NOTES

ALIENS AND THE RIGHT TO WORK: CONGRESS COMES TO TERMS WITH THE PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST ALIENS

> From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident. . . .[1]

Gustavo Fuentes, a permanent resident alien[2] of the United States, applied for employment with a major Washington, D.C. law firm. After an extensive interview, the firm discovered that Mr. Fuentes was not a United States citizen and thus eliminated him from consideration.[3] Mr. Fuentes is not alone. Many resident aliens have encountered similar discrimination.[4] In the past, private employers could discriminate against aliens without violating federal law.[5] Such discimination interfered with an alien's ability to make a living and thus jeopardized immigration policy.[6] Recently, however, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA")[7] making it an offense for an employer to discriminate on the basis of noncitizenship.[8]

This Note explores employment discrimination against aliens in the private sector.[9] Part I highlights the state of the law prior to IRCA,

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1. In re Griffiths, 413 U.S. 717, 719 (1973).

2. This Note uses the terms "alien," "resident alien" and "permanent resident alien" to refer to permanent resident aliens. *See infra* notes 12-14 and accompanying text.

3. Mr. Fuentes received his law degree from an accredited law school and was admitted to the Washington, D.C., and Florida Bars. *Anti-Discrimination Provision of H.R. 3080: Joint Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary and Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 419-20 (1985) [hereinafter *Joint Hearing*] (statement of the Mexican American Legal Defense and Educational Fund (MALDEF)).

4. *See id.* at 167 & 419-22 (statements of Rep. Garcia and MALDEF)(citing numerous examples of employment discrimination against aliens). Aliens face a problematic situation. As newcomers to this country, resident aliens try to keep a low profile and avoid pursuing legal advice. Thus, many potential alienage discrimination cases fall through the cracks.

5. *See infra* notes 22-43 and accompanying text.

6. *See infra* notes 64-79 and accompanying text.

7. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1324B).

8. *See infra* notes 86-96 and accompanying text.

9. This Note assumes that government regulation of private employment is desirable even if it

concentrating on federal antidiscrimination statutes and state and federal hiring policy as it related to aliens. Part II discusses immigration, economic and humanitarian policies that support antidiscrimination legislation. Finally, part III describes IRCA's antidiscrimination provision and concludes that the provision effectively addresses the problem of employment discrimination against aliens.

I. IMMIGRATION LAW AND POLICY

Congress has plenary power to enact laws controlling immigration.[10] In that role, Congress decides who may enter the country and the residency status of admitted individuals.[11] Permanent resident aliens are those individuals admitted into the United States who intend to abandon their foreign citizenship and reside in this country.[12] An applicant can qualify for permanent resident status if the labor market can accommodate the applicant's employment skills[13] or the applicant is closely re-

affects the employer's autonomy. Government regulation is a means to provide jobs for those groups suffering from unreasonable discrimination. Roosevelt, Jr., *Introduction*, 7 B.C. INDUS. & COM. L. REV. 413 (1966). Moreover, the American tradition is founded upon the belief of equality to all. Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1045 (1967).

10. *See* Fong Yue Ting v. U.S., 149 U.S. 698, 713 (1893). Congress' power to regulate immigration derives from a variety of constitutional sources: U.S. CONST. art. I, § 8, cl. 3 (commerce power); art. I, § 8, cl. 4 (naturalization power); art. I, § 8, cl. 11 (war power); art. I, § 9, cl. 1 (immigration and importation power), among others. *See generally* T. ALEINIKOFF & D. MARTIN, IMMIGRATION PROCESS AND POLICY 1-37; Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261-69.

11. *See* C. GORDON & R. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 2.1-2.2 (1985); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 320. Prior to 1882 the United States had no immigration laws restricting the entry of aliens.

12. Federal law defines the term "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1982). An alien who has lawfully been accorded the privilege of residing permanently in the United States as an immigrant is defined as "lawfully admitted for permanent residence." *Id.* at § 1101(a)(20). A resident alien may become a citizen if the individual, among other requirements, lawfully has resided in the United States for five continuous years and is of good moral character. *Id.* at § 1427(a).

13. The Immigration and Nationality Act allows aliens entry into the United States on a preferential basis according to set quotas. A stated number of visas are available to immigrants who are "members of the professions" or have "exceptional ability in the sciences or the arts" and whose services "are sought by an employer in the United States." 8 U.S.C. § 1153(a)(3) 1982). Similarly, a stated number of visas are granted to immigrants who can perform skilled or unskilled labor "for which a shortage of employable and willing persons exists in the United States." *Id.* at § 1153(a)(6). Such immigrant aliens are admitted to work in the United States only if:

> (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional

lated to a United States citizen or permanent resident alien.[14]

A permanent resident alien, because he does not yet owe allegiance to the United States, does not adopt legal rights equal to a citizen.[15] The Constitution, as well as federal and state law, distinguishes between "citizens" and "persons."[16] An alien, for example, cannot vote in public elections or run for political office.[17] He must, however, pay taxes and is subject to conscription.[18] In addition, he is subject to the Immigration and Nationality Act[19] as enforced by the Immigration and Naturalization Service (INS).[20] Prior to 1987, however, federal law did not protect a permanent resident alien's right to work free from discrimination.

