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The Unfair Immigration-Related Employment Practices Provision: A Modicum of Protection Against National Origin and Citizenship Status Discrimination

I. INTRODUCTION

The employer sanctions provision of the Immigration Reform and Control Act of 1986 (IRCA)¹ imposes penalties on employers who knowingly hire unauthorized aliens or who fail to comply with the Act's employment verification system.² This provision, envisioned as the principal means of curtailing the large influx of undocumented aliens into the United States,³ has elicited strong negative reaction from employers, minority groups, and members of Congress. Employers object because they are now subject to both civil and criminal penalties for failing to comply with the Act's stringent, and

1. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (to be codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

2. The IRCA provides that "[i]t is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—(A) an alien knowing the alien is an unauthorized alien [or] (B) an individual without complying with the requirements of subsection (b)." IRCA § 274(a)(1). Subsection (b) provides, in pertinent part, that "[a] person or other entity hiring, recruiting, or referring an individual for employment in the United States . . . must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien." IRCA § 274A(b)(1)(a). Verification requires examination of certain documents, such as a United States passport, certificate of United States citizenship, certificate of naturalization, unexpired foreign passport, if endorsed by the Attorney General, or a resident alien card. Certain documents, including a social security card, certificate of birth, or other documents established by regulation, may satisfy this requirement, provided they are accompanied by a driver's license, state identification card, or other document established by regulation. IRCA § 274A(b)(1)(A-D).

3. Indicative of the severe problem of controlling illegal immigration, the Immigration and Naturalization Service (INS) predicted that 1.7 million undocumented aliens would be apprehended during the 1986 fiscal year. H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 47, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. Immigration officials assert that this figure represents only a "small fraction of those who cross the border successfully and stay in the United States for years, [or] for a season." *Id.* In 1985, the INS apprehended 1.2 million undocumented aliens; in six of the past nine years, more than 1 million illegal aliens have been apprehended. *Id.*

The House Committee on the Judiciary reported that "[e]mployment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment." *Id.* at 46.

arguably cumbersome, regulations.⁴ Furthermore, Congress has, in effect, deputized employers as an adjunct enforcement arm of the Immigration and Naturalization Service (INS).⁵

Minority groups,⁶ civil rights groups,⁷ and members of Congress⁸ fear that employers will discriminate against Hispanic Americans,

4. For violating the IRCA's prohibition against the employment of unauthorized aliens, employers may be subject to money penalties ranging from \$250 to \$10,000 per violation. IRCA § 274A(e)(4)(i-iii). Penalties for failing to comply with the Act's verification procedures range from \$100 to \$1,000 per violation. IRCA § 274A(e)(5). An employer who engages in a "pattern or practice" of violations is subject to criminal penalties of up to 6 months imprisonment or fines of up to \$3,000 per violation, or both. IRCA § 274A(f)(1). Additionally, the Attorney General may seek to enjoin such practices in federal district court. IRCA § 274A(f)(2).

5. Employer sanctions "compel the employer to assume an enforcement role for the INS, by judging whether an applicant had violated the immigration laws and punishing him or her by denial of employment if he or she was 'found guilty.'" *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 274 (1981) (prepared statement of Arthur Flemming, Chairman, United States Commission on Civil Rights) [hereinafter *1981 House Hearings*] (quoted in Comment, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce*, 7 CARDOZO L. REV. 223, 232 n.62 (1985)).

6. Testifying before Congress, representatives of the League of United Latin American Citizens expressed the fear that sanctions would lead to increased discrimination against Hispanics. 129 CONG. REC. S6967 (daily ed. May 18, 1983) (cited in Comment, *supra* note 5 at 223, 246 n.181). A spokesman for the Mexican American Legal Defense and Education Fund (M.A.L.D.E.F.) also testified that Hispanic Americans may be mistaken for non-American residents, and would therefore be subjected to a higher risk of discrimination. *Joint Hearings 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*, 97th Cong., 2d Sess. 214 (1982) (statement of Anatonía Hernández, Associate Counsel, M.A.L.D.E.F.).

7. The United States Commission on Civil Rights, in considering an earlier version of the bill, voiced its concern that sanctions would "increase employment discrimination against U.S. citizens and legal permanent resident aliens who are racially or culturally identifiable with major immigrant groups." *1981 House Hearings*, *supra* note 5, at 268.

Furthermore, the American Bar Association objected to employer sanctions, as an "unworkable . . . and discriminatory procedure" for controlling undocumented immigration. American Bar Association, *HUMAN RIGHTS*, Winter 1983, at 11.

8. Congressman Robert Garcia of New York, vocal in his stand that employer sanctions will lead to discriminatory treatment of Hispanic Americans, asserted that "[a]s a shorthand for a fair identification process, employers would turn away those who appear foreign, whether by name, race or accent." *Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the House Subcomm. on Immigration, Refugees, and International Law and the Senate Subcomm. on Immigration and Refugee Policy*, 99th Cong., 1st Sess. 111 (1985) (quoted in H.R. REP. NO. 682, *supra* note 3, at 68).

Some members of Congress, however, have argued that the legislation provides adequate protection against discrimination even without the antidiscrimination provision. These members assert that sanctions can be avoided without producing discriminatory results through the use of the "simple steps to verify worker status" contained in the uniform verification process. Moreover, a Government Accounting Office study of the use of employer sanctions in other countries showed little or no evidence of discriminatory practices against noncitizens. H.R. REP. NO. 682, *supra* note 3, at 68.

other minorities, and authorized aliens in response to the threat of sanctions. These groups argue that "employers faced with the possibility of civil and criminal penalties will be extremely reluctant to hire persons because of their linguistic or physical characteristics."⁹ Congress thus included in the IRCA section 274B,¹⁰ the antidiscrimination provision, to provide express protection against discrimination on the basis of national origin or citizenship status. This antidiscrimination provision has provoked both controversy as to its necessity, given the existence of other antidiscrimination legislation, and uncertainty regarding its application.

This Comment will examine the antidiscrimination provision in the context of its legislative history, its relationship to other antidiscrimination legislation, and its requisite standard of proof. The authors' objectives are to examine the conflicting views concerning section 274B's proper interpretation, and to determine whether this Act does in fact constitute a substantial addition to existing civil rights legislation.

Specifically, this Comment will focus on the following: (1) the provision's origin and purpose; (2) its substantive aspects, including prohibited employment practices and protected classes, as well as its procedural enforcement mechanisms; (3) the provision's relationship to existing antidiscrimination laws, including section 703 of Title VII of the Civil Rights Act of 1964¹¹ and 42 U.S.C. § 1981, with attention to whether these laws adequately protect those classes contemplated by section 274B; and (4) whether the provision calls for a disparate impact or a disparate treatment standard of proof.

II. ORIGIN AND PURPOSE

Congress viewed the antidiscrimination provision as a necessary component of the IRCA and deemed the provision essential in order

9. H.R. REP. NO. 682, *supra* note 3, at 68. Already several major cities have reported an increase in the number of discrimination cases allegedly resulting from the enactment of employer sanctions. Complaints include the harassment of employees with Spanish surnames to verify their legal status, threats of unjustified dismissals, and outright discriminatory firings of "foreign looking" workers. Reinhold, *Reaction to Immigration Bill Is Sharply Split*, N.Y. Times, October 16, 1986, at B11, col. 1. The City of Chicago's Human Relations Commission stated that it receives "about 15 complaints a day from ethnic residents who have been fired or threatened with firings as a result of the new law." Moffet & Solis, *Employers Must Verify the Citizenship of All Workers Under Immigration Law*, Wall St. J., Nov. 26, 1986, at 13, col. 1. According to the New York Department of Social Services, "[M]ore than 64 cases of discrimination related to the Act have been documented as well as numerous threats of unjustified dismissals." Howe, *Enforcement of Aliens Law Faulted*, N.Y. Times, March 16, 1987, at Y9, col. 1.

10. Section 274B amends section 102A of the Immigration and Nationality Act.

11. 42 U.S.C. § 2000e-2 (1982).

to counterbalance the potential negative effects of employer sanctions. The purpose of employer sanctions is to remove unauthorized aliens from the workforce and thus requires "legality of residence as a precondition to employment."¹² As the House Committee on Education and Labor reported:

Because of this prohibition against employment of an unauthorized alien, a job applicant is potentially subject to alienage discrimination. Employers will be required for the first time to ascertain the immigration status of applicants. With this information an employer who wants to discriminate against non-citizens will be able to identify them.¹³

Not only will this information be readily available to employers, but the threat of sanctions will increase the likelihood that they will use this information to target potential victims to discriminate against. Employers, faced with civil and criminal penalties for hiring unauthorized aliens, may simply avoid individuals who are racially or culturally identifiable with major immigrant groups.¹⁴ Consequently, employers might refuse to hire American citizens who appeared foreign or aliens authorized to work but who had not yet attained full citizenship status.

The Act's sweeping amnesty provision further contributes to the possibility of discriminatory employment practices against noncitizens. The amnesty provision grants millions of undocumented aliens legal resident status and will allow them to remain in this country without requiring them to become United States citizens.¹⁵ The provision has thus broadened the base of potential citizenship discrimination victims, and further justifies the antidiscrimination provision's adoption.

