the IRCA's antidiscrimination provision, questioning whether it is needed).

48. *See generally Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 193 (1985) [hereinafter *Joint Hearing*] (statement of Bradford Reynolds, Assistant Att'y Gen., Civil Rights Division Department of Justice) (indicating the Administration's opposition to the antidiscrimination provision of the IRCA).

49. *Joint Hearing*, *supra* note 48, at 7 (testimony of Clarence Pendleton, former chairperson, U.S. Commission on Civil Rights) (stating that existing antidiscrimination law provides adequate protection against alienage discrimination); *see infra* note 93.

fect.[50] The relative merits of each position can be determined by examining Title VII and section 1981, and then comparing each with the protections embodied in section 274B.

A. Section 1981

1. Civil Rights Act of 1866

Since its inception in 1866,[51] courts have interpreted the legislative history of section 1981[52] in an effort to determine the legitimate boundaries of the statute's application. Early judicial decisions read the history of the statute narrowly, thus stemming its utility.[53] It was not until almost a century after its enactment that the United States Supreme Court in *Jones v. Alfred H. Mayer Co.*[54] rejuvenated section 1981 and made it a mainstay of modern civil rights litigation. The symbiosis between section 1981's historical beginnings and its contemporary judicial application is nowhere more apparent than in the determination of whether the statute prohibits both state and private discrimination based on alienage.

Section 1981 was enacted twice. The legislative precursor of the statute was section 1 of the Civil Rights Act of 1866.[55] This Act, introduced by Senator Lyman Trumbull, was passed pursuant to section 2 of the thirteenth amendment[56] and was intended to protect newly emancipated slaves.[57] The legislation provided that most persons born in the

---

50. 132 CONG. REC. H9770 (daily ed. Oct. 9, 1986) (statement of Rep. Fish).

51. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (re-enacted by Act of May 31, 1870, ch. 114, 16 Stat. 140) [hereinafter Act of 1866].

52. 42 U.S.C. § 1981 (1982). Section 1981 provides in part: "All persons within the jurisdiction of the United States shall have the same right . . . [to the] equal benefit of all laws . . . as is enjoyed by white citizens. . . ." *Id.*

53. For a thorough discussion of the early development and application of § 1981, see Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 61-64 (1980).

54. 392 U.S. 409 (1968).

55. Act of 1866, *supra* note 51, § 1, at 27. Section 1 of the 1866 Act reads in part:

> *Be it enacted* . . . [t]hat all persons born in the United States and not suhject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . [to the] . . . full and equal benefit of all laws . . . as is enjoyed by white citizens. . . .

Id. (emphasis in original).

56. U.S. CONST. amend. XIII, § 2. The thirteenth amendment provides in part: "Section 1. Neither slavery nor involuntary servitude, . . . shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." *Id.* §§ 1, 2.

At the time of the passage of the Civil Rights Act of 1866, only the thirteenth amendment had been ratified leaving it as the sole constitutional basis for the 1866 Act. *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 n.11 (1973); The Civil Rights Cases, 109 U.S. 3, 22 (1883).

57. *See, e.g.*, General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386 (1982); Run-

United States were citizens and enumerated certain rights, attendant to that status, that were to be enjoyed without discrimination due to race, color, or previous condition of servitude.[58] Though the 1866 Act was passed over the veto of President Andrew Johnson, its supporters feared that future Congresses or the courts would eviscerate the gains made.[59] They were aware of considerable disagreement over the scope of the thirteenth amendment, and were cognizant of arguments questioning Congress' power to enforce the amendment by appropriate legislation.[60] Against this background Congress passed, and the states ratified, the fourteenth amendment, thereby grounding the rights of newly freed slaves on a more secure constitutional foundation.[61]

2. Civil Rights Act of 1870

Upon adoption of the fourteenth amendment,[62] Congress passed the Civil Rights Act of 1870.[63] Congress intended this Act to facilitate the implementation of the new amendment[64] and to readopt pre-existing civil rights legislation.[65] Thus, section 18 of the 1870 Act re-incorporated the entire Civil Rights Act of 1866.[66] Congress slightly modified

---

yon v. McCrary, 427 U.S. 160, 179 (1976).

58. *See* Elk v. Wilkins, 112 U.S. 94, 112-15 (1884) (Harlan, J., dissenting); *see also supra* note 55.

59. *See generally* Note, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024 (1972) (discussing the historical development of § 1981 and the difficulties faced hy the 1866 Act's supporters in assuring its effective enforcement).

60. The extent to which Congress disagreed is exemplified by the congressional debates on the Civil Rights Act of 1866. According to Senator Willard Saulsbury, for example, the thirteenth amendment simply required:

> [A] person who heretofore was a slave of another shall no longer be his slave, and it operates no further. It bestows no rights further than to relieve him from the burdens of servitude and slavery. A man may be a free man and not possess the same civil rights as other men.

CONG. GLOBE, 39th Cong., 1st Sess. 476-77 (1866), *quoted in* Comment, *supra* note 53, at 44. Senator Edgar Cowan, echoing Senator Saulsbury, maintained that "[the thirteenth a]mendment, everybody knows and nobody dare deny, was simply made to liberato the negro slave from his master. That is all there is of it . . . ." *Id.* at 499, *quoted in* Comment, *supra* noto 53, at 44.

61. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968) (stating that "some members of Congress supported the [f]ourteenth [a]mendment 'in order to eliminate douht as to the constitutional validity of the Civil Rights Act [of 1866]'" (quoting Hurd v. Hodge, 334 U.S. 24, 32-33 (1948)); *see also* Comment, *supra* note 53, at 57 n.128.

62. The fourteenth amendment was adopted by three-fourths of the states on July 21, 1868.

63. Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-46 [hereinafter Act of 1870].

64. *See generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1333 (1952).

65. *Id.* at 1333-34.

66. Act of 1870, *supra* note 63, § 18, at 144. Section 18 of the 1870 Act reads:

> *And be it further enacted*, [t]hat the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be en-

the language of section 1 of the 1866 Act[67] when it amended the phrase "citizens of any race or color"[68] to read "all persons."[69] The change was codified as section 16 of the Civil Rights Act of 1870. Under section 16, therefore, all persons were given rights that previously were granted only to citizens in section 1 of the 1866 Act.

Introduced in Senate Bill 365, section 16 had its genesis in the solicitude of its sponsor, Senator William Stewart of Nevada, towards Chinese aliens subject to discriminatory treatment under the laws of California.[70] In proposing that section 1 of the 1866 Act be expanded to include all persons, citizen and noncitizen, Senator Stewart eloquently stated that " '[i]t is as solemn a duty as can be devolved upon this Congress to see that [these] people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens.' "[71] Thus, Congress clearly intended that aliens be protected under the 1870 Act against discriminatory treatment by the states. Correspondingly, the Supreme Court has long held that state law that discriminates on the basis of alienage can be sustained only if it withstands strict judicial scrutiny.[72]

While the protection of aliens against discriminatory state practice is well settled, the issue of whether an alien can maintain a cause of action for private discrimination remains in considerable flux. The issue again turns on a reading of the legislative history of section 1981.

---

forced according to the provisions of said act.

Id. (emphasis in original).

67. *Id.* § 16, at 144. Section 16 of the 1870 Act reads in part:

And be it further enacted, [t]hat all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States . . . to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens . . . .

Id. (emphasis in original).

68. *See supra* notes 51, 55.

69. *See supra* note 67.

70. *See* Bhandari v. First Nat'l Bank of Commerce, 829 F.2d 1343, 1346 & n.6 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3542 (U.S. Feb. 2, 1988) (No. 97-1293).

71. Runyon v. McCrary, 427 U.S. 160, 200 (1976) (White, J., dissenting) (empbasis omitted) (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3658 (1870)).

72. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984); Graham v. Richardson, 403 U.S. 365 (1971). In *Graham* the Court stated that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Id.* at 372 (footnotes and citations omitted).

The Court has articulated a narrow exception to the rule that state alienage discrimination triggers strict scrutiny. This exception, known as the "political function" exception, excludes from review those laws that deny aliens jobs related to the process of democratic self-government. The political function exception generally is invoked in those instances where a job involves discretionary power related to a basic governmental function. Thus, for example, United States citizenship can be a prerequisite for applicants seeking johs as police officers, Foley v. Connelie, 435 U.S. 291 (1978), and probation officers, Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

Courts addressing this issue are confronted by a statute that was enacted ultimately as the product of a redaction of two separate congressional acts, each with its own legislative history.