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ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

Id. at § 1182(a)(14).

14. *See* 8 U.S.C. §§ 1151 & 1153(a)(1), (2), (4), (5) (1982).

15. *See* A. MUTHARIKA, THE ALIEN UNDER AMERICAN LAW ch. 1 (1980 & Supp. 1984) (also noting that an alien still owes allegiance to his country of origin). The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 165(1) (1965) stipulates the rights of aliens under international law. Section 166 provides that state conduct that "involves treating the alien differently from nationals or from aliens of a different nationality without a reasonable basis for the difference" is wrongful under international law. *Id.* at § 166.

16. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (seven year citizenship requirement to be a Representative); art. I, § 3, cl. 3 (nine year citizenship requirement to be a Senator); art. I, § 8, cl. 4 (Congressional power to establish rules of naturalization); art. II, § 1, cl. 5 (President must be a "natural born" citizen); amend. XV, § 1 (rights of citizens to vote may not be denied on the basis of race); amend. XXIV, § 1 (rights of citizens to vote may not be denied on the basis of failing to pay taxes); amend. XXVI, § 1 (right of citizens, age eighteen or older, to vote may not be denied on basis of age). *See also* A. MUTHARIKA, *supra* note 15, at 7-21 (1980), at 2-6 (Supp. 1984).

17. U.S. Const. amend. XIV, § 2.

18. *See* A. MUTHARIKA, *supra* note 15, at ch. 6 & 7 (1980 & Supp. 1984). A resident alien is also eligible for public benefits. He is entitled to public education, public housing, medical assistance, workmen's compensation and unemployment compensation. *Id.* at ch. 4. Moreover, a resident alien is eligible for welfare and state laws denying such benefits have been struck down on equal protection and preemption grounds. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948).

19. 8 U.S.C. §§ 1101-1525 (1982). Under the INA, an alien must register and report his address each year and report any change of address within ten days. *Id.* at § 1305. Every alien must carry with him any certificate of alien registration. *Id.* at § 1304(e).

20. Unfortunately, the INS has a reputation of inefficiency. Aliens fall victim to the INS' loss of case files, slow responses to problems and costs for each verification application. As a result, aliens lose job opportunities. *Joint Hearing, supra* note 3, at 266 (statement of Benjamin Reyes, Deputy Mayor, City of Chicago). In addition, the INS is more likely to harass aliens of certain national origins. The standard that the INS uses to raid the workplace is whether some of the workers appear to be undocumented immigrants. *Id. See also* Note, *INS Factory Raids as Nondetentive Seizures*, 95 YALE L.J. 767 (1986).

A. Private Employment

Several federal antidiscrimination statutes prohibit private employers from discriminating on certain bases. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of "race, color, religion, sex, or national origin."[21] In *Espinoza v. Farah Manufacturing Co.*,[22] the Supreme Court held that in prohibiting discrimination on the basis of national origin, Title VII does not prevent a private employer from discriminating against aliens.[23] Justice Douglas disagreed.[24] He noted that an employment policy barring individuals born outside the United States suggests a practice of discrimination on the basis of national origin.[25] He observed the double standard imposed on resident aliens: the law requires resident aliens to pay taxes and register for the draft while simultaneously permits private employers to discriminate against them.[26]

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21. 42 U.S.C. § 2000e-2(a)(1)(1982). The Equal Employment Opportunity Commission enforces Title VII. If a violation occurs, the court may issue an injunction, compel the employer to reinstate or hire the employee and provide back pay, or provide other remedy. *Id.* at § 2000e-5(g). Title VII also prohibits "reverse" national original discrimination against individuals on the basis that they were born in the United States. *See, e.g.*, Thomas v. Rohner-Gehring & Co., 582 F.Supp. 669 (N.D. Ill. 1984) (a company's discharge of United States citizens who were replaced by Swiss or German born individuals violated Title VII).

Each state has an anti-discrimination statute modeled after Title VII. Some of the state statutes cover employers of less than fifteen employees, thus providing private employees with broader coverage than Title VII.

22. 414 U.S. 86 (1973).

23. *Id.* at 88-91. The Court employed a plain meaning analysis of Title VII and concluded that Congress did not intend to prohibit discrimination against aliens in private employment. For a discussion of this landmark decision, see B. PARLIN, IMMIGRANT PROFESSIONALS IN THE UNITED STATES 67-73 (1976); Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Laws*, 35 U. PITT. L. REV. 499 (1974); Hoffheimer, *Employment Discrimination Against Resident Aliens by Private Employers*, 35 LAB. L.J. 142, 143 (1984); Smith & Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigrant Control*, 6 N.C.J. INT'L L. & COM. REG. 19, 25 (1980); Comment, *Aliens—Employment Rights—Private Employer's Refusal to Hire Based on Lack of Citizenship Held Not to Violate Civil Rights Act of 1964*, 6 N.Y.U. J. INT'L L. & POL. 297 (1973) (authored by Gary H. Greenberg).