With these factors contributing to an increased likelihood of

12. H.R. REP. NO. 682, *supra* note 3, pt. 2, at 12.

13. *Id.* at 12.

14. *See* Reinhold, *supra* note 9, at B11, col. 1.

15. According to the Census Bureau, the legalization or amnesty provision will offer legal status to the approximately 3.5 to 6 million unauthorized aliens residing in the United States. Pear, *Bill Would Bar Hiring Illegal Workers and Give Several Million Legal Status*, N.Y. Times, October 15, 1986, at A1, col. 1. After application for legal status, these aliens face approximately a seven to nine year residency requirement before full citizenship status can be attained.

To achieve amnesty, an alien must prove that he entered the United States before January 1, 1982 and that he has resided here continuously since then. Aliens may apply for legal status within the 18-month period commencing six months after the bill became law. The alien then receives temporary resident status and must keep this status for 18 more months, after which time, he has one year in which to apply for permanent resident status. After receiving permanent resident status, the individual must then spend five additional years in the United States before becoming eligible for citizenship. IRCA § 245A.

employment discrimination, along with the belief that present law provided inadequate protection,¹⁶ Congress realized that "if there is to be sanction enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs."¹⁷

III. UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES

The core provision of section 274B, titled "Unfair Immigration-Related Employment Practices," states that:

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.¹⁸

The provision protects not only citizens or nationals of the United States, but also those aliens classified as "intending citizens."¹⁹ The statute defines this latter class to include aliens lawfully admitted for temporary residence under the new legalization provision of the Act, and aliens granted either asylum or refugee status.²⁰ As a prerequisite to protection under section 274B, these individuals must evidence "an

16. For a discussion of the scope of existing laws, see *infra* notes 36-71 and accompanying text.

17. H.R. REP. NO. 682, *supra* note 3, pt. 2, at 12. It is important to note that the anti-discrimination provision is a "complement to the sanctions provision and must be considered in this context." H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess., at 87, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840. The provision will provide protection only as long as the sanctions are in effect. If the sanctions are repealed, the antidiscrimination provision will expire. Moreover, if the Government Accounting Office finds that no significant discrimination has occurred as a result of the sanctions, or that the antidiscrimination provision itself has placed an "unreasonable burden on employers," the provision will be repealed. *Id.*; see IRCA § 274A(a)(1).

18. IRCA § 274B(a)(1).

19. *Id.* Interestingly, the Supreme Court has pointed out that citizenship serves as a symbol of loyalty to this country and that those aliens who refuse to declare an intention to become citizens retain "primary duty and loyalty to a foreign country." *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979). Others argue that resident aliens, even though they have not declared an intention to become citizens, have the same commitment to their community as do United States citizens or those resident aliens classified as intending citizens; they have chosen to reside in the United States and thus all have a comparable interest in their community's political and economic well-being. Furthermore, the naturalization process does not significantly increase loyalty—it merely serves as a formality by which an alien's commitment is officially recognized. See generally *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1411-13 (1983).

20. IRCA § 274B(a)(3)(B)(i).

intention to become a citizen of the United States through completing a declaration of intention to become a citizen."²¹

The IRCA further specifies certain exceptions from coverage. The Act does not extend to "a person or other entity that employs three or fewer employees,"²² or to claims of national origin discrimination covered by the Civil Rights Act of 1964.²³ Additionally, claims of citizenship status discrimination are excepted if United States citizenship is required "in order to comply with law, regulation, or executive order," or if it is required by a "federal, state, or local government contract."²⁴ Furthermore, citizenship discrimination is not unlawful if, in the judgment of the Attorney General, a citizenship requirement is "essential for an employer to do business with an agency or department of the Federal, State, or local government."²⁵

Finally, the Act provides that it is not an unfair immigration-related employment practice for an employer to "prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two indi-

21. IRCA § 274B(a)(3)(B)(ii). The "intending citizenship" requirement will necessarily have the effect of excluding certain classes of aliens from protection under this section. Not only must the alien be a lawful resident, a refugee or an asylee who has formally declared his intention to become a citizen, but he must also satisfy rigid qualifications and deadlines for the naturalization process once he becomes eligible. Specifically, aliens who fail to complete their application for naturalization within six months of eligibility will not attain "intending citizen" status for the purposes of this section. Those aliens who became eligible for naturalization before the effective date of the Act have only a six month period to apply, or similarly forfeit "intending citizen" protection. IRCA § 274B(a)(3)(B)(ii)(I). Furthermore, an alien who has made a timely application but has not achieved citizenship status within two years will not be classified as an "intending citizen" under the Act. IRCA § 274B(a)(3)(B)(ii)(II); see also Kobdich & Swanson, *Section 102 of the Immigration Reform and Control Act of 1986: An Analysis of the Act's Employment Discrimination Provisions*, in *THE NEW SIMPSON-RODINO IMMIGRATION LAW OF 1986*, at 148, 159-62 (1986).

22. IRCA § 274B(a)(2)(A).

23. IRCA § 274B(a)(2)(B). Title VII of the Civil Rights Act of 1964 covers all claims of national origin discrimination involving employers with fifteen or more employees. 42 U.S.C. § 2000e(b) (1982). IRCA will affect only those employers with between three and fourteen employees.

24. IRCA § 274B(a)(2)(C).

25. *Id.* The question of whether an employer may raise a bona fide occupational qualification (BFOQ) affirmative defense remains open. An earlier version of the bill expressly provided for such a defense. Kobdich & Swanson, *supra* note 21, at 156. The present bill, however, is silent on the issue. *Id.*

Under Title VII, an employer may discriminate on the basis of religion, sex, or national origin if these characteristics are "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (1982). Without express provision for such a defense, courts will be forced to confront the question of whether a BFOQ defense will be applicable under the IRCA. See generally Taylor & Scharf, *Immigration Reform and the Federal Law of Employment Discrimination*, in *THE NEW SIMPSON-RODINO IMMIGRATION LAW OF 1986*, at 202, 215-16 (1986); Kobdich & Swanson, *supra* note 21, at 156-58.

viduals are equally qualified.”²⁶ Congress, therefore, has recognized a right of an employer to favor citizens over noncitizens in initial employment decisions, where both are equally qualified.²⁷

The IRCA further provides for the creation of the Office of the Special Counsel within the Department of Justice. The Special Counsel, to be appointed by the President, is charged with the primary responsibility of prosecuting unfair immigration-related employment claims.²⁸ Procedurally, “any person alleging that the person is adversely affected directly by an unfair immigration-related employment practice”²⁹ may file a charge with the Special Counsel. The Special Counsel will then investigate and determine whether “there is reasonable cause to believe that the charge is true” and decide whether to file a formal complaint with an administrative law judge.³⁰ The Office of the Special Counsel is also empowered to conduct investigations and commence enforcement proceedings on its own initiative.³¹

If the Special Counsel has not filed a complaint within one hundred and twenty days of receipt of the charge, the complainant may bring an action directly before an administrative law judge.³² To state a claim under this private right of action section, a plaintiff must allege a “knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity.”³³

If a private litigant or the Special Counsel proves that an employer engaged in an unfair immigration-related employment practice, the administrative law judge must issue a cease and desist

26. IRCA § 274B(a)(4).

27. *Id.* For a discussion of the legal problems posed in determining whether candidates are “equally qualified,” see Kobdich & Swanson, *supra* note 21, at 162-64; Taylor & Scharf, *supra* note 25, at 212-13.

28. IRCA § 274B(c)(1). This section has elicited concern that bureaucratic confusion will result from the creation of the Office of the Special Counsel. Enforcement of national origin discrimination claims will now be divided between two agencies. The Equal Employment Opportunity Commission (EEOC) is presently charged with enforcing Title VII’s prohibition against national origin discrimination in cases involving employers with fifteen or more employees. The Special Counsel, under the terms of the Act, is charged with acting upon national origin discrimination claims against employers with four to fourteen employees, as well as charges of discrimination based on citizenship status. This split of enforcement authority may well lead to “disparate treatment for claimants with essentially identical grievances.” H.R. REP. NO. 682, *supra* note 3, pt. 2, at 47.

29. IRCA § 274B(b)(1).

30. IRCA § 274B(d)(1).

31. *Id.*

32. IRCA § 274B(d)(2).

33. *Id.* The proper interpretation of this language and the appropriate standard of proof for actions commenced by both private litigants and the Special Counsel has been the subject of considerable debate. See *infra* notes 131-50 and accompanying text.

order.³⁴ Such an order may, at the discretion of the administrative law judge, include both remedial and punitive measures, including compliance with verification procedures, prospective record keeping, compensatory hiring, back pay, and fines.³⁵

IV. DOES SECTION 274B FILL A VOID IN EXISTING LAW?

Perhaps the primary impetus for the passage of the antidiscrimination provision rests on the premise that existing law, specifically Title VII of the Civil Rights Act of 1964³⁶ and 42 U.S.C. § 1981, fails to provide sufficient protection for victims of unfair immigration-related employment practices. Some members of Congress as well as representatives of the executive branch, however, have asserted that the antidiscrimination provision is duplicative of existing law and therefore unnecessary.³⁷ To assess whether section 274B does, in fact, create a distinct cause of action, it is necessary to examine these conflicting views in the context of the protections afforded by Title VII and section 1981.