Section 1 of the Civil Rights Act of 1866 had its foundation in the thirteenth amendment and was intended to prohibit racial discrimination, whether public or private, against citizens.[73] Section 1 did not address alienage. By contrast, section 16 of the Civil Rights Act of 1870 was concerned intimately with alienage. Because section 16 was enacted in conjunction with the fourteenth amendment, however, it potentially circumscribes only state action.[74]

The confusion regarding the reach of section 1981 stems in large part from an historical note appended to the 1874 recodification of federal statutory law. The note indicates that section 16 of the 1870 Act is the sole source of section 1981. The failure of the redactors to mention section 18 of the 1870 Act, which readopted the 1860 Act, has lead some courts to conclude that section 1981 reaches only state discrimination

---

73. *See Runyon*, 427 U.S. at 168-72; Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968).

The Supreme Court recently ended considerable confusion when it defined "race" in terms of § 1981. Prior to its decision in Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987), many courts had interpreted § 1981 quite literally. They had held that only claims alleging race discrimination were justiciable. *See, e.g.*, Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125, 129 (E.D. Pa. 1987); Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975). The difficulties presented by this approach were obvious and manifested themselves in situations in which courts were confronted with claims of alleged national origin discrimination from individuals not "scientifically" classified in a distinct race from the defendant. For example, a Caucasian Hispanic would fail to state a cause of action under § 1981 against an Anglo because the term Hispanic is a taxonomic device covering people of a Spanish culture or origin regardless of race. *Cf.* 49 C.F.R. § 23.5 (1987) (defining the term Hispanic). In short, the classification of an individual as "Hispanic" is one based on ethnicity and not race. Those courts that strictly read the racial requirement into § 1981, therefore, would not allow any claims that alleged discrimination because of one's Hispanic background. *See* Note, *National Origin Discrimination Under Section 1981*, 51 FORDHAM L. REV. 919, 920-28 (1983).

The Supreme Court resolved this problem when it held that racial discrimination within the meaning of § 1981 would encompass those classifications that were considered "racial" at the time of § 1981's enactment. *Saint Francis College*, 107 S. Ct. at 2028. As Justice Brennan pointed out in his concurrence in *Saint Francis College*, however, the Court did not read out of § 1981 its "race" requirement but merely broadened its scope. *Id.* (Brennan, J., concurring). Thus, an allegation of discrimination "based on *birthplace alone* is insufficient to state a claim under . . . § 1981." *Id.* at 2029 (Brennan, J., concurring) (emphasis in original). The plaintiff must prove more than discrimination based on ancestry, she must prove discrimination based on ethnicity. As a result, § 1981 remains an insignificant weapon against discrimination based on citizenship status unless a citizenship requirement is a subterfuge for "racial" discrimination.

If a citizenship requirement is a mask for racial discrimination, then § 1981 will suffice to protect the interest of the victims. However, Congress' concern in enacting § 274B was not with the racist who refuses to hire "non-whites," but rather the employer who is fearful of being cited for violating the IRCA's prohibition against employment of undocumented workers. Section 1981 proves of little use against these fearful employers.

74. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-73 (1972) (holding state action is necessary for a violation of the fourteenth amendment).

against aliens.

The seminal case cited for the proposition that private alienage discrimination is justiciable under section 1981 recently has been overturned. In *Bhandari v. First National Bank of Commerce*[75] the appellee bank denied the appellant credit in part because he was not a United States citizen. The Court of Appeals for the Fifth Circuit reversed twelve years of precedent when it held that section 1981 did not prohibit private discrimination based on alienage.[76] In reaching its conclusion, the Fifth Circuit reasoned that section 1981 is derived solely from section 16 of the Civil Rights Act of 1870, which itself was enacted in conjunction with the fourteenth amendment, thus prohibiting only state discrimination against aliens.[77]

In *Espinoza v. Hillwood Square Mutual Association*[78] a United States district court adopted a different reading of the legislative history of section 1981. The *Espinoza* court reasoned that section 16 of the 1870 Act was intended to protect aliens from alienage discrimination to the same extent that section 1 of the 1866 Act was intended to protect citizens from racial discrimination. Section 1 prohibited private and state racial discrimination, therefore section 16 also prohibited private and state alienage discrimination.[79]

The *Espinoza* court's reasoning, while entirely plausible, has not won many converts. And, if *Bhandari* portends the future, section 1981's capacity to guard against private alienage discrimination is doubtful. Victims of alienage discrimination will have to look elsewhere to redress their claims.

B. Title VII

Title VII of the Civil Rights Act of 1964[80] introduced a comprehensive scheme designed to prohibit and remedy employment discrimina-

---

75. 829 F.2d 1343 (5th Cir. 1987).

76. The Fifth Circuit's ruling in *Bhandari* overturned its earlier holding in Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974). *Guerra* held that private discrimination against aliens was redressable under § 1981.

77. *Bhandari*, 829 F.2d at 1349-51. The *Bhandari* court essentially followed the dissent in *Runyon*. In a lengthy dissenting opinion in *Runyon*, Justice White stated that § 1981 was enacted pursuant to the fourteenth amendment and did not reach private discrimination. To hold otherwise, he said, "would result in confusion, by extending to one class of persons (blacks) a right not to be discriminated against by private individuals, while another class of persons (aliens) would be given no such protection by the same language." *Runyon*, 427 U.S. at 206 (White, J., dissenting). Justice White's position proceeds on the assumption that § 1981 is derived from § 16 of the 1870 Act.

78. 522 F. Supp. 559 (E.D. Va. 1981).

79. *Id.* at 564.

80. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

tion.[81] The Supreme Court has stated that the primary objective of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[82] The mandate given courts by Title VII, therefore, is to establish theories of liability and standards of proof that operate to prohibit discriminatory practice.[83] In response to this mandate, courts have established a number of divergent theories of liability and corresponding standards of proof.[84] However, while Title VII jurisprudence is quite expansive, it is not all-encompassing.[85]

Section 703 of Title VII makes it unlawful for public and private employers,[86] labor unions, and employment agencies[87] to discriminate against any individual on the basis of race, religion, color, sex, or national origin.[88] Critics of the IRCA's section 274B argue that Title VII's

---

81. *See* S. REP. No. 872, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355 [hereinafter 1964 U.S. CODE]. The Senate Committee on the Judiciary in reporting the Civil Rights Act of 1964 to the full Senate stated that: "The purpose of [this act] is to achieve a peaceful and voluntary settlement of the persistent problem of racial . . . discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations." *Id.* at 1, *reprinted in* 1964 U.S. CODE, *supra*, at 2355.

In reporting the 1964 Act to the full House of Representatives, the House Committee on the Judiciary said of Title VII in particular: "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment. . . ." H.R. REP. No. 914, 88th Cong., 1st Sess. 9, *reprinted in* 1964 U.S. CODE, *supra*, at 2401.

82. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

83. *Id.* at 431 (stating that "[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications").

84. *See generally* C. SULLIVAN, M. ZIMMER & R. RICHARD, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 1-69 (1980).

85. *See* H.R. REP. No. 682, *supra* note 46, pt. 1, at 70, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5674. In reporting the IRCA to the full House, the Judiciary Committee reiterated this concern when it stated:

> It makes no sense to admit immigrants and refugees to this country, require them to work and then allow employers to refuse to hire them because of their immigration (non-citizenship) status. Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.

Id. (parentheses in original).

86. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII applied to state government); *Griggs*, 401 U.S. 424 (Title VII applied to private employer).

87. *See, e.g.*, Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982) (applying Title VII to unions). The statutory language of Title VII expressly includes employment agencies. 42 U.S.C. § 2000e-2(b) (1982).

88. 42 U.S.C. § 2000e-2(a) (1982). Section 703(a) reads in part:

> (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 to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way

prohibition against national origin discrimination is sufficiently broad to allay the fears of those who believe that employer sanctions will result in unfair labor practices.[89] The critics' argument is based on the assumption that alienage discrimination is, in essence, a subset of national origin discrimination. Believing that no meaningful distinction exists between citizenship discrimination and national origin discrimination, these critics conclude that section 274B is unnecessary.[90] These critics specifically point to the Equal Employment Opportunity Commission's (EEOC) guidelines that prohibit discrimination based on citizenship if the "purpose or effect" of a citizenship requirement is to exclude individuals on the basis of their national origin[91] and they argue that the EEOC has an established bureaucracy with expertise in enforcing claims of national origin discrimination. Thus, they conclude that the alien already enjoys significant protections.[92]

This conclusion is questionable. A more precise inquiry into the law reveals that aliens do not enjoy significant protections and, moreover, that a cognizable difference exists between discrimination based on alienage and discrimination based on national origin. In the landmark case of *Espinoza v. Farah Manufacturing Co.*[93] the Supreme Court held that an employer's refusal to hire aliens did not violate Title VII prohibitions against national origin discrimination.[94] The *Espinoza* Court refused to accept the proposition that discrimination based on

---

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.