24. 414 U.S. at 96 (Douglas, J., dissenting).

25. *Id.* at 96-97. Douglas used the Court's standard from Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971), that Title VII prohibits neutral practices if they create "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 414 U.S. at 96-97 (*citing Griggs*). Justice Douglas agreed with EEOC guidelines which prohibited discrimination on the basis of citizenship as a form of national origin discrimination. 29 C.F.R. § 1606.1(d) (1972)(revised). The majority rejected the EEOC interpretive guidelines. 414 U.S. at 93-95.

26. 414 U.S. at 98. *See supra* note 18 and accompanying text. Justicie Douglas also noted that the Court has held that a state cannot bar an alien from practicing law, In re Griffiths, 413 U.S. 717

Justice Douglas argued that the United States is a country of immigrants and, therefore, this country should not only protect the immigrant's children from employment discrimination but also the immigrants themselves.[27]

Like Title VII, section 1981 of the Civil Rights Act of 1870[28] does not address Justice Douglas' concerns. Section 1981 provides that "all persons . . . shall have the same right . . . to make and enforce any contract . . . and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . . ."[29] Although the Supreme Court has ruled that section 1981 prohibits private discrimination based on race,[30] it has not addressed whether this section prohibits discrimination on the basis of alienage.

Several federal courts have ruled that section 1981 prohibits only racial discrimination.[31] Others have held that section 1981 prohibits national origin discrimination only if the discrimination has racial overtones.[32] In *Guerra v. Manchester Terminal Corp.*,[33] the Fifth Circuit went further and specifically held that section 1981 prohibits employment discrimination on the basis of alienage.[34] The court has since restricted this holding, however, by describing the discrimination

(1973), or deny employment to aliens, Sugarman v. Dougall, 413 U.S. 634 (1973). 414 U.S. at 96. For a discussion of constitutional limits on state laws barring alien employment, see *infra* notes 44-52.

27. 414 U.S. at 99.

28. 42 U.S.C. § 1981 (1982).

29. *Id.*

30. Runyon v. McCrary, 427 U.S. 160, 175 (1976); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975); Cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-39 (1968) (interpreting section 1982). For a discussion of section 1981 and alienage discrimination, see Brousseau, *Alienage and the Constitution: The Requirement of State Action Under Section 1981*, 30 ARK. L. REV. 1 (1976); Das, *supra* note 23, at 546-53; Hoffheimer, *supra* note 23, at 145; Smith & Mendez, *supra* note 23, at 25; Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.—C.L. REV. 29, 90-98 (1980); Recent Decision, *Aliens May Maintain a Cause of Action for Private Employment Discrimination Under 42 U.S.C. § 1981 (1970)*, 6 VAND. J. TRANSNAT'L L. 660 (1973).

31. *See, e.g.*, Shah v. Mt. Zion Hosp. & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981); Manzanares v. Safeway Stores, 593 F.2d 968, 971 (10th Cir. 1979). The *Manzanares* court held that the meaning given race is not restrictive and persons with Mexican surnames have claims under section 1981 because such persons may be measured agains white citizens.

32. *See, e.g.*, Anooya v. Hilton Hotels Corp., 733 F.2d 48, 50 (7th Cir. 1984); Keating v. Carey, 706 F.2d 377 (2d Cir. 1983) (dictum); Bullard v.. OMI Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981) (dictum); Stroud v. Seminole Tribe of Fla., 574 F. Supp. 1043, 1046 (S.D. Fla. 1983); Saad v. Burns Int'l. Security Services, 456 F. Supp. 33, 37 (D.D.C. 1978).

33. 498 F.2d 641 (5th Cir. 1974).

34. *Id.* at 655.

prohibited in *Guerra* as having "strong racial overtones."[35] Two other federal courts have rejected the *Guerra* holding and found that section 1981 does not prohibit discrimination against aliens.[36] Thus, section 1981 provides essentially no redress for employment discrimination on the basis of alienage.

Limited protection against alienage discrimination in employment arises when such discrimination interferes with the collective bargaining process. The National Labor Relations Act (NLRA)[37] prohibits private employers and labor organizations from imposing unfair labor practices on employees.[38] In *NLRB v. International Longshoremen's Ass'n Local 1581*,[39] the Fifth Circuit held that a union's agreement with the employer to give preferences in job referrals based on the residence of the job applicant's family and on the applicant's citizenship constituted an unfair labor practice.[40] Similarly, in *Sure-Tan, Inc. v. NLRB*,[41] the Supreme Court ruled that an employer had engaged in an unfair labor practice when he reported his illegal alien employees to the INS in retaliation for their participation in union activities.[42] Although such specific actions may violate the NLRA, the Supreme Court has not ruled that the NLRA provides broad redress for discrimination in private employment on the

35. Bobo v. ITT, Continental Baking Co., 662 F.2d 340, 344 (5th Cir. 1981), *cert. denied*, 456 U.S. 933 (1982); Campbell v. Gadsen County Dist. School Bd., 534 F.2d 650, 653-54 n.8 (5th Cir. 1976).