A. *Title VII of the Civil Rights Act of 1964*

A majority of Congress viewed Title VII of the Civil Rights Act of 1964 as inadequate in this context,³⁸ because it does not expressly protect individuals from private employment discrimination based on alienage or citizenship status.³⁹ The Senate Judiciary Committee, in accord with this view, stated that:

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-citizenship status, the committee is of the view that this instant legislation must do

34. IRCA § 274B(g)(2)(A).

35. IRCA § 274B(g)(2)(B). Specifically, the employer may be required to: 1) maintain records for a period of up to three years, containing information regarding all applicants and hired personnel; 2) hire individuals directly and adversely affected by the discriminatory practices, with or without back pay; 3) pay a civil penalty of not more than one thousand dollars plus attorney's fees for each individual discriminated against and a penalty of not more than two thousand dollars for a second violation. *Id.*

36. 42 U.S.C. § 2000e-2 (1982).

37. H.R. REP. NO. 682, *supra* note 3, pt. 2, at 46.

38. *Id.* at 12. The Committee on Education and Labor noted the "inadequacy of current law to protect individuals from the potential act of discrimination that may uniquely arise from the imposition of sanctions." *Id.*

39. H.R. REP. NO. 682, *supra* note 3, pt. 1, at 69; H.R. REP. NO. 682, *supra* note 3, pt. 2, at 12; *see also* Espinoza v. Farah Mfg. Co., 462 F.2d 1331, 1334 (5th Cir. 1972) (Title VII has limited reach.).

so.⁴⁰

Congress thus attempted to eliminate this perceived void in existing law by the adoption of the antidiscrimination provision. Without this provision, private employers could freely discriminate against noncitizens to avoid the threat of sanctions.

Critics of the antidiscrimination provision, however, argue that any discriminatory employment practices resulting from the fear of employer sanctions are already adequately addressed by the national origin component of Title VII. Critics point out that although Title VII does not expressly cover discrimination based on citizenship status, guidelines of the Equal Employment Opportunity Commission address the issue.⁴¹ These guidelines deem citizenship status discrimination a violation of Title VII when it has the "purpose or effect" of discriminating on the basis of national origin.⁴²

In the operation of these guidelines, critics argue that because there is no meaningful distinction between "national origin discrimination" and "citizenship status discrimination," there is no reason for an expansion of the existing protections.⁴³ Even assuming a distinction can be made, however, opponents assert that the distinction is insignificant. The employer sanctions provision only prohibits hiring undocumented aliens and, therefore, will not have a discriminatory effect on the hiring of legal resident noncitizens.⁴⁴ Furthermore, if discrimination occurred at all, it would be directed at "anyone who seems foreign," and would thus fall within the ambit of Title VII's national origin protections.⁴⁵

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against "any individual" on the basis of race, color, religion, sex or national origin.⁴⁶ The statute expressly protects "any individual," whether an alien or a citizen, from employment decisions based on these illegiti-

40. H.R. REP. NO. 682, *supra* note 3, pt.1, at 70.

41. Current EEOC guidelines provide: "In those circumstances, where citizenship requirements have the purpose or effect of discrimination against an individual on the basis of national origin, they are prohibited by Title VII." 29 C.F.R. § 1606.5(a)(b) (1986).

42. *Id.*

43. H.R. REP. NO. 682, *supra* note 3, pt. 2, at 47. Critics argue that "[i]t is difficult to see any practical distinction between citizenship discrimination and national origin discrimination. The facts needed to prove discrimination on the basis of citizenship would stem from the same source as those relied upon with respect to national origin discrimination claims." *Id.*

44. *Id.*

45. H.R. REP. NO. 682, *supra* note 3, pt. 1, at 216.

46. Title VII provides, in pertinent part:

It shall be an unlawful employment practice for any 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,

mate considerations; however, the statute does not make discrimination on the basis of alienage or citizenship status illegal.

Furthermore, in the landmark case of *Espinoza v. Farah Manufacturing Co.*,⁴⁷ the Supreme Court held that the refusal to hire an individual because of his noncitizenship status does not constitute discrimination on the basis of national origin under Title VII.⁴⁸ The *Farah* Court stated that the "plain language of the statute" compelled its decision.⁴⁹ The Court explained that the term "national origin" refers to "the country where a person was born or more broadly the country from which his or her ancestors came."⁵⁰ According to the Court, citizenship does not fall within this definition.⁵¹ Furthermore, the Court asserted that "the statute's legislative history, though quite meager, fully supports this construction," as Congress, in its debates, never discussed citizenship as falling within the meaning of national origin discrimination.⁵² Moreover, in light of the fact that Congress requires United States citizenship as a precondition for employment in certain federal jobs, it could not have intended to prohibit private employers from imposing a citizenship requirement.⁵³

The Supreme Court did recognize, as reflected in present Equal

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 in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(a) (1982).

47. 414 U.S. 86 (1973).

48. *Id.* at 95. The plaintiff, a Mexican citizen, brought suit against the Farah Manufacturing Company alleging that the company's refusal to hire her because she was not an American citizen violated Title VII's national origin component. The district court held that citizenship discrimination constituted national origin discrimination under Title VII. The United States Court of Appeals for the Fifth Circuit reversed, concluding that the term "national origin" did not pertain to citizenship. The Supreme Court granted certiorari and affirmed the Fifth Circuit in an 8-1 decision. *Espinoza v. Farah Mfg. Co.*, 343 F. Supp. 1205 (W.D. Tex. 1971), *rev'd*, 462 F.2d 1331 (5th Cir. 1972), *aff'd*, 414 U.S. 86 (1973).

49. *Farah*, 414 U.S. at 88.

50. *Id.* at 88 (footnote omitted).

51. *Id.*

52. *Id.* at 88-89. The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, chairman of the house subcommittee that reported the bill: "'It means the country from which you or your forebears came . . . You may come from Poland, Czechoslovakia, England, France, or any other country.'" *Id.* at 89 (quoting 110 CONG. REC. 2549 (1964)).

53. In justifying this position, the Court stated that "to interpret the term 'national origin' to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This court cannot lightly find such a breach of faith." *Farah*, 414 U.S. at 90-91.

Employment Opportunity Commission guidelines,⁵⁴ that there are instances when the Title VII national origin component will prohibit discrimination on the basis of citizenship. This protection, however, is available only if the citizenship discrimination has "the purpose or effect of discriminating on the basis of national origin."⁵⁵ In *Farah*, however, the Court found that it had not been confronted with such a claim. The plaintiff, a lawfully admitted resident alien, had been denied employment not because of her Mexican national origin, but rather because she had not yet become a United States citizen.⁵⁶

Thus, after the *Farah* decision, an employer could legitimately refuse to hire lawfully admitted aliens based on their lack of United States citizenship. Federal courts have strictly applied the *Farah* holding, and have narrowly read the Equal Employment Opportunity Commission guidelines prohibiting pretextual citizenship requirements.⁵⁷ Prior to the 1986 antidiscrimination provision, an alien could prevail in his citizenship discrimination claim only by meeting a heavy burden of proof: that his employer's citizenship requirement was merely a pretext for discriminating on the basis of national origin.

54. For the most recent EEOC guidelines, see *supra* note 41. The Court refused to accept an earlier version of the guidelines which suggested that citizenship discrimination *always* has the effect of discriminating on the basis of national origin. This earlier interpretation of Title VII's national origin component stated:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship

29 C.F.R. § 1606.1(d) (1972). The Court held that this guideline "was entitled to great deference" but that it need not defer to an "administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Farah*, 414 U.S. at 94-95 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

55. 414 U.S. at 92.

56. *Id.* at 93. The *Farah* Manufacturing Company had a policy of hiring only American citizens, but did not discriminate on the basis of Mexican national origin. Over 96% of *Farah*'s employees at its San Antonio factory were of Mexican ancestry; in fact 97% of those who occupied the position for which Ms. Espinoza applied were also of Mexican ancestry. Furthermore, the worker hired in place of the plaintiff was a citizen with a Spanish surname. Thus, *Farah*'s citizenship requirement did not have the purpose or effect of discriminating against persons of Mexican origin. *Id.* at 92-93.

57. The Ninth Circuit, citing *Farah*, denied recovery to lawfully admitted aliens for a reverse discrimination charge and asserted that they "have no legal right or entitlement either to be hired by private employers or to be free of discrimination on the basis of alienage when seeking private employment." *Lopez v. Arrowhead Ranches*, 523 F.2d 924, 927 (9th Cir. 1975). Similarly, a federal district court applied the *Farah* holding, by analogy, to a claim of alienage and national origin discrimination under the Fair Housing Act. The court held that a citizenship requirement does not constitute national origin discrimination unless the plaintiff can prove the requirement was "a pretext for national origin discrimination." *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 568 (E.D. Va. 1981); see also *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 674 (N.D. Ill. 1984) ("national origin" means "place of birth," not alienage).