Id.

89. *See* H.R. REP. No. 682, *supra* note 46, pt. 1, at 216, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5752 (statement of Rep. Lungren).

90. *Joint Hearing*, *supra* note 48, at 212 (statement of Paul Grossman).

91. [1987] EEOC Compl. Man. (CCH) ¶ 622.2, at 3801.

92. H.R. REP. No. 682, *supra* note 46, pt. 2, at 47, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5786 (minority views on the IRCA). The minority view concluded:

We can see no reason why a new office of Special Counsel is necessary for the enforcement of these anti-discrimination provisions. With the EEOC, we already have an agency with the expertise and personnel for enforcement of national origin discrimination claims. Citizenship claims are so similar to national origin claims that they, too, should be enforced by the EEOC. The New Office of Special Counsel is unnecessarily duplicative and expensive.

Id.

Notwithstanding these comments, over the past few years the EEOC has shown a disinterest in pursuing claims of national origin discrimination. *See* 130 CONG. REC. H5625 (daily ed. June 12, 1984)(statement of Rep. Garcia) (discussing the percentage of national origin cases which the EEOC has filed). Given the agency's recent de-emphasis, Congress was well advised to seek protection for the alien elsewhere. *See* Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984) (discussing the attitude of the Reagan administration toward civil rights enforcement).

93. 414 U.S. 86 (1973).

94. *Id.* at 95.

alienage was per se national origin discrimination when it ruled that in order to state a claim under Title VII the alien must have demonstrated that the employer's citizenship requirement "ha[d] the purpose or effect of discriminating on the basis of national origin."[95] The Court concluded that the term "national origin," as used in Title VII, did not embrace citizenship but, rather, referred to the country where a person was born, or, more broadly, to the country from where her ancestors came.[96] Thus, an employer legitimately can refuse to hire a legally admitted alien on the basis of citizenship, so long as citizenship is not a pretext for discrimination based on national origin.

The holding in *Espinoza* is especially problematic in cases in which the alien who is refused employment is of the same ancestry or country as a majority of the employer's work force. In this situation a citizenship requirement would have the "purpose and effect" of not discriminating on the basis of national origin, but on the basis of alienage.[97] This kind of discrimination is not prohibited by Title VII.

Moreover, Title VII exempts from its coverage both small and seasonal employers.[98] The statute provides that an employer must employ fifteen or more employees during twenty or more calendar weeks in each year in order to fall within its purview.[99] The obvious effect of this requirement is to provide an exemption from Title VII for those employers who hire hundreds of workers on a seasonal basis of less than twenty calendar weeks a year. Because a large percentage of the most likely beneficiaries of the IRCA are concentrated in industries that are seasonal in nature, the ability of Title VII to protect these individuals is doubtful. In response to this void in existing antidiscrimination law, Congress enacted section 274B of the IRCA. As the *Espinoza* Court made imminently clear, Title VII is ineffective in remedying alienage discrimination because its prophylactic provisions do not prohibit discrimination based on citizenship status. The effect of section 274B is, therefore, a congressional rejection of *Espinoza*[100] and, thereby, an extension of Title VII to a class of individuals previously not protected.

The Act also addresses the uncertainty created by the Fifth Circuit

---

95. *Id.* at 92.

96. *Id.* at 89.

97. The facts of *Espinoza* are illustrative. The respondent refused to employ the petitioner on the basis of a long-standing company policy that forbade the employment of noncitizens. The petitioner challenged the policy alleging that it discriminated against her on the basis of her national origin. In denying the prayed for relief, the Court noted that over 96% of the respondent's employees were of the same ethnic origin as the petitioner; thus, the policy of refusing noncitizens jobs did not have the "purpose or effect" of discrimination on the basis of national origin. *Id.* at 93.

98. 42 U.S.C. § 2000e(b) (1982).

99. *Id.*

100. *See supra* note 94 and accompanying text.

with its recent decision in *Bhandari*.[101] *Bhandari* held that private alienage discrimination was no longer justiciable under section 1981.[102] In response, the antidiscrimination provision of the IRCA provides an alternative cause of action independent of section 1981.

The Act's success, however, will depend ultimately on the theory of antidiscrimination law that the courts choose to apply. Unfortunately, the statute is silent regarding this choice. If a court adopts the disparate treatment theory, the intended beneficiaries of section 274B may find proof of discrimination difficult to establish and, consequently, the statute's substantive protections elusive. Alternatively, if a court adopts the disparate impact theory, proof of discrimination would be significantly less problematic, and the full panoply of protections embodied in section 274B would be more readily available.

IV. TITLE VII THEORIES OF LIABILITY

In construing the IRCA President Reagan stated that section 274B required a showing of deliberate discriminatory intent. Invoking Title VII disparate treatment jurisprudence, the President indicated that unless evidence of intentional discrimination is established, the plaintiff has not stated a cause of action under the Act's antidiscrimination provision.[103] In embracing the disparate treatment standard of proof, President Reagan expressly rejected Title VII's disparate impact doctrine,[104] which does not require a showing of discriminatory intent.[105]

Opponents[106] of this view maintain that the President's reading of the statute is wrong. They believe that the President failed to distinguish between the private right of action, which requires the plaintiff to allege either "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity,"[107] and the Special Counsel's right of action,[108] which has no similar statutory language.

The "knowing and intentional" language clearly invokes a disparate treatment standard. However, the proper interpretation of the "pattern or practice" language has caused some debate. President Rea-

101. *See supra* note 75 and accompanying text.

102. *See supra* note 76 and accompanying text.

103. Signing Statement, *supra* note 2, at 1535.

104. *Id.* (stating that "I understand section 274B to require a 'discriminatory intent' standard of proof . . . [t]hus, it would be improper to use the disparate impact theory of recovery").

105. Unlike the disparate treatment cases, under a disparate impact theory proof of discriminatory intent need not be shown. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *see also infra* notes 127-41 and accompanying text.

106. The President faces opposition from members of Congress, Hispanic groups, and civil rights organizations. *See infra* notes 169-72 and accompanying text.

107. IRCA, *supra* note 1, § 274B(d)(2), at 3376.

108. *See supra* notes 30-32 and accompanying text.

gan has argued that the term "pattern or practice" mandates a demonstration of intent,[109] while Representative Frank, the author of section 274B, has insisted that "pattern or practice" suits do not require proof of discriminatory motive.[110] The focus of the debate surrounding the appropriate standard of proof centers on President Reagan's insistence that the disparate treatment language of the private right of action is a general requirement of the entire antidiscrimination provision, including the Special Counsel's right of action.

A. Disparate Treatment

Disparate treatment exists when an employer intentionally treats some people less favorably than others because of their group status.[111] The Supreme Court has set forth a tripartite allocation and order of proof to be used in cases alleging disparate treatment.[112] First, the plaintiff must establish a prima facie case. Second, the employer must come forward with evidence of a legitimate nondiscriminatory reason for its actions. Finally, the plaintiff must be given the opportunity to prove that the alleged nondiscriminatory reason is merely a pretext for unlawful discrimination.[113]

To establish a prima facie case of intentional discrimination under Title VII disparate treatment theory, the plaintiff must show by a preponderance of the evidence:[114] (1) that the plaintiff is a member of a protected class; (2) that the plaintiff applied and was qualified for a job for which the defendant was seeking applications; (3) that the application was rejected; and (4) that following the rejection the job remained open and applications were sought from persons with the plaintiff's qualifications.[115]

Once a prima facie case is established, it creates a presumption of discrimination.[116] The burden of production shifts to the defendant to articulate a legitimate nondiscriminatory reason for the plaintiff's rejec-

---

109. Signing Statement, *supra* note 2, at 1535.

110. N.Y. Times, Dec. 9, 1986, at 14B, col. 1. Representative Frank appears to be wrong in this regard. *See infra* notes 142-53 and accompanying text.

111. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); *see also Teamsters*, 431 U.S. at 335 n.15.

112. *See, e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

113. *Id.* at 252 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

114. *Burdine*, 450 U.S. at 252-53.

115. *McDonnell Douglas*, 411 U.S. at 802.

116. *Burdine*, 450 U.S. at 254. The Court in *Burdine* stated:

> Establishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in tbe face of the presumption, the court must enter judgement for the plaintiff because no issue of fact remains in the case.

Id. (footnote omitted).

tion.[117] The defendant does not need to convince the court that she actually was motivated by the proffered reason.[118] It is sufficient if the defendant's admissible evidence raises a genuine issue of fact regarding discrimination against the plaintiff.[119] The employer only needs to produce such admissable evidence as would allow the fact finder rationally to conclude that the employment decision was not motivated by discriminatory intent.[120] However, the explanation provided must be legally sufficient to justify a finding in favor of the defendant.[121]

If the defendant succeeds in rebutting the presumption of discrimination, the plaintiff must then show by a preponderance of evidence that the proffered reason of the defendant is simply a pretext for intentional discrimination.[122] This burden may be accomplished by the introduction of either statistical or inferential evidence[123] showing that the defendant's proffered explanation is unworthy of credence and is a subterfuge for intentional discrimination.[124] At all times the ultimate burden of proving that the defendant acted intentionally remains with the plaintiff,[125] who must show that discrimination was a "but for" factor in the defendant's decision.[126]

---

117. *Id.* at 254; *see also McDonnell Douglas*, 411 U.S. at 802.

118. *Burdine*, 450 U.S. at 254 (citing Board of Trustees of Keene State College v. Sweeny, 439 U.S. 24, 25 (1978)).

119. *Id.*

120. *Id.* at 257.

121. *Id.* at 255; *see also* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 556 & n.106 (1981).

122. *Burdine*, 450 U.S. at 256. The burden of proving pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* Pretext as used in this context does not mean that the plaintiff must show that she was rejected because of race; rather, the plaintiff is required to prove only that race was a factor in the decision. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282 n.10 (1976).

123. *See McDonnell Douglas*, 411 U.S. at 804-05; *see also* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980). Law review commentary on burden of proof issues is quite extensive. *See generally* Belton, *Burdens of Pleading and Proof in Discriminatory Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981); Edwards, *Direct Evidence of Discriminatory Intent and the Burden of Proof: An Analysis and Critique*, 43 WASH. & LEE L. REV. 1 (1986).

124. *Burdine*, 450 U.S. at 256; *see also* Thorne v. City of El Segundo, 726 F.2d 459, 464-65 (9th Cir. 1983) (police department rejected female applicant allegedly due to lack of aggressiveness, self-assuredness, or probable physical ability; consequently, pretext was established by both direct and indirect evidence that rejection actually was based on sex-biased stereotype of women), *cert. denied*, 469 U.S. 979 (1984).

125. *Burdine*, 450 U.S. at 253.

126. Lewis v. University of Pittsburgh, 725 F.2d 910, 914-15 (9th Cir. 1983), *cert. denied*, 469 U.S. 892 (1984).

B. Disparate Impact

Disparate impact cases arise in situations in which an employer's facially neutral policies have an adverse impact on a group protected by Title VII.[127] The goal of the disparate impact doctrine is to eliminate the discriminatory effect produced by the evenhanded application of selection standards, if those standards are not job related. The seminal case articulating disparate impact theory is *Griggs v. Duke Power Co.*[128]

In *Griggs* the plaintiffs, black employees of Duke Power, challenged the defendant's policy of requiring either a high school diploma or a minimum score on an aptitude test as a prerequisite of employment for, or transfer to, certain jobs in the company.[129] There was no finding that the defendant's diploma or test requirement was motivated by discriminatory intent.[130] Nevertheless, the plaintiffs' statistical evidence established that these requirements, though applied equally to blacks and whites, disproportionately disqualified a substantially larger number of blacks than whites.[131]

The Court found Duke Power's diploma and testing requirements discriminatory, reasoning that the requirements had no relationship to job capability but, rather, operated as "built-in headwinds" to prevent members of a protected class from securing attractive jobs within the company.[132] Rejecting the argument that discriminatory intent must be established in a disparate impact case,[133] the Court said that Title VII

---

127. *See Teamsters*, 431 U.S. at 335 n.15.

128. 401 U.S. 424 (1971). For a general discussion of *Griggs* in terms of its impact on employment discrimination law, see Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

129. *Griggs*, 401 U.S. at 425-28. In *Griggs* the Court dealt with "the archetype of the subordination of black workers in the South." Blumrosen, *supra* note 128, at 63. Before the passage of the Civil Rights Act of 1964, the respondent, Duke Power, had retained blacks in only the most menial jobs. They were assigned to the labor department or to low level maintenance work; all other jobs were reserved for whites. *Griggs*, 401 U.S. at 427.

In 1955 Duke Power instituted a policy requiring a high school diploma for employment in any department other than labor. On July 2, 1965, the effective date of the Civil Rights Act of 1964, the respondent abandoned its policy of restricting blacks to the labor department, but retained its requirement of a high school education for any joh assignment other than lahor. From the time the high school requirement was instituted, however, white employees hired before the institution of the educational requirement continued to be promoted. *Id.*

In 1965 the respondent began to permit incumbent employees who lacked high school education to qualify for transfers by passing tests that purported to measure intelligence. On the basis of these policies, a class action on behalf of all black employees of Duke Power was instituted. *Id.* at 427-28.

130. *Griggs*, 401 U.S. at 428-29.

131. *Id.* at 429.

132. *Id.* at 432.

133. While the classic formation of the disparate impact theory does not require proof of discriminatory intent, *see Teamsters*, 431 U.S. at 335 n.15, cases challenging the constitutionality of a facially neutral law confront a different standard. It is well established doctrine that a consti-

is directed at the consequences of employment practices as well as the employer's motivations.[134] Thus, a showing of either good intent or discriminatory intent is not dispositive.[135] The fact that the job requirements operated to exclude certain members of the work force unjustly was sufficient to find that Duke Power had discriminated.

The order and allocation of the burden of proof under a theory of disparate impact is a three-step evidentiary process. First, the plaintiff must establish a prima facie case by showing that a substantially adverse impact inures to a protected class from the defendant's facially neutral policy.[136] If the plaintiff fails to meet this burden, the defendant is entitled to a verdict at the close of the plaintiff's case.[137] Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to validate the policy by a strong showing[138] that it is either related to job performance[139] or is a business necessity.[140] If the defend-

---

tutional challenge to a facially neutral law whose application results in a disproportionate impact requires proof of a racially discriminatory motive. Washington v. Davis, 426 U.S. 229 (1976). Justice Rehnquist reiterated this doctrine while writing for a unanimous Court in Hunter v. Underwood, 471 U.S. 222 (1985).

In *Hunter* a provision of the Alabama Constitution first enacted in 1901 was struck down as violative of the fourteenth amendment. *Id.* at 225. The provision required the disenfranchisement of persons convicted of crimes involving "moral turpitude." In invalidating the provision, the justices noted that even though it was racially neutral on its face, its original intent nonetheless was discriminatory in both adoption and application. *Id.* at 227-30. In so holding, the Court reaffirmed its earlier mandate that proof of discriminatory motive is a prerequisite for establishing the unconstitutionality of a facially neutral law whose application is discriminatory in impact. *Id.* at 227-28.

The *Washington v. Davis* doctrine has been condemned widely by civil rights activists and constitutional scholars who argue that proof of discriminatory intent is particularly problematic and, more fundamentally, that the injury of racial inequality exists irrespective of motive. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-20 & nn.4-7 (1987). Supporters of the doctrine are equally vociferous in proclaiming the doctrine's propriety by appealing to what amounts to a "slippery slope" argument. *Id.* at 320 & nn.9-13. The Supreme Court has shown little inclination to reverse the doctrine that it carved out with its holding in *Washington v. Davis*.

134. *Griggs*, 401 U.S. at 432; *see also Teamsters*, 431 U.S. at 335 n.15.

135. *Griggs*, 401 U.S. at 432.

136. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). To be legally cognizable the disparity must be significantly discriminatory—at a minimum the percentages must be markedly disproportionate. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977).