36. Rios v. Marshall, 530 F. Supp. 351, 361 (S.D.N.Y. 1981); De Malherbe v. Inter. Union of Elevator Constructors, 438 F. Supp. 1121, 1142 (N.D. Cal. 1977). The *De Malherbe* court explicitly stated that it is the role of Congress, through legislation, not the courts, through utilizing current policies to interpret statutes intended to protect other policies, to decide whether aliens should have a remedy for private employment discrimination. 438 F. Supp. at 1142.

37. 29 U.S.C. §§ 151-69 (1982).

38. The NLRA provides that it is an unfair labor practice for an employer to discriminate in hiring or tenure to encourage or discourage union membership. *Id.* at § 158(a)(3). Similarly, it is unfair labor practice for a labor organization to attempt to cause an employer to discriminate against the employee. *Id.* at § 158(b)(1)(A). Aliens are considered "employees" under the NLRA. NLRB v. Actors' Equity Ass'n, 644 F.2d 939, 941 (2d Cir. 1981).

39. 489 F.2d 635 (5th Cir. 1974).

40. *Id.* at 637-38.

41. 104 S.Ct. 2803 (1984).

42. *Id.* at 2810-12. For a discussion of the *Sure-tan* decision and illegal aliens under the NLRA, see Note, *The Alienation of American Labor: The National Labor Relations Act and the Regulation of Illegal Aliens*, 13 N.Y.U. J. INT'L L. & POL. 961 (1981) (authored by Michael K. Wager); Note, *Striking a Balance Among Illegal Aliens, the INA, and the NLRA: Sure-Tan v. NLRB*, 12 PEPPERDINE L. REV. 679 (1985) (authored by Carl M. Howard); Comment, *Illegal Aliens as "Employees" Under the National Labor Relations Act*, 68 GEO. L.J. 851 (1980) (authored by Violette Witwer Fernandez).

basis of alienage.[43]

B. Public Employment

Although, prior to IRCA, private employers were free to close the door to permanent resident aliens, access to state government employment was somewhat less restrictive.[44] State statutes barring aliens from public employment are subject to constitutional scrutiny. In *Traux v. Raich*,[45] the Supreme Court ruled that a state's denial of an alien's right to work would undercut the federal immigration power to regulate the entrance and residence of aliens. The Court noted that aliens "cannot live where they cannot work,"[46] and thus found that the state provision was preempted.[47]

Similarly, the Court has invalidated state laws discriminating against aliens in public employment on equal protection grounds.[48] Because

43. Congress enacted the NLRA to encourage and protect collective bargaining. 29 U.S.C. § 151 (1982). *See* Sure-Tan, Inc. v. NLRB, 104 S.Ct. at 2808-09 (stating that the purpose of the NLRA, to encourage and protect the collective bargaining process, is consistent with holding employers guilty of unlawful labor practices regarding illegal aliens). Thus, the NLRA prohibits alienage discrimination only if the discrimination interferes with legitimate union activity. *Cf.* Comment, *supra* note 42, at 863 (author contends that excluding aliens from coverage of NLRA would be inconsistent with the purpose of the NLRA to enable collective bargaining).

44. Every state has enacted laws barring alien employment. *See* A. MUTHARIKA, *supra* note 15, ch. 9 at 82-87 (May 1981) (containing table of statutory restrictions on alien employment).

45. 239 U.S. 33 (1915).

46. *Id.* at 42. Congress has plenary power to control immigration. If an individual's employment skill will substantially add to the labor market, Congress will admit such an individual as a permanent resident. *See supra* notes 13-14 and accompanying text. Thus, the Court argues that state laws excluding aliens from public employment undermines the federal immigration laws. The Court has stated that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with . . . [the] federal power to regulate immigration . . . ." Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948). *See also* Graham v. Richardson, 403 U.S. 365 (1970) (discussing the federal-state relations restriction on state legislation discriminating against aliens).

47. 239 U.S. at 42. For a general discussion of the federal preemption doctrine, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 675-76 (11th ed. 1985); Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069 (1979) (authored by David F. Levi); Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980).