The antidiscrimination provision, therefore, does fill a void in Title VII protection. Employers can no longer use a citizenship requirement to discriminate. Furthermore, employees need not prove that an employer's citizenship requirement was pretextual to secure the new provision's benefits. Under this new provision, citizens and noncitizens now have a statutory cause of action to challenge citizenship-based discriminatory hiring practices. The provision, therefore, creates a substantive employment right for a previously unrecognized and unprotected class of potential discrimination victims.

B. Section 1981

Section 1981 of Title 42 of the United States Code, which has its origin in the Civil Rights Acts of 1866 and 1870, provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."⁵⁸ Opponents of the antidiscrimination provision cite this section as support for their argument that existing civil rights legislation adequately protects aliens from citizenship discrimination.⁵⁹ On a closer analysis, however, it is apparent that this section does not effectively prohibit private discrimination on the basis of citizenship.

As section 1981 was enacted pursuant to the thirteenth amendment to eliminate the badges and incidents of slavery, it is well-settled that the section applies to state and private racial discrimination.⁶⁰ The Supreme Court has also extended section 1981 protection to alienage discrimination involving state action.⁶¹ The Supreme Court, however, has yet to rule on whether section 1981 extends to private discrimination on the basis of alienage,⁶² and thus the issue has been left to the lower federal courts, which remain divided.

While several district courts have extended section 1981 protection to cover private alienage discrimination,⁶³ the majority of lower

58. 42 U.S.C. § 1981 (1982).

59. H.R. REP. NO. 682, *supra* note 3, pt. 1, at 216.

60. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 168-72 (1976) (section 1981 reaches private acts of racial discrimination); *see also* Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975) (Section 1981 "affords a federal remedy against discrimination in private employment on the basis of race").

61. *Graham v. Richardson*, 403 U.S. 365, 377 (1971) (holding that section 1981 extends "to aliens as well as to citizens" where there is state action); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) (holding that section 1981 "and the Fourteenth Amendment on which it rests in part protect 'all persons' against state legislation bearing unequally upon them either because of alienage or color").

62. In *Espinoza v. Farah Mfg. Co.*, the Supreme Court expressly declined to address this issue, stating that it was "neither raised before the courts below nor presented in the petition for a writ of certiorari." 414 U.S. 86, 96 n.9 (1973).

63. *See, e.g.,* Guerra v. Manchester Terminal Co., 498 F.2d 641 (5th Cir. 1974) (section

federal courts insist that section 1981 only applies to private and state racial discrimination and state alienage discrimination.⁶⁴ The Fifth Circuit, in *Guerra v. Manchester Terminal Co.*,⁶⁵ was the first to extend section 1981 protection to private alienage discrimination. Confronted with an employment discrimination claim brought by a Mexican citizen, the court reasoned that if section 1981 applies to private and state racial discrimination and state alienage discrimination, then consistency dictates reading the section to apply to private alienage discrimination as well.⁶⁶

It is important to point out, however, that the plaintiff in *Guerra* was Hispanic, an ethnicity often associated with race.⁶⁷ Serious questions are raised, therefore, as to whether the *Guerra* court, and others in accord, are invoking section 1981 to protect against alienage discrimination, or whether in fact their decisions are based on racial considerations.⁶⁸ The Fifth Circuit itself has subsequently characterized *Guerra* as having "strong racial overtones."⁶⁹

1981 extends to private alienage discrimination); *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 561 (E.D. Va. 1981) (asserting in dicta that an allegation of private housing discrimination based on citizenship states "a viable claim under Section 1981"); *Ortega v. Merit Ins. Co.*, 433 F. Supp. 135, 138-39 (N.D. Ill. 1977) (holding that section 1981 extends to private discrimination against aliens as well as blacks in insurance sales).

64. See, e.g., *DeMalherbe v. International Union of Elevator Constructors*, 438 F. Supp. 1121, 1142 (N.D. Cal. 1977) (holding that section 1981's legislative history requires a finding that private discrimination on the basis of citizenship is not within the section's protection; only private and state racial discrimination and state alienage discrimination are covered); accord *Ben-Yakir v. Gaylinn Assocs.*, 535 F. Supp. 543, 545 (S.D.N.Y. 1982).

65. 498 F.2d 641 (5th Cir. 1974).

66. *Id.* at 653-54. In further support of its holding, the court referred to section 1981's legislative history and the fact that Congress explicitly "broadened the language of the portion of the 1866 Act that has become Section 1981 to include 'all persons' in order to bring aliens within its coverage." *Id.* at 653 (footnote omitted).

67. See *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979); *Ortiz v. Bank of Am.*, 547 F. Supp. 550 (E.D. Cal. 1982); *Cubas v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976).

The Supreme Court will have the opportunity to provide guidance to the lower courts on the proper scope of section 1981 when it reviews *Al-Khazraji v. Saint Francis College*, 784 F.2d 505 (3d Cir.), *cert. granted*, 107 S. Ct. 62 (1986), and *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir.), *cert. granted*, 107 S. Ct. 62 (1986). These companion cases present the Court with the question of whether Arabs and Jews are protected under sections 1981 and 1982. See generally Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 42 U. MIAMI L. REV. 823 (1987) (Race is a subjective concept; the courts should look to whether the discrimination was racial in nature rather than attempting to define race when determining the scope of coverage under sections 1981 and 1982.).

68. See, e.g., *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 674 (N.D. Ill. 1984) (asserting that "the courts are merely viewing Hispanics as a distinct race; and invoking the statutory [section 1981] protections against racial discrimination").

69. *Bobo v. ITT, Continental Baking Co.*, 662 F.2d 340, 344 (5th Cir. Nov. 1981), *cert. denied*, 456 U.S. 933 (1982). It is also interesting to note that in *Ortega v. Merit Ins. Co.*, a

It remains to be seen whether other circuits will follow the Fifth Circuit and extend section 1981 protection to private alienage discrimination. Nonetheless, until the Supreme Court speaks on the question, victims of alienage discrimination cannot rely on section 1981 to redress their claims.⁷⁰

C. Section 274B's Contribution

The antidiscrimination provision creates a distinct cause of action, omitted from Title VII, and of an uncertain status under section 1981. Several factors, however, may limit the utility of section 274B to many potential discrimination victims and thus reduce its overall significance.

First, it is important to note that during congressional deliberations section 274B was seen as a complement to employer sanctions.⁷¹ Discrimination claims were thought to be actionable only if the discrimination resulted from an employer's reaction to the threat of sanctions. If courts or the Special Counsel place emphasis on this interpretation, the end result would be to exempt substantive violations of the provision that are not related to employer sanctions. Strongly militating against this interpretation, however, is the fact that the IRCA does not provide for such an affirmative defense; to escape liability, an employer cannot claim, under any express provision of the Act, that his actions were unrelated to employer sanctions.⁷²

Second, the "intending citizen" requirement will necessarily limit the number of potential discrimination victims who may bring a claim under the new provision. Many legal permanent resident aliens and temporary legal residents live and work in the United States, without intending to become citizens. Furthermore, temporary agricultural workers similarly do not intend to become citizens. These classes of

district court extended section 1981 protections to alienage discrimination, but characterized the plaintiff as a "brown-skinned resident alien of Hispanic (Mexican) origin." 433 F. Supp. 135, 137 (N.D. Ill. 1977). This characterization indicates that race may have been a factor in the court's decision.

70. As to national origin discrimination, courts have generally found that such discrimination lies outside the scope of section 1981, and that national origin plaintiffs must proceed under Title VII. *See, e.g.,* *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 867 (D. Ariz. 1975) (allegation of discrimination based on national origin not within scope of section 1981); *Martinez v. Bethlehem Steel Corp.*, 78 F.R.D. 125, 129 (S.D.N.Y. 1975) (no need to extend section 1981 to national origin discrimination as Title VII is sufficient protection); *Schetter v. Heim*, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969) (section 1981 "limited to racial discrimination" and does not cover national origin discrimination).

71. *See supra* note 14.

72. *See supra* notes 22-27 and accompanying text.

aliens have the legal status necessary to remain in the United States, yet they are still vulnerable to discrimination. Given the fact that Congress has, in the same law, generously provided amnesty to a large number of undocumented aliens, it appears inconsistent that it did not extend commensurate protection against discrimination for *all* authorized aliens.

Whether the section actually contributes significantly to existing civil rights legislation is still open to debate. Neither Title VII nor section 1981 adequately protects those individuals contemplated by section 274B. Although section 274B expands existing employment rights, it cannot be viewed as a sweeping civil rights provision because the terms of the provision apply only to a narrow class and may be limited to sanctions-related discrimination claims. Furthermore, because of varying interpretations regarding the section's requisite standard of proof, those expressly protected classes may, in actuality, face formidable barriers to the successful prosecution of their discrimination claims. If the statute calls for a disparate impact standard of proof, the level of difficulty in proving a discrimination claim is substantially reduced. Alternatively, if a disparate treatment model is applicable, protected classes will face a significantly greater level of difficulty in bringing their actions.

