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Legal and Policy Issues in the Language Proficiency Assessment of International Teaching Assistants

IHELG Monograph 90-1

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Introduction

The decade of the 80's has brought with it an increase in both empirical and descriptive studies of various aspects of the international teaching assistant issue. To a large degree, these studies have come about in response to what has been called the "foreign TA problem," i.e. large numbers of international students have joined various university communities not only as graduate students, but also as teaching assistants. Their comprehensibility, intelligibility, and overall fluency, in addition to their teaching competence, have come under increasing regulation by state and institutional governing bodies in an attempt to insure the language proficiency of the international teaching assistant. This has been done in response to American students' complaints about their inability to understand and interact with their non-native English speaking instructors.

The development of research in response to complaints about international teaching assistant (thereafter, ITA) speech as well as the burgeoning increase of ITA programs designed to remediate language and cross-cultural teaching problems in both public and private institutions, have come about in response to what has been termed "practical, and immediate field problems of policy makers". ¹ Ruiz argues that the perception of language-as-problem is one of three possible orientations toward language planning, and suggests that all orientations "toward language and its role in society influence the nature of language planning efforts in any particular context." ² Thus, how the ITA issue is perceived – be it conscious or unconscious – determines the context for legislative policy and program development. It is our belief that the language-as-problem orientation, as contrasted with a language-as-right or language-as-resource orientation, has governed most legislative policy and program development to date.
As international education practitioners and legal professionals, we must acknowledge the planning frameworks we work within. We begin by exploring language and language-related legislation which have developed out of the "language-as-problem" context. Secondly, we address potential legal liability and the likely defenses to be asserted against these legal challenges. In the concluding portion of the paper, we propose an alternative framework to guide future ITA legislation and policy, employing Ruiz's "language-as-resource" orientation.

Our primary goal in this paper is to provide an overview of existing state legislation as well as university-based policies and to examine how such legislation or lack thereof has been interpreted for institutional purposes. Our intent is neither to praise nor to criticize the existing legislation and various institutional policies. Rather, we seek to explore the legality of the state statutes and university policies in light of current legislation in place to eliminate discrimination in the workplace. In the process, areas of potential concern to school officials, ITA program administrators, admission officers, international student advisors, and classroom instructors will be highlighted. We believe that without a comprehensive understanding of the long-term planning implications of current laws and institutional policies affecting the ITA, decisions may be made which will have a negative impact on international education.

In a time of increasing litigation, it appears likely that legal challenges to particular statutes and / or policies may eventually be instituted by individual ITAs. Accordingly, we believe it is imperative for international education practitioners and university attorneys to become familiar with how a court of law might decide legal challenges against the state and / or community which are initiated by aliens (including the ITA). At this time, since there is no federal legislation regarding language proficiency of ITAs or other instructors, we shall begin our discussion with an overview of state legislation aimed at monitoring proficiency of non-native instructors.
For the purposes of this discussion we would like to pose a hypothetical situation and for each area of law addressed, we will apply the law to this situation:

Assume that Charles was born and raised in France, attended private English medium schools throughout his lifetime and spoke English at home. Charles wishes to come to the United States as a graduate teaching assistant. Charles' counterpart, Jean-Pierre is a Haitian, but was born in the United States. Jean-Pierre attended New York public schools, but spoke French at home all of the time. Jean-Pierre is seeking a graduate teaching assistantship at a United States university.

The state statutes and university policies examined in this paper demonstrate how Charles and Jean-Pierre could be treated differently when applying for graduate teaching assistantships.

The status of state statutes which regulate instructor language proficiency changes very quickly. At the writing of this paper, eleven states have drafted statutes: California, Florida, Illinois, Missouri, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas, or at least a joint resolution which addresses language proficiency of particular educators. See Appendix A for the full text of each statute or resolution. In addition, although some states have not enacted specific legislation, may have enacted other policy decisions affecting the proficiency of ITAs. For example, Minnesota does not have a statute, but its state legislature has mandated that the University must demonstrate the oral and reading proficiency of its ITAs and in so doing has tied fiscal appropriations to the proficiency demonstration. The Oregon State System of Higher Education requires that international students who become graduate teaching assistants demonstrate writing
and speaking proficiency. A Kansas policy specifies a level of achievement on the SPEAK test (also known as the Test of Spoken English). In both Kansas and Arizona, formal procedures for evaluation of ITAs call for panels of educators to assess ITA language proficiency.

The following illustration compares and contrasts five areas covered under the eleven statutes and asks who is tested, what aspect of language proficiency is tested, whether public and or private institutions are affected, whether a standardized test is all that is required, and whether the test is mandatory.
### ILLUSTRATION A

**Statutes and policies regulating proficiency**

<table>
<thead>
<tr>
<th>State</th>
<th>CA</th>
<th>FL</th>
<th>IL</th>
<th>MO</th>
<th>ND</th>
<th>NM</th>
<th>OK</th>
<th>OH</th>
<th>PN</th>
<th>TN</th>
<th>TX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who Tested</td>
<td>all</td>
<td>all</td>
<td>all</td>
<td>TAs</td>
<td>all</td>
<td>n/a</td>
<td>all</td>
<td>TAs</td>
<td>all</td>
<td>all</td>
<td>all</td>
</tr>
<tr>
<td>What TA Tested</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>nns's</td>
<td></td>
<td></td>
<td>nns's</td>
<td></td>
<td></td>
</tr>
<tr>
<td>What Tested</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
<td>n/a</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
<td>oral</td>
</tr>
<tr>
<td>Pub/Priv</td>
<td>both</td>
<td>public</td>
<td>public</td>
<td>public</td>
<td>public</td>
<td>normal</td>
<td>public</td>
<td>both</td>
<td>public</td>
<td>both</td>
<td></td>
</tr>
<tr>
<td>Eval Only</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Mandatory Test</td>
<td>n/a</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>n/a</td>
<td>no</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>no</td>
</tr>
</tbody>
</table>
The majority of statutes profiled on the previous pages require that instructors at any level within the state system demonstrate oral proficiency. The Florida state statute requires for example, that all faculty be proficient, with the evaluation to be determined by the Test of Spoken English (TSE) or a similar test. Other states that have comparable statutes are Ohio, Pennsylvania, and Illinois which requires that "all persons providing classroom instruction" be proficient. California does not use the word proficiency but rather requires simply that the instructor speak English fluently. Similarly, the New Mexico Constitution requires that the legislature promulgate statutes providing for the training of teachers to be proficient in both English and Spanish.