48. U.S. CONST. amend. XIV, § 1 provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has ruled that aliens are "persons" for purposes of the fourtheenth amendment and thus are entitled to equal protection of the laws. *See* Yick Wo. v. Hopkins, 118 U.S. 356 (1886). A state may not, therefore, deny a resident's alien's right to work. Traux v. Raich, 239 U.S. 33, 41 (1915). For a general discussion of the equal protection doctrine and alienage discrimination, see G. GUNTHER, *supra* note 47, at 670-76; Smith & Mendez, supra note 23, at 28-30; Note, *State Prohibitions on Employment Opportunities for*

aliens are a politically powerless minority, state laws classifying individuals on the basis of alienage are subject to strict judicial scrutiny.[49] However, the Court has allowed states considerable freedom to exclude aliens from public positions if the position involves a policy making function. In *Sugarman v. Dougall*,[50] the Court noted that the state has a legitimate interest in ensuring that those who run the government share an identity with the government they control.[51] Thus, states may discriminate against aliens if the employment involves a political function.[52]

In contrast, aliens are virtually unprotected from employment discrimination in federal government positions. The federal government has a long history of excluding aliens from federal employment.[53] Soon after Congress created the Civil Service Commission (CSC) in 1883, the CSC enacted a regulation prohibiting aliens from working in the federal service.[54] In 1976, in *Hampton v. Mow Sun Wong*,[55] the Supreme Court

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Resident Aliens: Legislative Recommendiatons, 10 FORDHAM URB. L.J. 699 (1982) (authored by Joy B. Peltz); Comment, *Constitutional Law—Equal Protection and Alien Discrimination—Broadening the Exclusion from Public Employment*—Cabell v. Chavez-Salido, 29 N.Y. L. SCH. L. REV. 749 (1985) (authored by Roy G. Bromberg); Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516 (1979).

49. *See* Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (holding that state could not exclude aliens from the practice of civil engineering); In re Griffiths, 413 U.S. 717 (1973) (holding that the state could not prohibit aliens from practicing law); Sugarman v. Dougall, 413 U.S. 634 (1973) (holding that state could not prohibit non-citizens from working in the competitive civil service).

The Court first applied strict scrutiny to invalidate a state law withholding welfare benefits from indigent aliens. Graham v. Richardson, 403 U.S. 365 (1971). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948) (The Court stated that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.").

50. 413 U.S. 634 (1973).

51. *Id.* at 643. The Court found, however, that the state law had an overly broad sweep, applying to those who do not perform policy making functions. *Id.*

52. In three cases between 1978 and 1982 the Court upheld state statutes barring alien employment in certain public positions. In all three cases the Court concluded that the positions served governmental functions. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (state statute required all "peace officers" to be citizens); Ambach v. Norwick, 441 U.S. 68 (1979) (state statute barred from employment as public school teacher any alien who was eligible for citizenship but refused to seek naturalization); Foley v. Connelie, 435 U.S. 291 (1978) (state law barred aliens as state troopers).

But see Bernal v. Fainter, 104 S.Ct. 2312 (1984). In *Bernal* the Court invalidated a state law barring aliens from becoming notaries public. The Court held that a notary public is not a position closely related to the state's political community. *Id.* at 2317-20.

53. *See* Smith & Mendez, *supra* note 23, at 30-42: Note, *Aliens in the Federal Civil Service*, 10 CORNELL INT'L L.J. 255 (1977) (authored by Monica A. Otto).

54. 5 C.F.R. § 338.101 (1976) provided:

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

voided the CSC regulation. The Court ruled that the CSC had no power to exclude aliens from federal employment pursuant to the government's interests in foreign policy, national security or immigration.[56] The Court, however, expressly declined to decide whether a determination by Congress or the President to enact such a provision would constitute a valid exercise of their respective powers.[57]

In response to the Court's decision, President Gerald Ford issued an executive order excluding aliens from employment in the federal civil service.[58] The President recognized Congress' power to exempt federal positions from the ban when the employment of aliens was in the national interest.[59] Congress subsequently has exempted certain government agencies from the ban.[60] Nonetheless, aliens are subject to disparate treatment in federal employment thus exacerbating the problems faced in seeking private employment.

II. THE NEED FOR REFORM

The barriers to employment faced by permanent resident aliens resulted in a need for reform. Employment discrimination against aliens conflicts with basic humanitarian principles[61] and prevents aliens from assimilating into American culture.[62] In addition, such discrimination

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(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States . . . .

55. 426 U.S. 88 (1976).

56. *Id.* at 114-15.

57. *Id.* at 116.

58. Exec. Order No. 11,935, 5 C.F.R. 7.4 (1980), *reprinted in* 5 U.S.C. app. at 3301 (1982) provides:

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.

(c) The Office may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

59. 41 Fed. Reg. 37,304 (1976).

60. The agencies excluded include: the National Aeronautics and Space Administration, 42 U.S.C. § 2473(c)(10)(1982); International Communications Agency, 22 U.S.C. § 1474(1) (1982) (relating to skill in foreign language); Public Health Service, 42 U.S.C. § 209(h) (1982) (consultants and fellowship recipients); Library of Congress, 2 U.S.C. § 169 (1982) (up to 15 positions); Smithsonian Institution, 20 U.S.C. § 46(a) (1982) (scientific and technical positions). *See* Smith & Mendez, *supra* note 23, at 33-35.