137. Amey v. Delta Air Lines, Inc., 24 Fair Empl. Prac. Cas. (BNA) 1477, 1482 (N.D. Ga. 1980) (judgment for defendant at close of plaintiff's case because of failure to prove significant statistical disparities).

138. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (stating that "the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced" (footnotes omitted)), *cert. denied*, 404 U.S. 1006 (1971).

139. *See Griggs*, 401 U.S. at 431. There is considerable confusion regarding the exact meaning of the term "related to job performance" in referring to the defendant's burden. It has been suggested that the defendant's burden of proving job relatedness is a heavy one. Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420, 426 (2nd Cir. 1975), *cert. denied*, 429 U.S.

ant fails in establishing either of these defenses, the policy should be adjudged a violation of Title VII. Third, should the defendant succeed in establishing a defense, the plaintiff is given the opportunity to show that alternative policies with less differential impact on the protected class are available and would serve the legitimate business needs of the defendant employer.[141]

C. *Pattern or Practice Suits*

Litigants bringing a claim under the IRCA's private right of action are required to prove either intentional discrimination or a pattern or practice of discriminatory activity.[142] The Act does not define "pattern or practice" but defers to judicial interpretation of the phrase.[143] Because the phrase is found in numerous civil rights laws, including Title VII,[144] it has received substantial judicial construction. The phrase "pattern or practice" has been construed by courts as encompassing activities that are " 'repeated, routine, or of a generalized nature.' "[145]

Pattern or practice suits almost always involve claims of class-wide discrimination. Typically, the defendant is alleged to have treated a

---

823 (1976). The "job related" defense is invoked most often in cases challenging the validity of testing procedures. In addressing the burden of proof question, the Court of Appeals for the Ninth Circuit concluded that a job-related exam whose passing percentage excluded a disproportionately larger number of protected class members was discriminatory unless it could be established by professionally accepted methods to have been predictive of job performance or relevant to job selection. Contreras v. City of Los Angeles, 656 F.2d 1267, 1276 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982).

140. *Griggs*, 401 U.S. at 431. The parameters of the business necessity defense are not defined clearly. Much of the confusion stems from the courts' use of the terms "business necessity" and "job relatedness" in a synonymous fashion. In *Griggs* for example, the Court stated: "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The *touchstone is business necessity*. If an employment practice which operates to exclude [blacks] cannot be shown to be *related to job performance*, the practice is prohibited." *Id.* (emphasis added).

It is suggested by some commentators that the terms are not synonymous, but rather that business necessity is broader than job relatedness, and that job relatedness is a subset of business necessity. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328-29 (2d ed. 1983). The test generally articulated to determine if one has a legitimate business necessity defense is "whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business." *Robinson*, 444 F.2d at 798; *see also* Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376, 388-89 (1981).

141. *Albemarle*, 422 U.S. at 425.

142. IRCA, *supra* note 1, § 274B(d)(2), at 3376.

143. H.R. REP. No. 682, *supra* note 46, pt. 1, at 59, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5663.

144. Civil Rights Act of 1964, 42 U.S.C. § 2000e-6 (1982); *see also* Voting Rights Act of 1965, 42 U.S.C. § 1971-1974e (1982); Fair Housing Act of 1968, 42 U.S.C. § 3601-3631 (1982).

145. *Teamsters*, 431 U.S. at 336 n.16 (quoting 110 CONG. REC. 14,270 (1964)).

protected group in an intentionally discriminatory manner.[146] The Supreme Court, therefore, requires plaintiffs to prove more than the occurrence of a single insignificant act of discrimination.[147] They must demonstrate by a preponderance of the evidence that the defendant's discriminatory policy was "standard operating procedure—the regular rather than the unusual practice."[148] Statistical evidence indicating significant disparity between the percentage of a protected group's representation in the general population and its representation in the defendant's labor force may be introduced to carry this burden.[149] This evidence establishes an inference that an intentional discriminatory policy exists.[150]

The plaintiff, at the prima facie level, is not required to prove that each person for whom relief is sought is a victim of the employer's discriminatory policy.[151] A presumption exists that any employment decision made during the period when the discriminatory policy was in effect was made in furtherance of that policy.[152] The defendant can rebut the presumption raised by the prima facie case by showing that the plaintiff's statistical proof of a pattern of discrimination either is flawed or statistically insignificant.[153]

V. Intent vs. Impact: A Comparison

The state of mind of the defendant is irrelevant in a disparate impact model. The sole issue at the prima facie level is the effect that the defendant's policies have on a protected class. Practices that are neutral on their face, but which result in a disproportionate adverse impact, violate Title VII in the absence of a justifiable defense. Thus, without inquiring into the defendant's motivations, courts have enjoined the use

---

146. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 303 (1977); *Teamsters*, 431 U.S. at 335.

147. *Teamsters*, 431 U.S. at 336; *see also* United States v. Ironworkers Local 86, 443 F.2d 544, 552 (9th Cir.) (pattern or practice is found "where the acts of discrimination are not 'isolated, peculiar or accidental' "), *cert. denied*, 404 U.S. 984 (1971).

148. *Teamsters*, 431 U.S. at 336.

149. United States v. City of Alexandria, 614 F.2d 1358, 1364 (5th Cir. 1980); *see also* Pettway v. American Cast Iron Workers Local 86, 494 F.2d 211, 225 n.34 (5th Cir. 1974) (stating that statistics may be used to establish a prima facie case in pattern or practice actions), *cert. denied*, 439 U.S. 1115 (1979). The use of statistical evidence is not without its difficulties. *See generally* B. Schlei & P. Grossman, *supra* note 140, at 1331-94.

150. *Teamsters*, 431 U.S. at 359.

151. *Id.* at 360.

152. *Id.* at 362 (stating that "[t]he proof of the pattern or practice supports the inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy").

153. *Id.* at 360.

of minimum height and weight requirements,[154] standardized intelligence tests,[155] diploma requirements,[156] and a host of other facially neutral employment practices.[157] In establishing a prima facie disparate impact case, moreover, the traditional elements of causation generally are not an issue. Evidence of statistical disparity is itself proof of a causal link between the challenged procedure and the discriminatory result.[158]

In sharp contrast to disparate impact are pattern or practice suits and disparate treatment suits. In each suit an inquiry into the defendant's state of mind is required in order to show intentional discrimination.[159] To carry this burden of proof, the plaintiff must establish that the defendant intended to discriminate against a protected group.[160]

Statistical disparity between groups, while not wholly irrelevant to proof of discriminatory intent, normally will not itself evidence such intent.[161] Only in cases of egregiously unequal impact, when the only explanation is discrimination, will impact alone be determinative of intent.[162]

Given that invidious discrimination often manifests itself in more subtle forms than overt prejudice, proof of discriminatory motive is exceedingly difficult. As one commentator has observed, the process of proving intent produces a series of onerous specifications, as individual cases become involved in the vagaries of fact-finding in an attempt to

---

154. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

155. *See* United States v. Georgia Power, 474 F.2d 906 (5th Cir. 1973).

156. *See Griggs*, 401 U.S. 424.

157. *See, e.g.*, Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (treating unwed parenthood as immoral, and therefore a basis for employment denial, has disproportionate impact on minorities and females), *aff'd*, 507 F.2d 611 (5th Cir. 1975); Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969) (employer failed to prove that the requirement of a switchman's position demanded lifting duties that were so strenuous that all or most women would be unable to perform them).

158. *See* Lewis v. Bloomsburg Mills Inc., 773 F.2d 561, 571 n.16 (4th Cir. 1985).

159. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273 (1982) (disparate treatment); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (pattern or practice).

160. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 717 (1983) (Blackmun, J., concurring); *see* Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 122 n.66 (1983) (stating that " ' "[d]iscriminatory purpose" . . . implies that the decisionmakers . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.' " (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979))).

161. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-67 (1977).

162. *Id.* The *Arlington Heights* Court cited Yick Wo v. Hopkins, 118 U.S. 356 (1886), as an example in which the disparity was so stark as to lead to only one conclusion: the defendant intended to discriminate. In *Hopkins* California had enacted a law prohibiting laundries in any building made of wood. The effect of this law was to eliminate virtually every Chinese laundry in California. The Court quickly pointed out that instances of such stark disparity are quite infrequent. *Arlington Heights*, 429 U.S. at 266.

reveal the employer's state of mind.[163] The day of the bigoted employer who openly avows disdain for a particular group of individuals is waning; instead, discrimination is infinitely more sophisticated. Take, for example, the corporate employer who has a policy that all applicants for employment weigh at least 120 pounds. The policy has been in effect since the formation of the company and is applied equally to all individuals regardless of gender or race. The weight policy is challenged by an otherwise qualified female who is rejected because of it. The plaintiff is able to introduce statistical evidence that the policy operates to exclude twenty percent of all female applicants compared with six percent of all male applicants. No evidence is introduced that the policy is intentionally discriminatory, and the defendant is unable to justify it based on a business necessity.