Clearly, the original intention of this legislation was to ensure American college students that their instructors would be educated, intelligible speakers of English. This goal is appropriate and reasonable. However, the terminology used in the statutes cited above is somewhat arbitrary. Paikeday argues that the concept "native speaker of English" is almost "as arbitrary and elusive a concept as Abominable Snowman" and is used frequently for economically divisive purposes with nonnative speakers often relegated to jobs at lower salaries than native speakers.

Some of the language proficiency legislation which has been passed is both overinclusive and underinclusive. For example, the Missouri statute states:

1. Any graduate students who did not receive both his primary and secondary education in a nation or territory in which English is the primary language shall not be given a teaching appointment during his or her first semester of enrollment at any public institution of higher education in the state of Missouri. Exceptions may be granted in special cases upon approval of the chief academic and executive officers of the institution.
2. All graduate students who did not receive both their primary and secondary education in a nation or territory in which English is the primary language shall be tested for their ability to communicate orally in English in a classroom setting prior to receiving a teaching appointment. Such testing shall be made available by the public institution at no cost to the graduate student.

3. All graduate students prior to filling a teaching assistant position as a graduate student, who have not previously lived in the United States shall be given a cultural orientation to prepare them for such teaching appointment. 19

In our hypothetical example, Charles, who was born in France, attended private English medium schools throughout his lifetime and spoke English at home, would have to be tested if he or she sought employment as a teaching assistant at a Missouri public institution. This is because English is not the primary language of France. Yet, pursuant to our hypothetical case, Charles is most likely a native speaker of English. Accordingly, under Missouri law, its statute is overinclusive, that is to say, it mandates testing for a native speaker of English who happened to have been born outside of the United States. Clearly, Charles is harmed by the Missouri statute as he would be automatically held out of the job market for one semester even though he speaks perfect English. This demonstrates that where a person is born or where that person grows up does not necessarily determine the language he speaks. The harm occurs when statutes require testing of anyone not born in the U.S. or anyone who did not receive their education in a nation where English is the primary language, thereby placing all applicants from a foreign country under the testing requirement without analyzing whether that particular person is possibly a native speaker of English.
Under the Missouri statute, Jean-Pierre, the Haitian student, would not have to be tested since he, unlike Charles, was born in the U.S. and English is the primary language of the U.S. even though it is not Jean-Pierre's primary language. In Jean-Pierre's case, the Missouri statute is underinclusive, i.e., it does not mandate testing for a non-native speaker of English, who was born in the United States. The Missouri legislation then is functioning within the language-as-problem framework. In spite of the intent of the drafters of the Missouri statute, the ultimate result could be the opposite of that desired: a native speaker would be tested and a non-native speaker would not be tested.

We can see from the above example that because individuals born and raised in the United States do not have to take the test whereas those born and raised outside of the United States must take the test, a disproportionate burden is put on the foreign students. As we will see later, when one group of individuals must demonstrate abilities that are not required of all students applying for the same position, it is reasonable that that first group might rightfully claim that they had been discriminated against.

It is obvious that a challenge to the Missouri statute or any of the statutes outlined above will not escape a counter argument. Much of the law cited in Footnote Eighteen supporting an overbreadth challenge is far more broad than the statutes regulating the ITAs. For example, Robinson v. State held that a challenged statute was overbroad. This statute, in an attempt to cut down on armed robberies for attacks, provided that no person could enter public property while wearing any sort of a hood, masks, or any concealment of their face. Although this statute was aimed at a legitimate purpose, it restricted too much activity to achieve that end.20 The Missouri statute, however, is limited somewhat in its application. It has made an attempt to target those individuals who typically have problems with fluency. Indeed, any statute, no
matter how carefully it is drafted, will allow some to slip through the nets while holding on to some it should not. The difficulty regarding constitutionality enters when determining where to draw the line on the number who are allowed to slip through as opposed to those who wrongfully get caught. Applying the Missouri law as it stands, the university and states have a strong argument supporting the constitutionality of that statute in that statistically, those people who have difficulty with the English language have not grown up with the language or been educated in English medium schools.

In response to the argument that this statute or any other statute requiring English proficiency is underinclusive, it is foreseeable that a likely responsive argument by the states and/or universities will be that to require all TAs to be tested is far too demanding and is clearly overinclusive. Additionally, the amount of time and additional costs involved in administering all of the tests would severely burden the university officials such that no testing could be done, therefore defeating any attempt to protect the American students.\textsuperscript{21}

Just as the intent of the legislation is actually defeated by the language of the legislation, so too, the actual intent of employment actions, i.e., to help international TAs and American students, could be defeated by the employing institutions applying unduly broad or restrictive policies and statutes. The description of exactly whose English is being regulated becomes more complicated when various institutional policies are examined. The chart on the following pages summarizes the testing policies of nine universities\textsuperscript{22} (Illustration B). There is tremendous variation in descriptions of individuals who must be tested.
Illustration B
A Selection of University Policies Regarding ITAs

<table>
<thead>
<tr>
<th>George Washington U</th>
<th>U of IL (Chicago)</th>
<th>U of IA</th>
<th>U of KS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provides for a mandatory ITA program for all International graduate students who wish to be TAs. If a foreign student lives in the area, the school allows for an oral interview.</td>
<td>All international students must take one test, SPEAK or TSE and the student must be interviewed. SPEAK score must be +180. Requires all foreign students with a score between 180 and 230 to take a communication class.</td>
<td>All TAs who are non-native English speakers are tested. Appears to require all ITAs teaching for the first time to attend orientation program.</td>
<td>All non-native English speaking applicants must achieve at least 240 TSE or SPEAK or successfully complete the communication course prior to appointment.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>U of MN</th>
<th>U of MO</th>
<th>Ohio U</th>
<th>UW (Milwaukee)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Test all non-native English-speaking TAs with SPEAK. Must score +230 and if not achieved, must attend a communication class.</td>
<td>Focus on all int'l TAs. If not previously in U.S. must take cultural class. After SPEAK all ITAs must take intensive training. School requests feedback from students.</td>
<td>Test non-native English speakers. TSE score must be +240. Exception allowed with a mini-lesson. Appears to focus correspondence on all foreign students. Non-English-speaking countries are focused on in brochure.</td>
<td>No mandated policy. Require orientation program at which time English is subjectively tested. Also use SPEAK test. Move to test all non-native English speakers.</td>
</tr>
</tbody>
</table>

TX Tech U
appropriations bill requires testing of all professors whose primary language is not English. Requires ALL foreign students to attend communications workshop regardless of native language.
Basically, our initial research has shown that the individuals targeted for language proficiency testing differ from state to state and institution to institution. Further, for universities in states that have no specific statutory regulation, we note this same range of targeted individuals.