61. *See infra* notes 76-79 and accompanying text.

62. *See infra* notes 68-75 and accompanying text.

shields discrimination based on national origin and race.[63]

A. Justifying Racial and National Origin Discrimination

Employment discrimination against noncitizens could serve as a justification for discrimination on the basis of national origin. Justice Douglas recognized this in his dissent in *Espinoza*.[64] Ethnicity is a major cause of national origin discrimination.[65] Once an alien becomes a citizen, he becomes more assimilated into the language, customs and dress of the United States and less vulnerable to national origin discrimination than when he first arrived in the country. Rarely will an employer discriminate against a second generation United States citizen on the basis of national origin. The citizen has assimilated into the United States culture and national origin is not obvious. Those individuals new to the country whose ethnic background is most apparent, however, are more likely targets of national origin discrimination justified on the basis of alienage.

Similarly, the absence of a remedy for alienage discrimination could shield employment discrimination based on race, especially in locales where all the aliens are from one particular nation.[66] For example, employers having "citizen only" hiring policies in places where most resident aliens are Hispanic could avoid charges of racial or national origin discrimination, at least until the aliens become citizens. Unless the individuals could show that the discrimination had racial overtones,[67] they were without redress. Thus, not prohibiting discrimination against aliens increased the likelihood of that discrimination which was prohibited.

B. Immigration Policy and Humanitarian Principles

Discrimination based on alienage also contravenes immigration policy by frustrating Congress' goal to assimilate aliens into American culture. Congress carefully decides who can enter the country based on the needs of the labor market and the social community.[68] Congress permits those

63. *See infra* notes 64-67 and accompanying text.

64. *See supra* note 25 and accompanying text. *But see Joint Hearing, supra* note 3, at 219 (statement of Paul Grossman, labor attorney) (arguing that citizenship discrimination is not a meaningful problem and can be adequately remedied by finding national origin discrimination).

65. *See* Comment, *supra* note 23, at 305.

66. *See* Smith & Mendez, *supra* note 23, at 41.

67. *See supra* notes 28-36 and accompanying text.

68. *See supra* notes 10-14 and accompanying text.

aliens who fulfill certain requirements to live in the United States. The goal is to assimilate admitted aliens and, more importantly, ensure that they do not become a burden to society. In fact, unemployed aliens are eligible for welfare.[69] Employment discrimination may force such individuals onto the welfare roles. Such a result runs counter to immigration policy which seeks to assimilate resident aliens and promote such individuals' productivity.

Opponents of an antidiscrimination provision, however, argue that aliens threaten the job security of citizens.[70] They argue that aliens take jobs away from citizens and therefore create unemployment. Such arguments are more properly aimed at immigration policy[71] and do not justify employment discrimination against admitted individuals. In addition, resident aliens promote healthy job competition[72] and many, in fact, create jobs. The input of immigrants into the economy has produced many of this country's successful businesses.[73] Moreover, those aliens who accept low paying jobs do not take such jobs away from citizens. The employer often would not hire anyone for those positions if wages were higher.[74] In fact, an antidiscrimination provision would work in favor of citizens in such instances.[75] Because employers can pay aliens less, many employers discriminate in favor of aliens.

Discrimination in any form violates basic humanitarian principles. The Constitution and federal laws protect against many forms of discrimination.[76] Resident aliens also deserve protection from discrimination in private employment. Aliens must pay taxes and are subject to conscription.[77] Thus, aliens must sacrifice a portion of their earnings and their lives for the benefit of the American community. In addition, aliens

69. *See supra* note 18.

70. *See Joint Hearing, supra* note 3, at 87 (statement of Pay Choate, National Association of Manufacturers) (stating that because of unemployment there is nothing wrong with preferring a citizen over an alien); Price, *Immigrants Don't Take Jobs—They Make Them Many Times Over*, L.A. Daily J., Sept. 7, 1983, at 4, col. 3.

71. Such factors should influence a decision to admit an individual into the country in the first place. *See supra* note 13 and accompanying text.

72. *Cf.* Smith & Mendez, *supra* note 23, at 61 (noting the economic and cultural benefits aliens offer).

73. *See* Price, *supra* note 70 (arguing that immigrants create jobs and businesses).

74. *Id.*

75. 131 CONG. REC. §11,437 (daily ed. Sept. 13, 1985) (statement of Sen. Simpson). *Cf.* Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669 (N.D. Ill. 1984) (Title VII prohibits reverse discrimination) (discussed *supra* note 23).

76. *See supra* notes 21-52 and accompanying text.

77. *See supra* notes 15-20 and accompanying text.

have a need and right to work.[78] They thus contribute their time and money into the United States economy. Because aliens are key contributors to the economic and social welfare of the American community, the community should ensure such individuals equal access to employment. The United States is a country of immigrants.[79] As newly arrived immigrants, aliens have an urgent need of the law's protection.