Under the *Griggs* model of disparate impact, by introducing this statistical evidence the plaintiff has established a prima facie violation of Title VII. Under a disparate treatment standard, however, no violation has occurred because the relatively minimal disparity between male and female applicants would not approach the egregiously disproportionate level,[164] and there would not be other evidence of discriminatory intent because the policy was applied to all employees. Thus, the policy would stand.

Because of the subconscious[165] and institutionalized[166] nature of

---

163. Blumrosen, *supra* note 128, at 68; *see* United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.) (stating that "in an age when it is unfashionable . . . to openly express racial hostility, direct evidence of overt bigotry will be impossible to find"), *cert. denied*, 439 U.S. 824 (1978).

164. *See supra* note 162.

165. Lawrence, *supra* note 133, at 323. The subconscious, as it relates to racism, has been described as follows:

> The individual is unaware . . . that the ubiquitous presence of a cultural stereotype has influenced her perception . . . . Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, [s]he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

Id.

166. Institutionalized discrimination results from practices that create an environment in which negative stereotypes are fostered and continue causing injuries even after those practices have stopped. *See* Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 855-58 (1983). The discriminatory comments based on gender or race that are heard every day are evidence of the continuing impact of these past policies. These negative stereotypes, then, are manifested in the superstructure undergirding society and operate in many instances to retard the full involvement of women and minorities in the political and social process.

While institutionalized discrimination is not necessarily intentional, its manifestations, nevertheless, disrupt society. As Professor Eric Schnapper has observed:

> The essence of effective racial discrimination was and remains the creation of rules and circumstances that minimize the necessity for new acts of intentional discrimination. Once such a system has been established, all that is accomplished by forbidding further intentional discrimination is interference with the ability of biased officials to fine tune the system and

contemporary prejudice, and the pervasive use of facially neutral policies, proof of intentional discrimination is an arduous task. In response to these discrete forms of discrimination, the courts have articulated the doctrine of disparate impact. Under this theory evidence of impact is easier to show than proof of intent, but, more importantly, it affords adequate safeguards against the stealth of modern discrimination.

VI. A Matter of Misinformed Interpretation

At the time President Reagan signed the IRCA into law, he issued a statement asserting that section 274B required a showing of disparate treatment and not disparate impact.[167] Arguing that the "knowing and intentional" and "pattern or practice" language associated with the private right of action applied equally to the Special Counsel, the President read the IRCA as requiring proof of discriminatory motive in any action whether by the Special Counsel or by the private litigant.[168] President Reagan's reading of section 274B is quite narrow. He would extract from the IRCA's antidiscrimination provision all Title VII disparate impact theory.

Sentiment against the President's position is unified and vehement. Members of Congress,[169] Hispanic groups,[170] and civil rights organiza-

---

adapt it to unforeseen developments.

Id. at 863, *quoted in* Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. Cal. L. Rev. 733, 747 (1987).

167. Signing Statement, *supra* note 2, at 1535. The President's Signing Statement stated:

> Thus, a facially neutral employee selection practice that is employed without discriminatory intent will be permissible under the provisions of section 274B. 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. (emphasis in original).

168. *Id.* at 1535. The President's statement added that "I understand section 274B to require a 'discriminatory intent' standard of proof: The party bringing the action must show that in the decision making process the defendant's action was motivated by one of the prohibited criterion. Thus it would be improper to use the 'disparate impact' theory of recovery . . . ." *Id.*

169. *See generally Implementation of Immigration Reform and Control Act of 1986: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. of the Judiciary*, 99th Cong., 2d Sess. 115 (1986) (statement of Rep. Frank) [hereinafter *Implementation*]; N.Y. Times, Dec. 9, 1986, at B14, col. 3 (in which Rep. Frank calls the President's interpretation the "gravest usurpation of legislative prerogative" he has ever witnessed).

170. N.Y. Times, Nov. 23, 1986, at 34, col. 4 (city ed.) (E. Richard Larsons, Vice President of the Mexican American Legal Defense and Education Fund) (stating that "[t]he President's interpretation of the law would severely undercut the protections against discrimination that Congress provided"). Representative Esteban Edward Torres, Chairperson of the Congressional Hispanic Caucus, echoed Mr. Larson's view and added that he was "appalled at the President's interpreta-

tions[171] are united in their opposition to the President's interpretation. They insist that the President's views are myopic and ill-conceived.[172] While it generally is conceded that the private right of action is limited by its language to cases alleging disparate treatment discrimination, these groups insist that the same limitations should not apply to the Special Counsel. Substantively restricting the Special Counsel's right of action to cases alleging only intentional discrimination would eviscerate congressional intent and would set a dangerous precedent for civil-rights law.

President Reagan makes his case for a disparate treatment standard by building upon congressional intent to model the IRCA on Title VII. Believing Title VII section 703(a)(1) to be the sole source for the IRCA's antidiscrimination provision and the basis of disparate treatment theory, the President concluded that section 274B requires a showing of discriminatory intent.[173] The President then concluded that disparate impact theory is inappropriate in section 274B analysis. In reaching this conclusion, the President first posited that disparate impact is rooted in section 703(a)(2) of Title VII.[174] He then argued that this provision of Title VII has no counterpart in the IRCA and that, therefore, unintended acts of discrimination are not prohibited by section 274B.[175]

Even if the antidiscrimination provision is modeled on section 703(a)(1), the President's conclusions are faulty. No court expressly has tied disparate treatment discrimination solely to 703(a)(1),[176] and the Supreme Court has yet to decide whether subsection (a)(1) of Title VII, like (a)(2), allows a suit based on disparate impact.[177]

In *Colby v. J.C. Penney Co.*[178] the Seventh Circuit Court of Appeals recently addressed the issue of whether 703(a)(1) can sustain a

---

tion of the anti-discrimination provisions." *Id.* at 1, col. 1.

171. *See* Guttentag, *supra* note 13, at 22 (noting that representatives from the National Lawyers Guild called the President's statement illogical).

172. N.Y. Times, Nov. 23, 1986, at 1, col. 1 (city ed.).

173. *See supra* note 88 for text of 703(a)(1).

174. *See supra* note 88 for text of 703(a)(2).

175. Signing Statement, *supra* note 2, at 1535.

176. Colby v. J.C. Penney Co., 811 F.2d 1119, 1126-27 (7th Cir. 1987).

177. *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136, 144 (1977) (stating that the Court "need not decide whether, when confronted by a facially neutral plan, it is necessary to prove intent to establish a prima facie violation of § 703(a)(1)"); *cf.* Wambheim v. J.C. Penney Co., 705 F.2d 1492, 1494 (9th Cir. 1983) (holding that disparate impact analysis is appropriate in § 703(a)(1) but giving no reason in support), *cert. denied*, 467 U.S. 1255 (1984); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302-04 (9th Cir.) (applying disparate impact analysis to a § 703(a)(1) case), *cert. denied*, 467 U.S. 1255 (1984). *But see* Connecticut v. Teal, 457 U.S. 440 (1982) (implying that § 703(a)(1) does not state a claim under disparate impact); EEOC v. J.C. Penney Co., 632 F. Supp. 871, 874 (E.D. Mich. 1985).

178. 811 F.2d 1119 (7th Cir. 1987).

cause of action based on disparate impact. In ruling that it could, the court acknowledged that the difference between the two sections is far from clear. The court stated that to allow disparate impact under subsection (a)(2), but not under (a)(1), would generate complex litigation and pressure to interpret (a)(2) expansively, thereby bringing within (a)(2)'s ambit claims normally covered by subsection (a)(1).[179] Beyond the difficulties envisioned by the *Colby* court, an analysis of the statutory language contained in paragraphs (1) and (2) of section 703(a) provides an additional critique of the President's position.