As suggested above, the policies developed at various institutions have developed out of a perceived need to resolve a problem. The ITA training programs which have developed from the policies have been designed by professionals who are deeply committed to providing a solid language and culture base to enable international teaching assistants to move smoothly into their academic teaching assignments. Unfortunately, the onus for both repair and development of successful communication strategies is placed squarely on the shoulders of the speakers, the ITAs. It is not surprising that from within the planning framework of problem solving, fixing the language deficits of international teaching assistants has been seen as both the necessary and only remedy.

However, as has been argued elsewhere, while these remedies may be necessary, they may in fact be insufficient because the interactive nature of student–instructor relations is not fully considered: when language policies are implemented which do not place a certain proportion of responsibility for the successive classroom communication on the listeners, there is a disparate impact on the speaker. With the exception of the University of Missouri system which has gone outside of the scope of the Missouri Statue in requiring that all teaching assistants be treated equally, American teaching assistants (ATAs) are not being held to the same standards (See Appendix B and Illustration B - infra). What is unusual here is that we have the
Missouri state statute appearing to put a larger burden on international students, while in speaking to the competency of all teaching assistants, the state university system's manner of dealing with the statute is to be more inclusive than what the statute provides for.

In the not too distant future, it may be that an ITA could bring charges of discrimination on the basis of national origin, alienage or race against a particular institution adopting ITA regulations that favor Americans over aliens. Again, it is not our intention in this paper to promote such action nor to preclude it. Rather, we are simply raising an issue that must be discussed for the protection of all involved. Having provided a potential reason that litigation could be brought about, we now move to the second section of the paper and explore under what statutes and U.S. Constitutional provisions a challenge might be raised, along with likely defenses to be asserted by the states and universities.

II. How might a challenge to the legality of certain statutes and policies be brought about?

The most likely charge that could be brought by the aggrieved ITA would be discrimination on the basis of national origin. The ITAs would allege that they had been discriminated against as reflected in their being asked to take tests to determine their proficiency while their American counterparts did not have to take any tests or cultural orientation classes.

Let us return to our hypothetical examples of Charles and Jean-Pierre, and let us assume that these two students will be applying for graduate TA positions within the Missouri state system. Under the Missouri statute, Charles, who has grown up in France speaking English at home and studying in an English medium school, would be subjected to a series of tests: SPEAK and potentially, teaching demonstration tests while Jean-Pierre, his Haitian counterpart would not have to take the test.

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At Ohio University, two elements of the criteria for who should be screened include:

"Native speakers of English from the U.S., Canada, Great Britain, Australia or New Zealand can be assumed to have spoken language proficiency and are thus exempted from the initial screening process and the on campus testing. Please note that the critical factor here is not citizenship, but native language. A citizen from Puerto Rico might have language problems.

All those who are not native speakers of English from the U.S., Canada, Great Britain, Australia or New Zealand should be screened."

(See Illustration B - supra).

With respect to our own hypothetical ITAs, Charles and Jean-Pierre, the question of who is a native speaker and who has to be tested is problematic. Applying the requirements of Ohio University's policy, we see that Charles, who is not from an exempted country, even though he speaks English fluently, is required to go through the testing procedure. Because ITA program administrators would likely assume Jean-Pierre to be a native speaker of English even though French is his native language, he would probably be excused from any testing. The issue of who is a native speaker of English is being confounded with who is a citizen in spite of the best attempts of the University to separate them.

The two policy examples which we have cited come from institutions with clear-cut effective ITA programs. Although international education administrators have designed programs to allow the ITAs to move smoothly into the classroom, even the best policies could be sorely put to the test, and well-intending administrators and their universities could unwittingly be named defendants in lawsuits.
We have developed potential circumstances under which a claim of national origin, or alienage, or even race discrimination could arise. The following section of this article explores the legal strategies which could be employed by an ITA to make a claim of discrimination a reality to the university. Illustration C outlines the six most likely statutes which would be drawn upon to make the claim.

III. On What Statutory Basis Can a Discrimination Claim Be Made?

Title VII of the 1964 Civil Rights Act

Of the six potential claims discussed in this article, Title VII of the 1964 Civil Rights Act is the most likely statute to be used against a college or university. This statute specifically states that it is an unlawful employment practice for an employer who employs more than fifteen employees, to discriminate on the basis of national origin27 (See Appendix B). National origin is "the place where one is born or where an ancestor is born, as well as the physical, cultural or language characteristics of an ethnic group."28

The Supreme Court has held that a person cannot be discriminated against just because they were born in a country other than the United States.29 This case did not hold that an employer cannot discriminate on the basis of citizenship or alienage, but it does recognize the protection afforded to those people who are discriminated against because of their national origin. It is important to distinguish national origin from citizenship. For example, one can be a citizen of the United States and of French national origin. Espinoza said that employers can treat citizens differently than non-citizens, i.e., certain jobs can require citizenship, therefore excluding aliens from eligibility for that job. Restrictions which provide which aliens can be excluded will be discussed infra under the Immigration Reform and Control Act of 1986.