IV. IMMIGRATION REFORM AND CONTROL ACT OF 1986

Congress responded to the need by enacting the Immigration Reform and Control Act of 1986.[80] IRCA contains an overdue antidiscrimination provision.[81] Other IRCA provisions, however, intensify the need for a remedy. IRCA provides for sanctions against employers who knowingly hire, recruit or refer for a fee any unauthorized alien.[82] In the absence of an antidiscrimination provision, such employer sanctions would create serious problems for resident aliens. To avoid sanctions, employers would enact a policy of citizen-only hiring or discriminate against those individuals who appear to be aliens.[83] Past experience demonstrates that when employer sanctions exist, employers will take extreme measures to comply.[84] Congress recognized this and provided that the employer sanctions provision will terminate after three years if reports show that a pattern of employment discrimination based on national origin or alienage results from the provision.[85]

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78. *See supra* notes 45-47 and accompanying text.

79. *See supra* notes 1 & 27 and accompanying text.

80. Pub. L. No. 99-6033, 100 Stat. 3359 (1986) (to be codified at 8 U.S.C. § 1324B).

81. *See infra* notes 86-96 and accompanying text.

82. IRCA § 101(a)(1), 100 Stat. § 3360 (1986) (to be codified at 8 U.S.C. § 1324A(a)(1)).

83. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 85, 87 (1986) [hereinafter H.R. Conf. Rep.] *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842. *See* 131 CONG. REC. S11,436 (daily ed. Sept. 13, 1985) (statement of Sen. Levin). *See also Joint Hearing, supra* note 3, at 137-38 (statement of Arthur S. Fleming, former Chairman, U.S. Comm. on Civil Rights) (employers, to avoid investigation and prosecution would deny jobs to "foreign looking or sounding persons"); *Id.* at 398 (statement of MALDEF) (employers may consider identification cards of resident aliens as forged and thus refuse to hire them).

84. After Project Jobs, which also included employer sanctions, employers were hesitant to rehire resident aliens. Joint Hearing, supra note 3, at 361-62 (statement of Raul Yzaguire, President, National Council on La Raza); *Id.* at 423-26 (statement of MALDEF).

85. The General Accounting Office (GAO) and a special task force will submit three annual reports to Congress analyzing whether a pattern of employment discrimination has resulted from the sanctions. IRCA § 101(j)-(k), 100 Stat. 3359, 3369-70 (1986) (to be codified at 8 U.S.C. § 1324A(j)-(k)). If the reports show a widespread pattern of discrimination from the sanctions, and if Congress approves the report, the sanctions will terminate. *Id.* at § 101(1), 100 Stat. at 3370 (to be codified at 8 U.S.C. § 1324A(1)).

A. The Antidiscrimination Provision

Congress specifically enacted IRCA's antidiscrimination provision to complement the employer sanctions.[86] The antidiscrimination provision prohibits employment discrimination with respect to hiring, recruitment, referral for a fee, or firing on the basis of national origin or alienage.[87] The provision contains four exceptions. It does not apply to employers with less than four employees.[88] Second, if a discrimination claim on the basis of national origin can be brought under section 703 of the Civil Rights Act or was filed and has not been dismissed under Title VII, the individual cannot assert an IRCA claim.[89] Third, the provision exempts discrimination pursuant to state or federal regulations which require citizenship for employment.[90] Finally, when persons are equally qualified, the provision allows employers to prefer a citizen over an alien.[91]

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86. H.R. CONF. REP. No. 1000, 99th Cong., 2d Sess. 85, 87 (1986) *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5840, 5842.

87. IRCA § 102(a)(1), 100 Stat. at 3374 (to be codified at 8 U.S.C. § 1324B(a)(1) provides:

> (1) General Rule—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 (as defined in paragraph (3)), because of such individual's citizenship status.

88. IRCA § 102(a)(2)(A), 100 Stat. at 3374 (to be codified at 8 U.S.C. § 1324B(a)(2)(A).

89. *Id.* at § 102(a)(2)(B) which provides that the antidiscrimination provision shall not apply to:

> (B) a person's or entity's discrimination because of an individual's national origin if the discrimination with respect to that person or entity and that individual is covered under section 703 of the Civil Rights Act of 1964.

Section 102(b)(2) provides:

> (2) NO OVERLAP WITH EEOC COMPLAINTS.—No charge may be filed respecting an unfair immigration-related employment practice described in subsection (a)(1)(A) if a charge with respect to that practice based on the same set of facts has been filed with the Equal Employment Opportunity Commission under title VII of the Civil Rights Act of 1964, unless the charge is dismissed as being outside the scope of such title. No charge respecting an employment practice may be filed with the Equal Employment Opportunity Commission under such title if a charge with respect to such practice based on the same set of facts has been filed under this subsection, unless the charge is dismissed under this section as being outside the scope of this section.