IV. DISPARATE IMPACT V. DISPARATE TREATMENT

Members of Congress and representatives of the executive branch, including the President, are engaged in a major debate concerning the appropriate standard of proof under section 274B.⁷³ The controversy centers on the meaning of the language contained in the Act's private right of action section, and whether that language gives rise to a disparate impact or a disparate treatment standard of proof. Specifically, the section states that a private litigant may bring an action if he alleges a "knowing and intentional discriminatory activity or a pattern or practice of discriminatory activity."⁷⁴

Parties on both sides of the debate concede that the "knowing and intentional discriminatory activity" language is indicative of a disparate treatment, or "intent" standard of proof.⁷⁵ The "pattern or

73. The proper role of presidential signing statements in statutory construction depends on a resolution of constitutional issues. For a discussion of these issues, see Comment, *Judicial Deference to the Chief Executive's Interpretation of the Immigration Reform and Control Act of 1986 Antidiscrimination Provision: A Circumvention of Constitutionally Prescribed Legislative Procedure*, 41 U. MIAMI L. REV. 1057 (1987).

74. IRCA § 274B(d)(2).

75. Upon signing the bill into law, the President asserted that the meaning of "knowing and intentional discrimination" is "self-evident." President's Statement on Signing S. 1200

practice" language, however, raises significant questions as to whether a demonstration of intent is required, or whether a plaintiff may proceed under the disparate impact theory, which does not require a showing of intent.⁷⁶ "Pattern or practice" actions are usually thought to be a variant of disparate treatment actions.⁷⁷ The fact that "pattern or practice" actions, however, share some of the characteristics of disparate impact actions fuels the controversy as to the appropriate standard of proof invoked by the term "pattern or practice."

Notwithstanding the importance of this issue, a fundamental question exists as to whether the language contained in the private right of action section narrows the scope of the Special Counsel's right of action.⁷⁸ The section's legislative history is interpreted by some commentators as indicating that Congress intended to narrow the private right of action, and therefore included the "knowing and intentional" and "pattern or practice" language in that section.⁷⁹ At the same time, however, Congress may not have intended this language to apply to the Special Counsel's right of action, as the Special Counsel section contains no such qualifying language.⁸⁰

The debate over the appropriate standard of proof invoked by the term "pattern or practice" must be analyzed in light of the disparate impact and treatment models applicable under Title VII. Because the two models have significant differences, and thus will greatly affect litigants bringing claims under the section, a brief overview of how each operates is appropriate. Additionally, the significance of the term "pattern or practice" must be reconciled with these concepts.

A. *Disparate Treatment*

Plaintiffs complaining of intentional discriminatory treatment by

Into Law, 22 WEEKLY COMP. PRES. DOC. 1534, 1535 (Nov. 6, 1986) [hereinafter President's Signing Statement]. The author of the antidiscrimination provision, Representative Barney Frank, agrees with the President that the language invokes an "intent" standard of proof. Statement and Supporting Documents Submitted by Rep. Frank for Inclusion in Record of December 17, 1986 Hearing Before the House Subcomm. on Immigration, Refugees, and International Law 2 (n.d.) [hereinafter Statement Submitted by Rep. Frank] (these documents are available from Rep. Frank's Washington D.C. office).

76. For discussion of the appropriate interpretation of "pattern or practice," see *infra* notes 143-151 and accompanying text.

77. C. RICHEY, *MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURTS*, at A9 (1986) (Pattern or practice actions fall within the disparate treatment theory.); Salomone, *Title VI and the Intent/Impact Debate: A Critical Look at "Coextensiveness"*, 1 HASTINGS CONST. L.Q. 16, 21 n.24 (1982) ("Pattern or practice is actually a variant of the disparate treatment theory").

78. See *infra* notes 152-77 and accompanying text.

79. Statement Submitted by Rep. Frank, *supra* note 75, at 1.

80. IRCA § 274B(c)(1); see *infra* notes 152-77 and accompanying text.

an employer proceed under a disparate treatment theory of recovery.⁸¹ Under this theory, "proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."⁸²

McDonnell Douglas Corp. v. Green,⁸³ the leading disparate treatment case, sets out "the order and allocation of proof"⁸⁴ in a disparate treatment action. To establish a prima facie case, the plaintiff must prove the following elements:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁸⁵

Establishment of these elements gives rise to a rebuttable presumption of intentional discrimination.⁸⁶ The burden then shifts to the employer "to articulate some legitimate nondiscriminatory reason for the employee's rejection."⁸⁷ The employer need not prove, however, that he was "actually motivated by the proffered reasons."⁸⁸ To rebut the presumption, he need only introduce evidence that raises a genuine issue of material fact as to whether his employment practices were discriminatory.⁸⁹

81. For discussion of this concept, see L. MODJESKA, *HANDLING EMPLOYMENT DISCRIMINATION CASES* (1980 & Supp. 1986).

82. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (citation omitted).

83. 411 U.S. 792 (1973).

84. *Id.* at 800; see also *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 254 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

85. *McDonnell Douglas*, 411 U.S. at 802 (footnote omitted). The Court, however, stated that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

86. *Id.* at 802. As the Court explained in *Furnco Construction Corp. v. Waters*, the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." 438 U.S. 567, 577 (1978).

87. *McDonnell Douglas*, 411 U.S. at 802. It must be noted that this burden is a burden of production, and not of persuasion. The burden of persuasion always remains on the plaintiff. See *Burdine*, 450 U.S. at 253 ("[U]ltimate burden of persuading the trier of fact . . . remains at all times on the plaintiff.").

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

89. See *Burdine*, 450 U.S. at 254-55. The Court continued by stating that "if the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Id.* at 255.

If the employer succeeds in rebutting the presumption of discriminatory intent, the plaintiff next has the opportunity to show by a preponderance of the evidence that the employer's proffered reasons are merely a pretext for intentional discrimination.⁹⁰ It is in this, the third evidentiary stage, that proof of discriminatory intent must be established.⁹¹ This may be accomplished through direct proof of intentional discrimination or inferentially through statistical or other evidence.⁹²

B. *Disparate Impact*

The Supreme Court articulated the disparate impact standard of proof in *Griggs v. Duke Power Co.*⁹³ The disparate impact theory focuses on employer actions that appear facially neutral but have discriminatory effects when statistically analyzed.⁹⁴ This model is generally the most easily satisfied, because it does not require that a plaintiff prove that an employer acted with discriminatory intent in an employment decision.⁹⁵ Rather, the disparate impact theory focuses on the "consequences of employment practices, not simply the motivation."⁹⁶ Because a facially neutral employment practice may adversely affect⁹⁷ one group more than another, and because proof of

90. *McDonnell Douglas*, 411 U.S. at 804. The plaintiff's burden of proving the pretextuality of the proffered reasons, however, "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256.

91. *McDonnell Douglas*, 411 U.S. at 804.

92. *Id.* at 804-05. Other evidence to show pretext includes facts as to the employee's treatment during her term of employment, an employer's reaction to the employee's civil rights activities, the employer's general policy regarding minority employment, and whether the employer's hiring standards are applied alike to members of all races. The *McDonnell Douglas* Court also noted that statistics may be helpful in determining whether the employer's refusal to hire an applicant "conformed to a general pattern of discrimination." *Id.*

93. 401 U.S. 424 (1971).

94. *Id.* at 429-30.

95. *Id.* at 432.

96. *Id.* The Court noted that the objective of Title VII was "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 classification." *Id.* at 431. The authors of Title VII, as the court reasoned, must have intended to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*

97. The basis for the Court's recognition of the disparate impact theory lies in section 703(a)(2) of Title VII. 42 U.S.C. § 2000e-2(a)(2) (1982). This section makes it an unlawful employment practice to "adversely affect" an employee's status "because of such individual's race, color, religion, sex, or national origin." The "adversely affect" language suggested to the Court that the consequences of discriminatory employment practices must be considered—as opposed to focusing exclusively on an employer's intent to discriminate. See Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 74 (1972).

intent poses too great a burden on plaintiffs,⁹⁸ the *Griggs* Court ruled that a showing of "good intent or absence of discriminatory intent"⁹⁹ is not dispositive.

To prove employment discrimination under *Griggs*, a plaintiff must establish that a facially neutral employment practice had a substantial disparate impact on a protected class of which he is a member.¹⁰⁰ The prima facie case is usually established through a statistical analysis of the employer's labor force, which demonstrates that the practice has resulted in a denial of equal employment opportunity to persons in a protected class.¹⁰¹ The burden then shifts to the employer to prove that the employment practice in question is justifiable as a "business necessity."¹⁰² If the employer successfully establishes the "business necessity" of his employment practices, the plaintiff may still prevail by demonstrating the existence of an alternative practice that would not adversely affect the plaintiff's class.¹⁰³

C. *Pattern or Practice*

The term "pattern or practice" has its origin in Title VII's enforcement provision.¹⁰⁴ Section 707 of the Civil Rights Act of 1964 authorizes the Attorney General to commence a civil action when he has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the

98. Proving intent under the disparate treatment theory produced "a series of almost insuperable difficulties, as individual cases became bogged down in the vagaries of fact-finding. The potential law enforcement thrust of the statute was lost in the search for circumstantial evidence that would reveal the employer's state of mind." Blumrosen, *supra* note 97, at 67.