After the Court rendered its decision in Espinoza, the Equal Employment Opportunity Commission modified the EEOC guidelines to require a citizenship
ILLUSTRATION C

DISCRIMINATION IS CONTEMPLATED

POTENTIAL CAUSES OF ACTION

Title VII and/or Due Process and/or Title VII and/or If intending citizen and/or 42 USC 1981 and/or 42 USC 1983

Disparate Treatment and/or Disproportionate Impact

IFCA

POTENTIAL DAMAGES PLAINTIFFS COULD RECOVER

1. TA COULD RECEIVE BACK WAGES;
2. TA COULD BE REINSTATED;
3. TA COULD BE AWARDED CIVIL DAMAGES;
4. UNIVERSITY COULD BE ASSESSED WITH PUNITIVE DAMAGES IF CONDUCT IS WILLFUL;
5. UNIVERSITY COULD LOSE FEDERAL FUNDING;
6. COURT COULD DECLARE STATUTE UNCONSTITUTIONAL;
7. COURT COULD ORDER UNIVERSITY TO CEASE AND DESIST APPLICATION OF POLICIES.
requirement to not have the purpose or effect of discriminating on the basis of national origin. If a U.S. citizenship requirement does have this effect, it will be held unlawful.\textsuperscript{30}

A more recent case than Espinoza focused on international students in American Universities.\textsuperscript{31} The facts of Ahmed v. the University of Toledo indicate that the University required the international non-immigrant students to carry health insurance in order to attend the University of Toledo. The District Court held that this requirement was not discriminatory on the basis of alienage because international permanent residents were not required to carry health insurance and therefore the requirement was not directed toward international students as a class. Rather, the requirement focused on a sub-part of a class of international students, those who had not sought permanent residence in the United States.\textsuperscript{32} The court found that these non-immigrant students did not make up a suspect class.\textsuperscript{32} The policies and statutes under scrutiny in this paper do not distinguish between immigrant and non-immigrant aliens. The policies of the Universities overall tend to clump all aliens into one classification even though the term alienage is not used.\textsuperscript{33}

Our research has not indicated that any universities to date have sought to use U.S. citizenship as a requirement. As we observed with the Ohio University's regulation, the intention there was specifically not to focus on citizenship. Our purpose in pointing out this distinction is to show the reader that merely changing the modifications to those of citizenship will not create an umbrella protecting the university from liability.\textsuperscript{34}

Some scholars have argued that the university may in fact be protected from liability because teaching assistantships are not employment, but rather financial aid. In fact, most institutions have considered teaching assistantships to be part of an overall grant-in-aid package.\textsuperscript{35} Theoretically, by viewing the remuneration teaching assistants receive as part of their aid package, universities have not had to worry about whether a Title VII lawsuit alleging discrimination on the basis of national origin
or race would be brought against them. If a suit were filed, we believe that a court of law would take as its first task the determination of whether teaching assistantships constitute financial aid or employment. If the assistantships were determined to be financial aid, then the university would not have to abide by Title VII guidelines in the hiring, firing, and terms and conditions of employment. But, as we shall see later, this distinction will not protect the university from an attack under the provisions of Title VI, 42 U.S.C. §1981 or the Immigration Reform and Control Act of 1986 (IRCA). They would have to abide by Title VI, 42 U.S.C. §1981, and the Immigration Reform and Control Act of 1986. If in contrast, the assistantships were determined to be employment, then the university would have to abide by Title VII guidelines in its hiring, firing, terms and conditions of employment with specific attention to the hiring requirements. We believe the safest course for a university administration to take is to assume the teaching assistantship is employment and therefore follow the guidelines of Title VII. As we have suggested throughout the paper, this would mean that the ATAs should be subject to the same testing and employment parameters as the international teaching assistants are.36 The international teaching assistants should also be protected against discrimination to the same degree that the ATAs are.

We believe that the manner by which the state universities proceed in requiring all foreign-born students to take an exam can be said to discriminate on the basis of national origin because American graduate teaching assistants do not need to take the same test battery as international graduate teaching assistants.

In addition to alleging discrimination on the basis of national origin, discrimination on the basis of race might also be claimed by the ITA, particularly because a claim for national origin discrimination, coupled with a claim of race discrimination is much stronger than a single claim of national origin discrimination. This is because with a claim alleging only national origin discrimination, an employer can generally assert a legitimate non-discriminatory reason for the action: in this case,
the students from foreign countries do not speak English clearly enough.\footnote{37} In the case of a race discrimination suit, it would be unlikely for an employer to be able to assert a legitimate, non-discriminatory reason for the employer's action.\footnote{38}

As Illustration D demonstrates, Title VII claims of discrimination fall under one of two theories: disparate treatment\footnote{39}, when the discrimination against an individual is directly observable, or disparate impact\footnote{40}, when a particular policy or practice appears neutral on its face, but in application disproportionately hinders a protected class.

**Disparate Treatment**

A particular ITA may claim initially, disparate treatment if, as the elements of a Title VII disparate impact claim require: 1. he was a member of one of the protected classes; 2. he applied, or had been appointed to the job of teaching assistant; 3. he was qualified for the position\footnote{41}; 4. he was rejected; and the 5. the teaching assistant position for which he applied remained open.
Title VII was enacted to protect people with certain characteristics that have traditionally been the basis for discrimination, e.g., national origin or race. A protected class means any group of people who possess a particular characteristic, e.g., not American.
Any such ITA could demonstrate membership in a protected class, be it based on race or national origin. That ITA could demonstrate qualification for the position of teaching assistant as far as knowledge of the topic is concerned. Further, that ITA would most likely be likely be able to demonstrate rejection for the position unless he or she had been able to fulfill certain language proficiency requirements not required to be demonstrated by their American counterparts, ATAs. Also, it could be shown that the employing institution had not disputed the ITA's qualifications, but had disputed the ITA's manner of expressing these qualifications. The ITA could demonstrate that the employing institution had not taken any action to ensure that the ATAs were prepared to take on their classes. This different action towards the ATA versus the actions directed toward the ITA form the basis for the overt discrimination against the ITA on the face of the university policy or the state's legislation. Further, the ITA could demonstrate rejection for the job until passing tests the ATAs had not been required to pass.