Paragraph (1) proscribes discrimination in the context of hiring, discharge, compensation, and conditions of employment.[180] Paragraph (2) prohibits the classification of employees and the deprivation of employment opportunities that adversely affect a protected group's status.[181] The prohibited basis of discrimination in either paragraph is race, religion, sex and national origin.[182] Reduced to their essentials, paragraphs (1) and (2) address the same evil, discrimination in employment. Indeed, the full statutory language of 703(a) appears redundant.

"Discrimination" in the first paragraph is modified by "compensation" and "conditions of employment," while "classify" in the second paragraph is modified by "employment opportunities" and "adversely affect." It is difficult to imagine a valid distinction between discrimination affecting compensation or conditions of employment, and classifications adversely impacting employment opportunities. Nevertheless, some courts and the President have seized on the statutory bifurcation and assigned to paragraph (1) the theory of disparate impact. The incongruity that this assignment creates is self-evident, particularly in light of the evidentiary burdens that the defendant would encounter when rebutting the prima facie case.

For example, a prima facie showing of disparate treatment may be rebutted by articulating a nondiscriminatory reason for the employment decision.[183] This rebuttal faces a low level of judicial scrutiny. On the other hand, a prima facie case alleging disparate impact may be rebutted by establishing a "business necessity" defense.[184] This defense encounters strict judicial scrutiny. It makes little sense if a discriminatory rule or policy of an employer receives careful judicial review if it affects employment opportunities, but not if it affects hiring or compensation. The results of a rigid bifurcation between paragraphs (1) and (2)

179. *Id.* at 1127.
180. *See supra* note 88.
181. *Id.*
182. *Id.*
183. *See supra* note 117 and accompanying text.
184. *See supra* note 140.

are incongruous rulings at odds with the stated purposes of Title VII.

VII. Legislative History: A Response to the President

A. The Special Counsel's Right of Action

According to President Reagan, the substantive limitations associated with the private right of action are coterminous with the Special Counsel. Thus, the power of the Special Counsel is delimited by the capacity of the private right of action. Claims that fail to allege intentional discrimination, therefore, are beyond the jurisdiction of the Special Counsel and must be dismissed.[185] The President's view is based neither on section 274B, nor supported by its legislative history.

The Office of Special Counsel had its inception in the 98th Congress. Representative Barney Frank proposed the Office as part of amendment six to House Bill 1510.[186] This amendment, entitled "Unfair Immigration-Related Employment Practices," passed the House by an overwhelming majority.[187] Though the Bill ultimately failed,[188] amendment six reappeared in the IRCA with very little debate and today constitutes section 274B. The scope of the Special Counsel's right of action cannot be understood without first investigating the legislative intent embodied in amendment six.

As proposed in House Bill 1510, the function of the Special Counsel was to investigate claims of employment discrimination resulting from employer sanctions.[189] During the debate on amendment six, no distinction was drawn between intentional and unintentional acts of discrimination. Instead, the discussion reflected the concern of House members that the Special Counsel be given sufficient latitude to deal aggressively with any form of discrimination that might arise.[190] The Special Counsel's authority, therefore, was unlimited and unconstrained by any requirements that discriminatory intent be established before a cause of action could be mounted.

A provision for a private right of action also was included in amendment six. As originally drafted, this right of action was undiffer-

185. IRCA, *supra* note 1, § 274B(b)(2), at 3375.

186. H.R. 1510, 98th Cong., 2d Sess., 130 Cong. Rec. H5640-41 (daily ed. June 12, 1984).

187. *Id.* at H5644.

188. House Bill 1510 was tabled and set for reconsideration in the following Congress. *Id.* at H6185.

189. *Id.* at H5643 (statement of Rep. Bartlett) (stating that "[t]he Special Counsel which the amendment creates will be able to handle complaints concerning discrimination and to see to it that the victims have redress").

190. *Id.* at H5641. The Bill's sponsor Representative Frank stated, "[w]hat we have if . . . amendment [6] . . . is adopted [is] a readiness for any discrimination that might arise. It will be an *anticipatory* remedy for any discrimination that might arise." *Id.* (emphasis added).

entiated from the right of action enjoyed by the Special Counsel.[191] The only limitation on the private litigant was a requirement that she wait until after the Special Counsel's statutory period of investigation had expired before filing a complaint.[192] Other than this limitation, the private right of action was unfettered by any restrictions.

In the Senate, immigration reform took a different path with Senate Bill 529.[193] While Senate Bill 529 established employer sanctions, this companion bill to House Bill 1510 said nothing about unfair immigration-related employment practices. Consequently, no provision existed for the formation of a Special Counsel. The Senate's failure to acknowledge the possibility that sanctions would lead to discrimination deeply troubled the House. Representative Garcia particularly was concerned. He sought guarantees that the Office of Special Counsel would be preserved during the upcoming Conference Committee with the Senate. Assurances that every effort would be made not to diminish the Special Counsel's effectiveness were forthcoming.[194]

During the 1984 Conference Committee objections were raised that the private right of action was too broad.[195] In response, the Committee reached a compromise that limited the private litigant to cases alleging intentional discrimination or a pattern or practice of discriminatory activity.[196] By qualifying the private right of action, the conferees imposed a heavy evidentiary burden on those litigants who would bring their own claims, and thereby substantially narrowed this right. The compromise worked out in 1984 survives in section 274B of the IRCA.

As first introduced, the antidiscrimination provision did not distin-

---

191. *Id.* at H5640 (stating that if the Special Counsel, after "receiving . . . a charge respecting an unfair immigration-related employment practice, has not filed a complaint . . . the person making the charge may . . . file a complaint directly").

192. *Id.*

193. S. 529, 98th Cong., 1st Sess., 129 CONG. REC. S6970-87 (daily ed. May 18, 1983).

194. H.R. 1510, *supra* note 186, at H5642. The following exchange took place among Representatives Garcia, Mazzoli, and Rodino:

> —Mr. Garcia. . . . If in fact we get to the conference committee, what assurances do we have as a committee here that every effort is going to be made to make sure that if we pass this bill, that the [Special Counsel] amendment is going to be included?
>
> . . . .
>
> —Mr. Mazzoli. . . . I can assure my friend from New York that I will do my very best to preserve the [Special Counsel] amendment and what it stands for, which is an ability to pursue any unintended discrimination in the full conference product.
>
> . . . .
>
> —Mr. Rodino. . . . I want to assure the gentleman that there will be no equivocation, there will be no possible effort made by me or anyone else that will be represented by this side to diminish this amendment's effectiveness.

Id.

195. *Implementation*, *supra* note 169, at 115 (statement of Rep. Frank).

196. *Id.* at 116.

guish between the Special Counsel and the private litigant. Not until the issue was considered by the Conference Committee was the private right of action circumscribed by the inclusion of qualifying language. The authority of the Special Counsel, however, was unaffected because no similar limitations were imposed. Nevertheless, the President insists that the Special Counsel faces the same evidentiary burdens as the private litigant. If the President's position is correct, Congress accomplished nothing by limiting the private right of action. The coterminous relationship that existed prior to the Conference continued unchanged, only the nature of an actionable offense is new.

If the objective of the Conference was to narrow the private right of action to less than that enjoyed by the Special Counsel, then, according to the President, it failed. Instead, the President believes that the Conference Committee altered the entire scheme of the antidiscrimination provision—something the House conferees promised not to do.[197] Militating against the President's conclusion is the lack of debate that section 274B engendered when it was introduced.[198] Had the 1984 Conference Committee substantially altered the substance of the antidiscrimination provision, considerable debate would have ensued from those conferees who supported the provision in its original form.

Finally, if Congress intended to modify the Special Counsel's authority, it should have done so expressly.[199] The President's argument, by reference to the private right of action, will not withstand scrutiny. A fundamental maxim of statutory construction is that the "plain meaning" of words must be given their full effect and neither transposed nor interpreted so as to create ambiguity when none previously existed.[200] At best, the President's reading of the Special Counsel's authority is ambiguous. Giving import to its plain language, the statute restricts the private litigant, not the Special Counsel.

---

197. *See supra* note 193.

198. The debate on the IRCA's antidiscrimination provision takes up less than six pages in the Congressional Record and concerns an amendment offered by Representative Dan Lungren to strike in its entirety § 274B. 132 CONG. REC. H9767-72 (daily ed. Oct. 9, 1986). The amendment was defeated handily, *id.* at H9772, and the discussion essentially revolved around the same issue that the House had considered in the previous Congress. There was no discussion concerning the power of the Special Counsel, nor, for that matter, was there any discussion of the private right of action.