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

100. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

101. See *Hazelwood School Dist.*, 433 U.S. at 307-08; see also *Segar v. Smith*, 738 F.2d 1249, 1269 (D.C. Cir. 1984). For a discussion of the use of statistics, see Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5 (1977).

102. *Griggs*, 401 U.S. at 431. The *Griggs* Court also noted that the employer must show that "any given requirement has a manifest relationship to the employment in question." *Id.* at 432. Subsequently, the Fourth Circuit, in *Robinson v. Lorillard Corp.*, stated that a court must take the following factors into account when determining whether an employment practice was justifiable as a business necessity: the safe and efficient operation of the business, the contribution of the requirement to the purpose it is designed to serve, and whether there are acceptable alternative policies or practices that would accomplish the business purposes for which the requirement was instituted. 444 F.2d 791, 798 (4th Cir. 1971).

103. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

104. 42 U.S.C. § 2000e-6(a) (1982).

full exercise of the rights herein described.¹⁰⁵

In 1972, Congress amended the statute to give the Equal Employment Opportunity Commission responsibility for prosecuting "pattern or practice" suits against private employers.¹⁰⁶

The term "pattern or practice" is not defined in Title VII, but the Act's legislative history provides guidance. During congressional deliberations prior to the statute's adoption, Senator Humphrey articulated the following definition: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature."¹⁰⁷ Courts are in general agreement, therefore, that the term "pattern or practice" applies to employment discrimination that is "not an isolated or accidental or peculiar event."¹⁰⁸

In *International Brotherhood of Teamsters v. United States*,¹⁰⁹ the Supreme Court stated that "pattern or practice" suits focus on systemic employer discrimination against protected minority groups.¹¹⁰ In a "pattern or practice" suit, the government has the burden of proving that discrimination was an employer's "standard operating procedure—the regular rather than the unusual practice."¹¹¹

A prima facie case is usually established through the use of statistical evidence indicating disproportionate minority representation in

105. *Id.*

106. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-6(c) (1982) (amending 42 U.S.C. § 2000e-6).

107. *Teamsters*, 431 U.S. at 336-37 n.16 (quoting 110 CONG. REC. 14,270 (1964)). Senator Humphrey went on to say:

There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.

. . . .

The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice

Id.

The *Teamsters* Court, in discussing the term's significance, stated that "pattern or practice" was "not intended as a term of art, and the words reflect only their usual meaning." *Id.* at 336-37 n.16. Courts have consistently followed this view in subsequent decisions. See, e.g., *United States v. Ironworkers Local 86*, 433 F.2d 544, 552 (9th Cir. 1971); *United States v. Mayton*, 335 F.2d 153, 158-59 (5th Cir. 1964).

108. *Ironworkers Local 86*, 433 F.2d at 552 (quoting *Hearings on H.R. 1037 Before the House Comm. on the Judiciary*, 86th Cong., 2d Sess. 13 (1960) (statement of Deputy Attorney General Walsh)).

109. 431 U.S. 324 (1977).

110. *Id.* at 336.

111. *Id.* (footnote omitted).

an employer's labor force.¹¹² After presentation of the prima facie case, the burden shifts to the employer to defeat the government's showing by demonstrating that its statistical proof is either "inaccurate or insignificant."¹¹³ The government need not, at the initial stage, offer evidence of discrimination for each person for whom it will ultimately seek relief.¹¹⁴ As the Court stated, "[T]he proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."¹¹⁵ The burden then shifts back to the employer to show that his refusal to hire a particular applicant was based on legitimate reasons.¹¹⁶

V. THE PRIVATE RIGHT OF ACTION UNDER SECTION 274B

A. *The President's Position*

In a public statement upon signing the bill, President Reagan expressly rejected the use of the disparate impact standard of proof under the IRCA.¹¹⁷ Pointing to the "knowing and intentional" and "pattern or practice" qualifying language in the private right of action section, the President asserted that all actions brought under section 274B, whether by the Special Counsel or a private litigant, "require a 'discriminatory intent' standard."¹¹⁸ According to the President, the meaning of "knowing and intentional discrimination" is "self-evident," and the language "pattern or practice" is "taken from the Supreme Court's disparate treatment jurisprudence" and thus also requires proof of discriminatory intent.¹¹⁹

In describing this position's practical effects, the President made the following statement:

[A] facially neutral employee selection practice that is employed

112. It is well-settled that statistics may be used to establish a prima facie case in "pattern or practice" actions. See, e.g., *United States v. Fresno Unified School Dist.*, 592 F.2d 1088 (9th Cir.), cert. denied, 444 U.S. 832 (1979); *United States v. Masonry Contractors Ass'n of Memphis*, 497 F.2d 871, 875 (6th Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971).

113. *International Bhd. of Teamsters v. United States*, 431 U.S. at 360. In defense of her actions, an employer may show that the allegedly discriminatory employment pattern is a result of "pre-Act hiring rather than unlawful post-Act discrimination," or that too few employment decisions were made to justify an inference that she engaged in a pattern or practice of discrimination. *Id.* at 360.

114. *Id.* at 361-62. The government must focus only on establishing a pattern of discriminatory employment decisions. *Id.* at 361.

115. *Id.* at 362.

116. *Id.*

117. President's Signing Statement, *supra* note 75, at 2.

118. *Id.*

119. *Id.*

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.¹²⁰

In the President's view, therefore, "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."¹²¹ In his statement, the President has articulated a limited view of a section 274B cause of action. This position stands in sharp contrast to Title VII which permits a plaintiff to proceed under the disparate impact or disparate treatment theories of recovery.

B. Congressional Opposition

Reaction to the President's position on this issue has been strong. Members of Congress, Hispanic groups, and civil rights advocates assert that the President's interpretation of the provision is too narrow.¹²² Representative Barney Frank, a primary author of the section, argues that the President's interpretation is in conflict with the language of the statute and its legislative history.¹²³ Representative Frank has taken the position that "pattern or practice" suits do not require proof of discriminatory intent, and therefore the President's imposition of an intent requirement is unwarranted.¹²⁴

According to this argument, the private action's "pattern or practice" language refers to "intentional, regular, OR repeated violations."¹²⁵ The term "intentional" is only one category, "listed in the

120. *Id.*

121. *Id.*

122. Pear, *Immigration Law Sets Off Dispute over Job Rights for Legal Aliens*, N.Y. Times, Nov. 23, 1986, at 1, col. 1-2. Representative Esteban Edward Torres, Chairman of the Congressional Hispanic Caucus, stated that he was "appalled at the President's interpretation of the anti-discrimination provision." *Id.* E. Richard Larson, Vice President of the Mexican American Legal Defense and Educational Fund, voiced his organization's view that "the President's interpretation of the law would severely undercut the protections against discrimination that Congress provided." *Id.*

123. See *Implementation of Immigration Reform and Control Act of 1986: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. of the Judiciary*, 99th Cong., 2d Sess. 91 (1986) [hereinafter 1986 Subcomm. Hearings].

124. Statement Submitted by Rep. Frank, *supra* note 75, at 1.

125. *Id.* (referring to Documents #2 and #3). In Document #2, entitled Modifications to

disjunctive," leaving both "regular" and "repeated" violations actionable without requiring the plaintiff to prove an employer's discriminatory intent.¹²⁶ Thus, the private right of action section provides for two separate and distinct causes of action: the first, involving "knowing and intentional discriminatory activities," invokes the disparate treatment theory of recovery; the second, concerning "pattern or practice" violations, invokes the disparate impact theory of recovery.¹²⁷ Interpreting "pattern or practice" as invoking the disparate treatment theory renders the term superfluous.¹²⁸

It is further argued that the "pattern or practice" language invokes the disparate impact theory of recovery, because both "pattern or practice" cases as well as disparate impact cases focus on the consequences of discriminatory employment practices, rather than on an employer's intent to discriminate.¹²⁹ Both seek to identify and remedy patterns of employment practices that, when statistically analyzed, show discriminatory effects on a protected minority group.¹³⁰ Thus, the similarities between the underlying purposes of both disparate impact and "pattern or practice" cases, along with the private right of action's legislative history, serve as the basis for critics' opposition to the President's interpretation.

C. *An Analysis of the Controversy*

The decision as to which standard of proof governs the private right of action section will be critical in analyzing the section's overall contribution to existing civil rights legislation. If the courts permit private litigants claiming discrimination based on national origin or

the Frank Amendment Proposed by Mr. Mazzoli and/or Mr. Frank, Item 2 is a proposal to "Limit the Private Right of Action to 'Pattern or Practice' Discriminatory Activity." This section called for "Statutory Language [that] will make it clear that 'pattern or practice' means that the conduct must be more than an isolated, accidental departure from otherwise non-violative practices; rather, intentional, regular, or repeated violations of the rights granted under the statute must be shown." Document #3 is a memorandum submitted by Rep. Frank's assistant to Senator Simpson proposing the same.