Under the disparate treatment analysis, the second element requires that the plaintiff must demonstrate that he is qualified for the position he applied for. As mentioned above, the Court looks to the minimum standard when determining whether or not the applicant is qualified. When ITAs possess appropriate academic credentials and are required to undergo tests that ATAs do not have to take in order to demonstrate their language proficiency, disparate treatment occurs. A comparison of the language of the statute in Illinois with the language of the mandate tied to funding appropriations for Minnesota reveals that the Minnesota legislature is causing the university system in Minnesota to treat ITAs differently than ATAs in that only ITAs must demonstrate their oral proficiency in English. The Illinois statute, on the other hand, requires all instructors to demonstrate proficiency.
The authors recognize that the notion of possessing appropriate academic credentials must include possession of an appropriate threshold level of language proficiency, and that certain ITAs do not possess sufficient language proficiency to teach prior to enrollment in an ITA English class. This group of individuals fall outside the scope of disparate treatment because their particular credentials do not meet the minimum guidelines established by the university. However, when ITAs are required by law to demonstrate language proficiency, and the same demonstration is not required of ATAs, then disparate treatment should be seriously considered. In sum, we are not suggesting that it is inappropriate to test the language proficiency of the ITA. However, we feel that if ATAs are not required to demonstrate their language proficiency and the ITAs are, then the ITAs are victims of disparate treatment. If the purpose of Title VII is to prevent discrimination on the basis of race or national origin, subjecting ITAs to different rules, policies, and procedures than their American counterparts is discriminatory.\(^{45}\)

**Disparate Impact**

If there are a group of alien ITAs who feel the university has discriminated against them, they could file a class action suit claiming discrimination because of the disparate impact of legislation or university policy. When a policy or statute has the effect of only testing international TAs and not fellow American TAs, there is a foundation for a disparate impact charge. The Court in *Griggs v. Duke Power* held that the purpose of Title VII is to prevent employers from creating "built in headwinds" against a class of persons under the guise of a legitimate requirement.\(^{46}\) Each of the elements of the two theories, disparate treatment, and disparate impact, and their application to the ITA situation are described in Illustration D on page 19.
In order to establish a Title VII disparate impact claim, the first element requires that the test or requirements must be directly related to job performance. As with the disparate treatment analysis mandating that an individual be qualified for the position for which he applies, the notion of a class of persons being rejected or disqualified at a higher rate than other applicants must be present. It is our belief that any demonstration of oral proficiency is directly related to job performance, and therefore, all potential applicants for teaching assistant positions should have to take the English proficiency test. At present, only ITAs have to demonstrate their language proficiency, which, as discussed above, is directly related to job performance. Potentially there is a disparate impact upon ITAs who can demonstrate that they belong to a protected class based on their national origin or race and who are required to take the test while ATAs are not so required.

The requirement to test, mandated by state legislation or university policies, affects the hiring of international students for teaching assistant positions. Testing only the international students "limits, segregates, or classifies" employees in a manner that deprives certain individuals of employment opportunities or adversely affects their status as employees. A policy by an employer is considered unlawful when the requirements operate to disqualify a protected class at a substantially higher rate than the general population.

When the discrimination is based on a test, the employers has the burden of proving that the test is related to the employment and that the exam is shown "by professionally accepted methods, to be 'predictive of or significantly correlated' with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." This does not appear to be a problem with the instant facts. The Sspeak test is used to predict the test taker's ability to speak English. The Sspeak and TSE tests are national tests that have been normed and
validated to test the proficiency of English of the test taker regardless of the test taker's nationality. It is possible that the SPEAK test has a disparate impact against international students, meaning that even if the test were required of all, the results could be such that they would disproportionately affect the international students. Note, Griggs, supra.51 As the test is applied today, there is no way to determine if international students have a higher rate of failure on the SPEAK test because only international students are tested.

Many ITA programs incorporate a cultural orientation portion into the syllabus. This portion is designed to familiarize the international students with American classroom culture in order to assist them in becoming effective teachers. This cultural orientation correlates with important elements of work behavior, but in most instances, only foreign students are required to participate in these classes (See Appendix B.) It is our contention that both the test and the classroom requirements could be said to have a disparate impact on the ITAs. Griggs, supra, required that an objective standard be used to determine eligibility, e.g., a standardized intelligence test for all workers.52 If such a test has disparate impact toward members of a protected class, the exam is suspect.

A recent United Stated Supreme Court decision held that subjective criteria utilized in making an employment decision must also be able to withstand the disparate impact analysis. The holding of Watson53 focuses on promotions granted after subjective evaluations. The Court was split with what burden of proof to use, but was in agreement with respect to the use of subjective criteria to establish a case of disparate impact discrimination. The Court's holding in Watson would apply with our facts if, for example, an institution were to ask an ITA to prepare a sample lesson to "teach" to a panel of students and or administrators, and if this performance was evaluated as part of the criteria used to award a teaching assistantship.54
The second element to prove disparate impact does not require that a plaintiff show that an employer intentionally discriminated, nor do we wish to suggest that such intentional discrimination occurs.55

In the interest of efficiency, we have not attempted to explain every element represented in Illustration D, but rather, we have highlighted those elements that may weigh on international educators’ minds.

Once a Title VII plaintiff has established the elements of either "disparate treatment" or "disparate impact", then the employer has the burden of showing a legitimate business justification for their decision not to hire the ITA. An employer would argue that a demonstration of language proficiency is a legitimate justification because all college and university students have a right to understand their instructors. In rebuttal, the plaintiff has one more opportunity to show that the defendant’s offered justification is merely a pretext, i.e., an ITA could argue that demonstration of language proficiency is merely a pretext for exclusion from university level employment since the ATAs do not have to demonstrate they they are also understandable.

Dialect varieties of American English are not perceived to be obstacles to comprehension even though a Midwest student may have difficulty understanding a TA from the Bronx. However, what Kachru56 calls "institutionalized" varieties of English, i.e. Indian English, Nigerian English, and Malaysian English, are perceived to be obstacles.57 In like manner Japanese English, Chinese English and Laotian English, what Kachru calls performance varieties of English are also perceived to be obstacles. Thus, becoming familiar with varieties of American English is seen as necessary and appropriate. However, becoming familiar with other varieties of "institutionalized" or "performance" Englishes is not seen as either appropriate or necessary. We frequently praise the diversity of American geographic regions as reflected through dialect varieties; we see this diversity as a resource. Yet, global
varieties of English on the American campus, particularly when spoken by ITAs are seen as problems to be fixed. Again we see a policy planning approach based on a language-as-problem\textsuperscript{58} orientation rather than on a language-as-resource\textsuperscript{59} orientation.