199. *See* United States v. Price, 361 U.S. 304, 310-11 (1960) (stating that inaction by Congress affords the most dubious foundation for drawing inferences concerning the interpretation of statute).

200. *See* United States v. Public Utils. Comm'n, 345 U.S. 295, 315 (1953); *see also* B. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 229-37 (1975).

B. Title VII Disparate Treatment Doctrine Remains in Effect

Section 274B is intended to prohibit discrimination against noncitizens in all its manifestations. The structure of the statute creates alternative causes of action. On the one hand, the private litigant is limited to claims alleging intentional discriminatory activity. On the other hand, the Special Counsel is unencumbered by restrictive statutory language. The issue becomes which theory of liability and corresponding standard of proof the Special Counsel is required to satisfy in order to show a violation of section 274B.

If the IRCA is intended to reach facially neutral employment practices that have a discriminatory effect, then the theory of liability will be disparate impact, and the standard unintentional discrimination. Conversely, if the law targets only intentional acts of discrimination then the theory will be disparate treatment, and the standard intentional discrimination. There are no talismanic devices to discern the meaning of congressional intent. With section 274B, however, one is guided by Title VII.

The antidiscrimination provision of the IRCA is modeled on Title VII,[201] and extends Title VII's protection against national origin discrimination to employees not covered already.[202] As Representative Frank noted, the Act is intended to add to, not replace, existing Title VII remedies.[203] Similarly, the Conference Report on the Act specifically indicated that Title VII protections were to be broadened under the new law.[204] Thus, it is clear that Congress intended to maintain Title VII when it enacted the IRCA.

It is axiomatic in Title VII litigation that a claim may proceed under either disparate impact or disparate treatment standards of proof.[205] Restricting a claimant to one or the other standard sets a dangerous precedent for civil rights law because it, in effect, would state that normal civil rights protections against job discrimination do not apply.[206]

When Congress enacted the IRCA it was fearful that employer sanctions would have a discriminatory effect on those who "looked or

---

201. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 87 [hereinafter H.R. CONF. REP. No. 1000], *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5840, 5842 (stating that "[t]he [antidiscrimination provision] broadens the Title VII protections against national origin discrimination, while not broadening the other Title VII protections").

202. See *supra* note 99 for statutory limitations on Title VII.

203. H.R. 1510, *supra* note 186, at H5641 (commenting on House Bill 1510).

204. *See* H.R. CONF. REP. No. 1000, *supra* note 201, at 87, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5842.

205. International Bhd. of Teamsters v. United States, 431 U.S. 324, 334 n.15 (1977).

206. N.Y. Times, Nov. 23, 1986, at 1, col. 1 (city ed.) (quoting Arnold Leibowitz, former Senate Counsel on Immigration).

sounded" foreign.[207] In response, Congress included section 274B in the IRCA. This provision bans employment discrimination on the basis of an individual's citizenship status or national origin, whether such discrimination is intentional or unintentional. In order to effectuate section 274B, Congress vested in the Special Counsel a broad right of action, similar to the rights granted to the EEOC under Title VII. While Congress did limit the private right of action to claims alleging intentional discrimination, it imposed no similar restriction on the Special Counsel. The President argues that, however, by implication derived from the private right of action, Congress also restrained the Special Counsel.

When Congress adopted the IRCA, it ratified existing antidiscrimination provisions in Title VII. In doing so, Congress intended to allow the Special Counsel to prosecute discrimination resulting from facially neutral employment practices. The President's contention that Congress impliedly repealed Title VII disparate impact jurisprudence is misguided.

It is a cardinal principle of statutory construction that "repeals by implication are not favored."[208] Congress is presumed to know the effect of its legislative action and to speak clearly when it intends to modify a previously enacted statute.[209] The Act's legislative history expressly confirms, rather than implicitly repeals, Title VII's protections. The House Education and Labor Committee Report on the IRCA directly addressed the Title VII issue, stating that no provision of the Act is intended to limit the power of the EEOC. To do otherwise would be counterproductive of the Committee's intent.[210]

Section 274B complements Title VII by extending its protection to persons otherwise not covered. Part of the protection extended is the right to base a cause of action on either disparate treatment or disparate impact. Although Congress has precluded the private litigant from relying on disparate impact, it has manifested no similar intention toward the Special Counsel. The President's insistence that the IRCA requires the Special Counsel to establish discriminatory intent in all allegations of unfair labor practices is inconsistent with traditional Title VII case law. President Reagan's position assumes that individuals covered under section 274B are not entitled to the same protection that

---

207. *See Joint Hearing*, *supra* note 48, at 123-28 (statement of Rep. Garcia acknowledging that persons of "foreign" appearance or accent are most likely to feel the full brunt of discrimination resulting from employer sanctions).

208. United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976).

209. Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

210. H.R. REP. No. 682, *supra* note 46, pt. 2, at 8-9, *reprinted in* 1986 U.S. CODE, *supra* note 46, at 5757-58.

Title VII affords other minority groups. This assumption is unwarranted by the Act's legislative history. At the very least, such an interpretation leaves uncovered many evils that Congress intended to prohibit.

For example, a facially neutral policy that requires the automatic termination of employees who falsify employment applications with invalid social security numbers would fall disproportionally on previously undocumented aliens.[211] The Act stipulates that undocumented aliens who apply for amnesty and eventual citizenship must reveal their status. Thus, an employer who had a policy of automatic termination could identify immediately those workers who had falsified their application. Congress did not intend to force qualified aliens to make the choice between employment and citizenship. It is this choice, however, that aliens will face if the Special Counsel is not allowed to pursue facially neutral employment practices that have a disproportionate impact.

VIII. The Future of Litigation under Section 274B

Regardless of the theory of liability ultimately adopted by courts, the IRCA's future as a font for employment litigation is uncertain. There are a number of disincentives that are likely to prevent section 274B from becoming a mainstay of civil rights litigation. First, there is a slim chance of being awarded attorney's fees. Although the Act stipulates that attorney's fees are awardable if the losing party's case is without merit,[212] in essence this standard requires that the losing suit be frivolous. The difficulty of establishing legal frivolity combined with the IRCA's absence of a punitive damages provision will inhibit litigation.

A second disincentive is the limited coverage that section 274B provides. The antidiscrimination provision is restricted to claims of unfair immigration-related employment practices resulting from the hiring, recruitment, referral for a fee, or discharge[213] of an individual based on citizenship status or national origin. Compared with Title VII and section 1981, the statutory breadth of the IRCA is considerably smaller.

Finally, the statute protects only citizens or intending citizens.[214] The latter category, from which most of the complainants will come, is

---

211. *See generally* League of United Latin Am. Citizens (LULAC) v. Pasadena Indep. School Dist., 662 F. Supp. 443 (S.D. Tex. 1987) (from which the foregoing example is drawn). This is the first court to consider § 274B in terms of the requisite standard of proof required to show a violation. The court concluded that § 274B does not require evidence of intentional discrimination. The *LULAC* court specifically recognized that Title VII provides the foundation for § 274B.

212. IRCA, *supra* note 1, § 274B(h), at 3378.

213. *Id.* § 274B(a)(1), at 3374.

214. *Id.* § 274B(a)(3)(A), (B), at 3374-75.

narrowly defined.[215] Thus, the number of potential litigants will be limited.

IX. CONCLUSION

In 1986 the confluence of politics and legislative momentum resulted in the enactment of the IRCA. The primary purpose of the Act was to impose sanctions against employers who hired undocumented aliens. Many in Congress feared that employers seeking to avoid the possibility of severe penalties would discriminate against anyone who appeared foreign, whether by name or by appearance. In response to this concern, Congress enacted the antidiscrimination provision of the IRCA. This provision, known as section 274B, prohibits discrimination on the basis of citizenship status or national origin. In order to enforce section 274B, Congress created the Office of the Special Counsel.

Congress vested in the Office the authority to investigate and prosecute claims of unfair immigration-related employment practices. The legislative history of section 274B clearly indicates that Congress did not limit the Special Counsel's right of action to claims alleging only intentional acts of discrimination. Practices neutral on their face but discriminatory in their impact also are prohibited.

*Carlos A. González**

215. *See supra* notes 21-24 and accompanying text.

* My thanks go to Robert Belton, Professor of Law, Vanderbilt University School of Law, who first introduced me to the topic of this Note and then guided me through its more difficult parts. I also want to recognize the assistance of my wife, Marilyn, without whom this project would never have reached fruition.