126. *Id.*

127. *Id.* at 2; see also Kobdich & Swanson, *supra* note 21, at 173.

128. In testimony before Congress, Rep. Frank asserted that the Justice Department's interpretation of the "pattern or practice" language as requiring proof of intent would, in effect, reduce the language to "excess verbiage." 1986 *Subcomm. Hearings*, *supra* note 123, at 88.

To counter Rep. Frank's position, a spokesman for the Justice Department asserted that "knowing and intentional" refers to a single act of discrimination, while "pattern or practice" goes to the "repeated nature of the act" but also requires intentional discrimination. Thus, the "pattern or practice" language is not superfluous. *Id.* at 89.

129. Kobdich & Swanson, *supra* note 21, at 176.

130. For analysis of "pattern or practice" and disparate impact, see *supra* notes 93-116 and accompanying text.

citizenship status to bring their actions without requiring proof of subjective discriminatory intent, then the courts are invoking the disparate impact theory.¹³¹ If, as the President asserts, a plaintiff must prove discriminatory intent, directly or inferentially, then the disparate treatment theory is applicable.¹³² The disparate treatment standard of proof, according to the President, applies to private actions brought under 274B, whether a plaintiff alleges a "knowing and intentional" or a "pattern or practice of discriminatory activity."¹³³ On a closer analysis, the President's position appears consistent with the provision's purpose, its legislative history, and judicial construction of the term "pattern or practice."

The underlying purpose of section 274B is to counter the potential discriminatory effects that may result from the imposition of sanctions.¹³⁴ Congress feared that employers, threatened with penalties for hiring unauthorized aliens, would *purposely* avoid hiring anyone who appeared or sounded foreign. An employer's refusal to hire these applicants would be a conscious and deliberate effort to avoid sanctions; thus such discriminatory practices are aptly termed "inherently intentional."¹³⁵ The argument that only an intent standard of proof applies to this section, therefore, appears consistent with the purpose of the antidiscrimination provision.¹³⁶

Moreover, those opponents of the President's position who argue that proof of intent is not necessary in "pattern or practice" actions have failed to take note of the House Committee on the Judiciary's report accompanying the bill.¹³⁷ The report states that the term "'pattern or practice' has received substantial judicial construction," and that the committee intended to follow a particular line of cases,¹³⁸ including *International Brotherhood of Teamsters v. United States*,¹³⁹ a disparate treatment case. These cases indicate that the term "pattern or practice" applies to "regular, repeated and intentional activi-

131. See *supra* notes 93-103 and accompanying text.

132. See *supra* notes 81-92 and accompanying text.

133. President's Signing Statement, *supra* note 75, at 2.

134. See *supra* notes 12-14 and accompanying text.

135. 1986 Subcomm. Hearings, *supra* note 123, at 62 (statement by Mark Disler, Assistant United States Attorney General).

136. Regulations proposed by the Department of Justice, with respect to the implementation of this provision, are in accord with this view. See Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 9,274 (1987) (proposed Mar. 23, 1987) (to be codified at 28 C.F.R. pt. 44).

137. H.R. REP. NO. 682, pt. 1, *supra* note 3, at 59.

138. *Id.* The House Committee on the Judiciary cited *United States v. Mayton*, 335 F.2d 153 (5th Cir. 1964); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1976); and *United States v. Ironworkers Local 86*, 438 F.2d 679 (9th Cir. 1971). *Id.*

139. 431 U.S. 324 (1976).

ties, but does not include isolated, sporadic or accidental acts.”¹⁴⁰ Thus, the House Committee on the Judiciary has been explicit in its definition of “pattern or practice”: the language under this provision applies only to widespread, intentional discriminatory activities and invokes the disparate treatment theory of recovery.

In addition, the proposed language that would have defined “pattern or practice” as “intentional, regular or repeated” violations was never incorporated into the provision.¹⁴¹ These same categories, originally listed in the disjunctive during conference negotiations, are now listed in the conjunctive in the final version of the House Committee on the Judiciary report.¹⁴² This expression of congressional intent demonstrates that “pattern or practice” actions require a showing of the regular and repeated nature of the violations *and* the employer’s discriminatory intent. If both the provision’s underlying purpose and the committee report’s definition of “pattern or practice” are also considered, it must be conceded that Congress, by its own doing, has set the standard for “pattern or practice” actions as requiring proof of intent.

Although the legislative history points to the conclusion that the term “pattern or practice” invokes the disparate treatment standard of proof, opposition to this interpretation is understandable. “Pattern or practice” and disparate impact cases are similar; at the *prima facie* level both utilize statistical evidence to demonstrate disproportionate minority representation in an employer’s workforce.¹⁴³ “Pattern or practice” actions, utilizing the disparate treatment standard of proof, however, also use statistical evidence at the *prima facie* level to raise a rebuttable presumption of intentional discrimination.¹⁴⁴ Although disparate treatment actions usually require satisfaction of the four *prima facie* elements set out in *McDonnell Douglas*,¹⁴⁵ the *Teamsters* Court noted that in “pattern or practice” actions, *McDonnell Douglas* “did not purport to create an inflexible formulation.”¹⁴⁶ The significance of *McDonnell Douglas* rests “not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial bur-

140. H.R. REP. NO. 682, *supra* note 3, pt. 1, at 59. Although this definition is related primarily to the Act’s criminal penalties provision for hiring unauthorized aliens, the report specifies that “the same interpretation . . . shall apply . . . for certain unfair immigration-related employment practices.” *Id.*

141. *See supra* note 125 and accompanying text.

142. H.R. REP. NO. 682, *supra* note 3, pt. 1, at 59.

143. *See supra* note 112 and accompanying text.

144. *Teamsters*, 431 U.S. at 335 n.15.

145. *See supra* note 85 and accompanying text.

146. *Teamsters*, 431 U.S. at 358.

den of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.”¹⁴⁷ Because the House Committee on the Judiciary cited *Teamsters* as the standard for “pattern or practice” actions brought under this section, the disparate treatment model, with its intent element, is the operative standard for private litigants.

Further controversy centers on the perceived difficulties of satisfying the intent element under the disparate treatment standard of proof. These perceived difficulties stem from the misconception that direct proof of intent is essential in all “pattern or practice” actions.¹⁴⁸ In fact, proof of intent in “pattern or practice” cases need not be direct or actual; an inference of intent established by the plaintiff in rebuttal is sufficient to defeat an employer’s defense.¹⁴⁹ This inference is usually established by a statistical analysis of the discriminatory effects on an employer’s workforce.¹⁵⁰ Although the intent standard appears to be exacting, the fact that intent may be established through an inference, based on statistical evidence, lessens the plaintiff’s burden.

VI. SPECIAL COUNSEL’S RIGHT OF ACTION

The “knowing and intentional” and “pattern or practice” language is not present in the Special Counsel section. The President has apparently taken the language of the private right of action, a procedural section, and concluded that this language also substantively restricts the Special Counsel’s right of action. The disparate treatment model, according to the President, is the only theory of recovery available, not only for private litigants, but also for actions commenced by the Special Counsel.¹⁵¹

The President, in justifying this position, stated that “[s]ection 274B tracks only the language of paragraph (1) of section 703(a) [of Title VII], the basis of the ‘disparate treatment’ . . . theory of recovery.”¹⁵² The use of the disparate impact standard “would be

147. *Id.*

148. 1986 Subcomm. Hearings, *supra* note 123, at 113. During subcommittee testimony, Mark Disler of the Justice Department stated that opposition to the President’s interpretation stems from the fact that “some members of [Congress] . . . feel that the intent standard is a narrower standard than it actually is” *Id.* at 62. Mr. Disler explained that “discriminatory effects can be used to identify intent” through a statistical analysis of an employer’s labor force. *Id.* at 63. Representative Barney Frank later conceded that he was, in fact, “too literally reading the President’s statement.” *Id.* at 103.

149. See *supra* notes 90-92 and accompanying text.

150. *Id.*

151. President’s Signing Statement, *supra* note 75, at 2.

152. *Id.*

improper," as paragraph 2 of section 703(a), the basis of the disparate impact model, "does not have a counterpart in section 274B."¹⁵³

The President's analysis of the Special Counsel's right of action by reference to the private right of action section has been characterized as "a grave error."¹⁵⁴ The legislative history, according to one view, supports the argument that Congress intended the scope of the private action to be smaller than that of the Special Counsel.¹⁵⁵ The scope of the Special Counsel's right of action, however, is not limited merely to actions alleging "knowing and intentional" discrimination or a "pattern or practice" of discrimination.

In support of this argument, proponents point out that the earlier version of the provision passed by the House of Representatives in 1984 did not qualify either the Special Counsel's right of action or the private right of action.¹⁵⁶ In a 1984 conference, however, objections as to the coterminous scope of the two rights of action resulted in a narrowing of the private right of action.¹⁵⁷ The compromise language, "knowing and intentional" and "pattern or practice," was inserted in the private action and survives in the statute's present form. By qualifying the private right of action, however, the Special Counsel is left with the right to bring an action without alleging "knowing and intentional" discrimination or a "pattern or practice" of discriminatory activity.