Title VII of the 1964 Civil Rights Act would be one cause of action under which an ITA could bring a discrimination claim. A second cause of action falls under the United States Constitution.

**Constitutional Right to Due Process and Equal Protection Under the Fourteenth Amendment**

The fourteenth amendment to the United States Constitution guarantees that no person shall be denied the right to due process or equal protection of the laws.\textsuperscript{60} The right to due process stems from the fifth amendment as applied to the states through the fourteenth amendment and states that "no person shall be deprived of life, liberty or property, without due process of law." \textsuperscript{61} The fourteenth amendment contains the right to equal protection of the laws.\textsuperscript{62} The right to equal protection stems from the fifth amendment due process right and has been interpreted to forbid the federal government or any non-federal public body from denying equal protection of its laws.\textsuperscript{63} Any non-native speaker of English, whether a citizen of the United States, a lawful permanent resident of the United States, or a lawfully admitted student, is a person, and has certain rights under the Constitution. If this student is considered an "alien"\textsuperscript{64}, any status other than a citizen, he is entitled to the protection of the fifth and fourteenth amendments.\textsuperscript{65}

As early as 1915, the United States Supreme Court held in *Truax v. Raich* that "the right to earn a livelihood and to continue employment unmolested by efforts to enforce void enactments is entitled to protection."\textsuperscript{66} This protection includes a right not only to be employed, but much deeper, a right to be considered equally, and treated equally when being considered for employment. This being so, it hardly seems fair
to require the ITAs to take courses to enhance intelligibility and cohesiveness without requiring the ATAs to participate in these programs (See Appendix B).

The Court in *Truax* went on to state that the right to work is a liberty right protected under the fourteenth amendment, and that states may not seek to regulate admission of aliens into the U.S. through creation of restrictive legislation.\textsuperscript{67} The United States Immigration Service was created to deal with the admission of aliens, and the duty to regulate admission of aliens is the business of that agency.\textsuperscript{68} The broad, fundamental right to work with respect to aliens has been limited under the Immigration Reform and Control Act. to be discussed infra. Aliens in general, possess most of the same rights as American citizens.

Other recent cases have decided non-employment rights of aliens under the United States Constitution that go beyond the right to work. For example, in *Chapman v. Girard*,\textsuperscript{69} the court held that to bar aliens from public scholarship funds violates the equal protection clause of the fourteenth amendment. This case held that the state could not refuse a scholarship fund to an alien just because he was an alien in order to foster a pool of qualified citizens to fill government vacancies.\textsuperscript{70}

The Court has recognized certain instances in which discrimination against aliens will be tolerated. This is a very narrow exception, and the Court has not necessarily created a license to discriminate; instead, the Court will look to the act with a less strict level of review. This exception stems from the desire to "preserve the conception of a political community" of the United States government to those taken by American citizens, those who have become part of the process of self-government.\textsuperscript{71} If the position involves a "fundamental function of government," it will usually be allowed to be delegated to an American citizen.\textsuperscript{72}

The Supreme Court has not yet developed a single test, i.e., level of scrutiny, to use in the determination of alienage classifications in relation to equal protections guarantees under the fourteenth amendment equal protection or due process clauses.
Much of the dilemma herein is centered around the different standard of reviews the court has chosen to apply to alienage discrimination cases.

It should be clear that the theoretical and legal basis of much of this paper proposes that American TAs and international TAs should have the same rights and privileges. If ITAs are tested and subjected to other screening devices, then ATAs should also be tested. If ITAs are able to profit from orientation classes which make them better teachers, than ATAs should have access to the same type of classes. The trend towards treating both groups equally appears to be growing on many college campuses (See for example the University of Missouri policy in Appendix A). Whether this is the result of fear of litigation or simply recognition of a good thing on the part of administrators and educational planners, potential litigation may be avoided by such action.

A third cause of action under which an ITA could bring a discrimination claim falls under Title VI of the Civil Rights Statutes.

Title VI

According to Title VI of the 1964 Civil Rights Act, a program that receives Federal Financial Assistance cannot discriminate on the basis of race, color, or national origin. This means that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial Assistance.

A plaintiff seeking to assert a Title VI claim, similar to the Title VII disparate impact theory, does not have to allege intent to discriminate on the part of the college or university receiving the federal funding although different Courts have varied in their interpretation of the statute and the more recent cases tend to support a finding of requisite intent. In order to be a plaintiff and assert a Title VI claim, the ITA plaintiff must be entitled to bring this action; in other words, the plaintiff must have standing.
The plaintiff carries the initial burden to show discrimination. Then, just as was true with disparate treatment, the defendant has an opportunity to show a justification for its discriminatory actions, with the ultimate burden falling back to the plaintiff to show that the reason offered by the defendant was merely a pretext intended to cover up a discriminatory intent.\textsuperscript{77}

If an employer who is receiving federal funding discriminates on the basis of race, color, or national origin, the employer may be liable for back wages to a private person bringing the claim.\textsuperscript{78} Thus, Title VI can be thought of as an application of Title VII's provision against discrimination to public institutions receiving federal funding. As all public institutions of higher education receive some degree of federal funding, Title VI is particularly important to note. A positive finding of intentional discrimination may affect the entire university funding. If an ITA were to successfully entertain a discrimination claim against a university, that institution could be required to pay back wages for the entire period the ITA was not allowed to work. If disparate impact were claimed and the employer was found liable, the economic burden on the employer for back wages would be overwhelming to the institution. For example, if a large state institution had a class action suit filed by twenty ITAs each earning $10,000.00 each per year, and all twenty were unable to teach for at least one year, and all of whom could receive back wages as a result of the settlement, the university could have to pay out over $200,000.00 not including legal costs for defending this suit.\textsuperscript{79} In addition, if the university were receiving federal funding and the discrimination was found to be intentional, the university would also be required to forfeit all or some of its federal funding. The university could also be required to hire a specialist determined by the plaintiff in order to implement a plan or procedure which would not have a discriminatory effect.\textsuperscript{80} It is also interesting to note that in 1988, Congress enacted the Civil Rights Restoration Act of 1987, which was intended to "restore the broad scope of coverage and to clarify the coverage of Title VI of the Civil Rights Act of 1964." \textsuperscript{81}
act, in effect, would hold the entire university liable if it was determined that one department or program within the university system was violating a provision of Title VII. This is to say that the university would lose all of its federal funding, not just the funding that went toward the particular discriminatory program (See Appendix C).