100 Stat. at 3375 (to be codified at 8 U.S.C. § 1342B(b) (2)).

90. IRCA § 102(a) (2) (C), 100 Stat. at 3374 (to be codified at 8 U.S.C. § 1324B(a) (2) (C). *See supra* notes 58 - 60 and accompanying text.

91. IRCA § 102(a) (4) provides that:

> Notwithstanding any other provision of this section, it is not an unfair immigration-related employment practice for a person or entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

IRCA also provides an enforcement mechanism. The President must appoint a Special Counsel within the Department of Justice to investigate and file complaints and prosecute all such complaints before an administrative law judge.[92] If the judge finds the complaint valid, the judge will issue a cease and desist order. The judge also may compel the guilty employer to hire or refrain from firing the aggrieved individual, provide back pay, and pay a civil penalty of up to $1,000 for the first offense and $2000 for any subsequent offense.[93]

Because Congress enacted the antidiscrimination provision to counteract the provisions for employer sanction, the antidiscrimination provision will also terminate if the employer sanction provision terminates.[94] In addition, Congress may repeal the antidiscrimination provision if the administration of the provision results in an unreasonable burden on employers[95] or the provision is used for purposes other than to protect against employment discrimination based on alienage or national origin.[96]

B. IRCA*: An Effective Solution*

IRCA provides an effective solution to the problem of employment discrimination on the basis of alienage.[97] In prohibiting discrimination on the basis of national origin or alienage, IRCA's antidiscrimination provision offers the necessary coverage.[98] The statute addresses those problems existing prior to IRCA[99] and those problems that the employer

100 Stat. at 3375 (to be codified at 8 U.S.C. § 1324B(a) (4)).

92. IRCA § 102(c) (1)-(2), 100 Stat. at 3375-76 (to be codified at 8 U.S.C. § 1324B(c) (1)-(2)). If special counsel fails to file a complaint within 120 days of receiving the charge, the person making the charge may so file directly with the administrative law judge if the charge involves a "knowing and intentional discriminatory activity." *Id.* at § 102(d) (2), 100 Stat. at 3376 (to be codified at 8 U.S.C. § 1324B(d) (2)).

93. *Id.* at § 102(g) (2), 100 Stat. at 3377-78 (to be codified at 8 U.S.C. § 1324B(g) (2)). *Compare supra* note 21 (Title VII remedies).

94. IRCA § 102(k), 100 Stat. at 3379 (to be codified at 8 U.S.C. § 1324B(k)).

95. *Id.*

96. H. R. CONF. REP., *supra* noe 83, at 87, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 5843.

97. Critics argue that there is no case law precedent for the law, except analagous cases under other antidiscrimination laws such as Title VII. They argue that a new statutory scheme will confuse lawyers, duplicate the EEOC's resources and cause procedural conflicts. *Joint Hearing, supra* note 3, at 212-17 (statement of Paul Grossman, labor attorney).

98. *See supra* notes 87-91 and accompanying text.

99. *See supra* notes 21-79 and accompanying text.

sanction provision creates.[100] The statute properly extends to discrimination with respect to hiring and firing,[101] coverage similar to that provided in Title VII.[102] At the same time, Congress avoided the procedural conflicts that would arise between IRCA and the Civil Rights Act.[103]

The antidiscrimination provision properly applies to employers of four or more employees.[104] Title VII applies to employers of fifteen or more employees.[105] Thus, IRCA provides redress to a greater number of victims of national origin discrimination than does Title VII. This extension is proper due to the potential increase in employment discrimination likely to arise from implementing employer sanctions.[106]

Congress, by instituting a sunset provision, directly confronted the risk of increased discrimination caused by such sanctions. IRCA requires annual reports showing whether a pattern of employment discrimination based on national origin or alienage results from the sanctions.[107] If discrimination results, the sunset provisions provide that both employer sanctions and the antidiscrimination provision will terminate.[108]

However, because discrimination exists separate from the newly enacted employer sanctions, Congress should consider retaining the antidiscrimination provisions even if employer sanctions terminate.[109] An antidiscrimination provision furthers immigration policy and humanitarian goals, and protects an alien's right to make a living. By enacting IRCA, Congress formulated an expedient method to combat alienage discrimination in employment. The rights of Mr. Fuentes and other permanent resident aliens now conform to United States immigration policy and humanitarian stance.

Wendy D. Fox

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100. *See supra* notes 80-85 and accompanying text.
101. *See supra* note 87.
102. *See supra* note 21.
103. *See supra* note 89 and accompanying text.
104. *See supra* note 88 and accompanying text.
105. *See supra* note 21 and accompanying text.
106. *See supra* notes 82-84 and accompanying text.
107. *See supra* note 85 and accompanying text.
108. *See supra* notes 85 & 94 and accompanying text.
109. Congress also may consider amending Title VII to include alienage discrimination. *See Joint Hearing, supra* note 3, at 210-17 (statement of Paul Grossman, labor attorney). Political realities suggest that an amendment to Title VII, however, will be difficult. *Id.* at 231 (statement of Rep. Bryant).