The issue thus becomes what standard of proof is applicable in an action commenced by the Special Counsel, and what impact, if any, will a determination that the disparate impact model is "inappropriate"¹⁵⁸ have on the viability of a section 274B claim. As one opponent argued, affording section 274B claimants the right to bring an action only under the disparate treatment standard of proof sets "a dangerous precedent for civil rights law. The effect is to say that normal civil rights protections against job discrimination don't apply to aliens, resulting in an unequal, dual system of enforcement."¹⁵⁹

Although it is apparent that following the President's interpretation would indeed set a "dangerous precedent"¹⁶⁰ for civil rights law, given the fact that litigants under Title VII may utilize both the dispa-

153. *Id.* See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

154. Statement Submitted by Rep. Frank, *supra* note 75, at 1.

155. *Id.*

156. *Id.*

157. *Id.*

158. President's Signing Statement, *supra* 75, at 2.

159. Pear, *supra* note 122, at 1, col. 1-2 (quoting Arnold Leibowitz, former Senate Counsel on Immigration).

160. *Id.*

rate treatment and impact theories, the President's position is soundly based on legislative history and the overall statutory scheme of section 274B. This interpretation, therefore, must be given deference.

Section 274B's purpose is to prohibit intentional discriminatory acts on the basis of an individual's national origin or citizenship status.¹⁶¹ The provision was not intended to target facially neutral employment practices that, even when objectively applied, have an adverse impact on a protected class. The provision, a complement to employer sanctions, was a compromise to alleviate congressional fear that sanctions would cause employers to discriminate against legal resident aliens and national origin groups.¹⁶² Thus, the provision targets only intentional discriminatory acts.

Moreover, the assertion that by qualifying the private right of action with the "knowing and intentional" and "pattern or practice" language leaves the Special Counsel with the right to bring an action without having to prove intent is an inconsistent attempt to justify a broader right of action for the Special Counsel. Congressional opponents argue that the President's interpretation of the private right of action as involving only the disparate treatment theory is erroneous. They assert that both the disparate impact and treatment theories are appropriate for private litigants.¹⁶³ At the same time, however, these opponents insist that they intentionally narrowed the private right of action because of objections to the coterminous scope of the private and Special Counsel rights of action.¹⁶⁴

If it is accepted that Congress narrowed the private right of action, however, the argument that a private litigant can bring an action on a disparate impact theory fails. If the private action was in fact narrowed, the only remaining theory is disparate treatment. Furthermore, if the disparate treatment theory is the only theory available to private litigants, then according to this argument Congress has vested the Special Counsel with a broader right of action than a private plaintiff's right of action. Such a conclusion departs from the traditional notion that the ultimate right to vindicate a claim remains with the individual.

Congress enacted the antidiscrimination provision to protect individual rights, and thus a broader right of action could not have been delegated to the executive branch. To vest the Special Counsel with the power to bring both disparate treatment and disparate

161. See *supra* notes 134-36 and accompanying text.

162. *Id.*

163. See *supra* notes 122-30 and accompanying text.

164. See *supra* notes 156-57.

impact actions, when a private litigant could bring only a disparate treatment action, would, in many cases, foreclose a private plaintiff from securing redress should the Special Counsel decide not to institute an action based on a plaintiff's complaint. Congress could not have intended to set up such a dual system of enforcement. If the private right of action is limited to the disparate treatment standard of proof, the Special Counsel's right of action must face the same limitation.

Perhaps the strongest argument in favor of the intent standard is that the language of section 274B tracks only section 703(a)(1) of Title VII, the basis of the disparate treatment standard of proof.¹⁶⁵ The antidiscrimination provision makes it unlawful to "discriminate . . . against any individual . . . because of such individual's national origin . . . or citizenship status."¹⁶⁶ Similarly, section 703(a)(1) of Title VII makes it unlawful to discriminate "because of . . . race, color, religion, sex or national origin."¹⁶⁷ The "because of" language, in both statutes, is recognized by courts as "traditional intent language"¹⁶⁸ and invokes the disparate treatment theory.

Furthermore, missing from section 274B is paragraph 2 of section 703(a) of Title VII. This paragraph makes it unlawful for an employer to "adversely affect an employee's status because of his race, color, religion, sex or national origin."¹⁶⁹ The "adversely affect" language is generally recognized as the basis for the disparate impact theory.¹⁷⁰ This language suggested to the *Griggs* Court that the focus of a discrimination claim should be on the effects or consequences of an employer's action and not on the employer's underlying intent.¹⁷¹ In fact, as one scholar noted, "applying the principle of liberal construction," as done by the *Griggs* Court, "requires an anchor."¹⁷² That anchor, paragraph 2 of section 703(a) of Title VII, is not present in section 274B.

The argument in favor of a disparate impact theory is thus unsupported by the statutory scheme of section 274B, its legislative history, and purpose. The argument may, however, have a persuasive effect on courts interpreting this legislation. Allowing a plaintiff to proceed under either the disparate impact or treatment theory is con-

165. See *supra* note 153 and accompanying text.

166. IRCA § 274B(a)(1).

167. 42 U.S.C. § 2000e-2(a)(1) (1982).

168. *Subcomm. Hearings, supra* note 123, at 63.

169. 42 U.S.C. § 2000e-2(a)(2) (1982).

170. See *supra* note 97 and accompanying text.

171. See *supra* note 96 and accompanying text.

172. See Blumrosen, *supra* note 97, at 74.

sistent with traditional civil rights legislation. Congress granted citizens, intending citizens, and national origin groups statutory protection against discrimination. To deny them the right to redress their claims under either the disparate impact or treatment theory leads to the conclusion that Congress may not have viewed these individuals as being entitled to the same protections afforded to other minority groups in the United States under Title VII. Because section 274B borrows much of its language from Title VII, and because of the inconsistencies in the statute and ambiguities in its legislative history, reviewing courts will ultimately have to decide the issue.

Courts have consistently sought to construe Title VII's language as broadly as possible to make the statute effective in eradicating discriminatory employment practices.¹⁷³ A reading of Title VII gives the appearance that proof of intent is essential.¹⁷⁴ The Supreme Court, however, in *Griggs*, held that proof of intent is not required in all Title VII actions.¹⁷⁵ A plaintiff, under Title VII, may use either the disparate impact or treatment theory.

Title VII's legislative history is regarded "only as an outer limit, not as a guide, apparently based on the premise that the courts [are] available to prevent serious error."¹⁷⁶ The courts, as the ultimate arbiter, must determine if a "serious error" has been made and devise an appropriate solution. The fact that Title VII and section 274B have ostensibly similar purposes, and closely parallel language, strongly suggests that the same standard of proof should apply to both Title VII and section 274B plaintiffs.

VII. CONCLUSION

The antidiscrimination provision is Congress's attempt to combat the potential negative effects of employer sanctions. Employer sanctions will impose severe penalties on employers who hire unauthorized aliens or who fail to verify their legal status. Because of the difficulties of verifying an alien's legal status and the potential that fraudulent working papers may become standard, employers may purposely avoid hiring anyone who appears or sounds foreign. Congress, through employer sanctions, has, in fact, created an incentive

173. *Id.* at 110.

174. See Taylor & Scharf, *supra* note 21, at 209.

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

176. Brief for the Chamber of Commerce of the United States as Amicus Curiae at 7-9, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (footnote omitted) *quoted in* Blumrosen, *supra* note 97, at 110.

for employers to discriminate on the basis of national origin and citizenship status.

Recognizing that existing law provided inadequate protections from such discriminatory practices, Congress included the antidiscrimination provision in the IRCA. Title VII does not expressly make discrimination on the basis of citizenship status illegal. Nor does its national origin component adequately bring citizenship discrimination within its coverage. Furthermore, until the Supreme Court speaks to the question, it remains uncertain whether section 1981 protections extend to alienage or national origin discrimination. The antidiscrimination provision, therefore, creates a substantive employment right for a previously unrecognized and unprotected class of potential discrimination victims.

Congress, however, has limited this right. Congress has imposed the "intending citizen" requirement and has left open the possibility that claims under the provision are actionable only if they are related to employer sanctions. Such limitations will seriously undermine the provision's effectiveness in eliminating *all* citizenship and national origin discrimination. These limitations, moreover, substantially reduce the provision's contribution to existing civil rights legislation.

Furthermore, because of the varying interpretations regarding the section's requisite standard of proof, those expressly protected classes may, in actuality, face formidable barriers to the successful prosecution of their discrimination claims. The position in favor of a disparate treatment standard of proof appears to be soundly based on section 274B's legislative history and overall statutory scheme. Courts will ultimately interpret this statute, however, and may very well find that if Congress has taken steps to grant national origin groups, citizens, and intending citizens protection against discrimination, this protection must be commensurate with that of other minority groups in the United States. To deny the same protection afforded other minority groups is to perpetuate the notion that legal resident aliens and national origin groups maintain an inferior status in the United States and thus are not entitled to equal employment rights.

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