As of this date, the employer's liability under Title VI has been limited to those instances where the primary objective of the Federal Financial Aid is to provide employment or where the discriminatory employment practices tend to cause discrimination in the services provided to the beneficiaries. Further methods of enforcement include the termination of or refusal to continue the financial assistance that the public institution is receiving or any other means authorized by law.

A fourth cause of action available to the ITA falls under the Immigration Reform and Control Act of 1986.

**IRCA**

In 1986, Congress enacted the Immigration Reform and Control Act, hereinafter, IRCA, to impose sanctions on those employers who continued to employ illegal aliens over United States citizens or lawfully admitted aliens who in most cases are intending citizens. According to this act, an employer does not have the right to discriminate against lawfully admitted aliens by choosing an American citizen first. (See Appendix D).

Most students will enter the United States on an F-1 (student) visa. The student coming in to study is a non-immigrant. Because they are students, the legislature has set out guidelines specifically providing for their employment on campus while they attend school. Because the legislature has specifically provided for their employability, an employer may not exclude them from employment based upon their alienage.

It is unlikely that most students who would pursue a claim would draw upon IRCA because most ITAs are not intending citizens nor are they lawful permanent
residents. This section could be drawn upon by a Puerto Rican U.S. citizen for example, whose first language is Spanish and who had to take the SPEAK test. We bring up this possible cause of action because it is possible that a naturalized American citizen whose national origin is other than American and whose first language is not English and who had been in the United States for a period of time would be subject to language proficiency testing procedures while his native English speaking American counterpart would not be tested.

A fifth cause of action under which an ITA could bring a discrimination claim falls under § 1981 of the United States Code volume 42.

**42 U.S.C. § 1981**

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, . . . , and to the full and equal benefit of all laws and proceedings . . . as enjoyed by white citizens" 86 (See Appendix E). The language of this section is very broad. It states that all persons in the United States should have the same rights as white citizens. The plain language of this statute would lead the reader to interpret that anybody within the United States had all the same rights as a citizen. The true intent of this section was to promote equality among the whites and blacks.87 Thus, problems arise when the language of §1981 is called on to protect aliens, defined as "any person who is not a citizen or national of the United States," 88 against discrimination. However, this statutory section is invoked to protect aliens from certain instances of discrimination and could be drawn upon by individuals who do not fall under the protection of IRCA.

**Bhandari**, a very important case, has put the true meaning and intended meaning of §1981 at the doorstep of the U.S. Supreme Court. In **Bhandari**, the Court cited the **General Building Contractors Association** as per the 1870 Voting Rights Act to interpret the application of §1981 to aliens.89 The bottom line of **Bhandari** is that aliens are protected under 42 U.S.C. § 1981 if there is state action involved. In most
instances which have been discussed in this paper, there is state action, with state universities acting under state laws that have been enacted to give them power.

A limitation to be applied in a §1981 charge is that several appellate courts have required "purposeful discrimination." 90 This purposefulness has been limited when it is being asserted in conjunction with a Title VII claim and has been held to have no greater or lesser protection against employment discrimination practices than Title VII.91

Both Title VII and 42 U.S.C. §1981 can be asserted together, that is to say, an ITA could suggest that either disparate treatment and/or disparate impact had occurred in a situation where state action was involved. When this is the case, however, a 42 U.S.C. §1981 claim has no greater or lesser protection against employment discrimination practices than Title VII.92 An advantage to bringing them together is that the notion of "alienage" would be put forth because it is easier to define a protected class based on alienage than a protected class based on national origin. Although "alienage" as a protected class is easier to define, the individual requirements to prove an initial case of discrimination under Title VII are very clear.

IV. Conclusion

This paper has explored current state legislation and university-based policies which have been implemented in a number of institutions of higher education. We have argued that policy makers, to their potential detriment, have been working within a language as problem framework wherein the chief focus has been to fix ITA speech as the primary objective. Although unintentional, the individual rights of many ITAs have been ignored. There may be serious and costly legal ramifications that specific institutions may soon encounter as a result of this short-sighted approach.

There are practical implications of such claims being brought by the ITA. The legal context in which administration of ITA programs is situated can no longer be ignored. There is now real potential for individual and institutional liability. People in
upper management positions at institutions, people who have designed ITA programs, and people who run the programs could be named as defendants in lawsuits challenging the validity of the testing requirements and application of these requirements.

Also, the economic context in which the administration of ITA programs is situated cannot be ignored. First of all, there would be a loss of tuition monies if ITAs were not able or decided not to come to the United States because they would be unable to finance their living expenses. If fewer foreign TAs came to the United States, there would be fewer individuals to fill positions now vacant because there are not enough American students to fill these graduate assistantships. The shortage would also create long term implications for U.S. institutions in the area of educational, economic, and cultural exchange between nations.

Ruiz suggests that a language-as-resource orientation may provide a broader context than language-as-problem does from which to resolve ITA language planning issues. We believe that use of this framework allows us to create the widest lens from which to view the ITA issue. To reduce the ITA issue to the level of a simple English proficiency problem to be solved ignores the cross-cultural parameters of the issue and prevents American students from becoming more interculturally competent.

There may be a diffusion of tension on college campuses between ITAs and everyone else if all work cooperatively so that the ITAs' strengths and skills are seen as resources not to be exploited but to be maximized. There are no clear cut answers to the specific issues facing individuals at particular institutions. Planners must exchange information among institutions and draw on the expertise of legal professionals inside and outside the university community. This paper is a first step towards a better articulation of the complicated legal framework which surrounds the ITA issue.
Endnotes


2. Id. at 4.

3. Id. at 6.

4. Id. at 14.

5. Alien is defined as "any person who is not a citizen or national of the United States." 8 U.S.C. §1101(a)(22).

6. We are grateful to Amy Minert for her assistance in compiling the state statutes relevant to this paper.


As an interesting sidebar, there are several states that have enacted statutes declaring English to be the official language of the state. For example, South Carolina, at S.C. CODE ANN., §1-1-696, (LAW. CO-OP. 1987) California, at CA STAT. ANN. Article 3, §6(b) (West 1987), North Dakota, at ND CENT. CODE, § 54-02-13 (1983), Tennessee, at TENN CODE ANN. 4-1-403 (1984), Illinois, at ILL. ANN. STAT. §3005 (1969), Commonwealth of Virginia, VA CODE, § 22.1-212.1 (1981), North Carolina, at N.C. GEN.STAT. §145-12. (b) (1987), Kentucky, at KY REV. STAT. § 1,013 (1994), Indiana, at IND.CODE ANN. §1-1-10-1. (1984), Mississippi, at M.ISS. CODE ANN. §3-3-31(1987), and Arkansas, at ARK STAT. ANN. § 6-1-104(a) (1947) requiring that English be the basic language of instruction.

8. 1985 Minn. Sess. Law Serv. §1-7 subd. b.

10. University of Kansas policy states that "all non-native English speaking applicants must achieve at least a 240 TSE or SPEAK or successfully complete the communication course prior to appointment.


12. FLA. STAT. ANN. §240.246 (West 1983)

13. OHIO REV. CODE ANN. §3345.28.1 (Page 1986); ILL. ANN. STAT. Ch 122, para. 103- 292 (Smith-Hard 1987); PA. STAT. ANN. Tit _____, §_____, (Purdon 19____).


17. Id. at 32.

18. By law, statutory requirements must be defined clearly, they must not be vague or indefinite, although just because an act criticized as being vague in some of its provisions does not render the entire provision void as long as it does not infringe some constitutional provision and is capable of execution in its more essential provisions. Collier v. United States, 283 F.2d 780 cert den 365 U.S. 833, 5 L. Ed.2d 744, 81 S.Ct. 746; Broadrick v. Oklahoma, 37 L.Ed. 2d 830, 93 S. Ct. 2908. If the uncertain or vague portion of the statute is so essential to or connected with the statute as a whole, it may render the entire statute invalid. State by Van Riper v. Traffic Tel. Workers' Federation, 2 NJ 335, 66 A2d 616.

19. MO. ANN. STAT. §170.012 (Vernon 1990)The entire application of the Missouri statute is focused around the requirement that the TA be born in the United States or attend a school in a country where the primary language is English, irrespective of the language that individual actually speaks.

An example of overbreadth which parallels the issue before us is found in Robinson v. State, 393 So. 2d 1076 (Fla. 1980) in which the court found that a Florida statute was overbroad when it prohibited any person from entering on public property while concealing his identity by way of a mask, hood, or hiding any other portion of the face. This constituted a denial of due process and was declared unconstitutionally overbroad because it was susceptible of application to entirely innocent activities, it lacked any rational basis, and the language was very specific so that it could not be modified easily.
20. **Robinson v. State**, 393 So. 2d 1076 (Fla. 1980)

21. In addition to questioning the Missouri statute on the basis of testing, we also have difficulty with the requirement that those ITAs who have not previously lived in the U.S. must attend a cultural orientation program. The argument advanced with testing requirements also applies with the cultural orientation program. In addition, we also believe that in limiting the cultural orientation to ITAs who have not previously lived in the U.S., the states and universities are hurting the American students--it may not only be international teaching assistants who need a cultural and/ or classroom orientation before becoming a teaching assistants.

22. We are grateful to the program directors at these various institutions who have graciously provided us with primary source documents.


24. We are grateful to sociolinguist Michal McCall for pointing out the discriminatory practice of using an acronym for international teaching assistants while retaining the long form for American teaching assistant. To redress this imbalance, in this paper we shall use the two acronyms ITA for international teaching assistant and ATA for American teaching assistant.


27. 42 U.S.C. §2000(e)-2 (a) (1) which states, it shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, . . ., or national origin.


32. Id. at 286. The Court distinguishes between those cases in which the Supreme Court has looked with strict scrutiny towards a practice of a state classification affecting aliens. A strict review is applied when aliens generally are a class. Permanent residents are still aliens. The Court also discusses how the equal protection clause does not apply here because resident alien students are not subjected to the policy. Citing Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) which held that non-immigrant alien students considered alone are not a suspect classification.

33. This is not to suggest that all will be well if the state statutes and university policies only affect non-immigrant international students. In order to pass even a limited review, commonly defined as a rational basis review by the court, the university in question must show that there is a rational basis for its decision to include only non-immigrant students in the requirement to be tested. If the true goal of the university is to ensure that all TAs can speak English clearly this goal will not be met by merely testing the non-immigrant ITAs. The goal in Ahmed was to ensure that the aliens would be able to take care of themselves. The court found it to be a "logical and legal extension of the policies of Congress and the Immigration and Naturalization Service." The facts presented in this paper differ substantially. The Federal government requires that non-immigrant alien students be financially responsible and the university the student attends has to certify that the alien entering the United States has sufficient financial resources to meet all of the alien's expenses. The insurance requirement fosters financial independence. This is not the same for the language proficiency requirement.

34. For a further discussion on discrimination based on citizenship see Employers' Immigration Compliance Guide at Part 4 which addresses Unfair Immigration-Related Employment Practices. See specifically § 4.03 which discusses national origin discrimination.

35. We are grateful to Robert Kaplan of the University of Southern California and Janet Constantinides of the University of Wyoming for drawing this distinction to our attention.

36. As we discussed earlier, we are not suggesting that the university require ATAs to take the SPEAK test. Rather, it is our suggestion that the university modify its testing procedures so as to avoid being overinclusive or underinclusive. The testing ought to measure language proficiency (including intelligibility to the particular university audience), skills such as lesson planning ability, and knowledge such as familiarity with American classroom culture.

37. An employer will be released from liability for discrimination which results if the employer was acting on a decision made without any intent to discriminate but which does have the purpose and effect of singling out a
class or persons. For example, if a production company was looking to hire an actor to play Nelson Mandela, an aspect of the job description would be to require the actor be black and male. This is a legitimate reason. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

38. It has been noted that if a plaintiff also alleges racial discrimination at the time of proving his national origin discrimination case, he has a better chance of success. National Origin and race can be closely related in that many foreign students are of a different race. The reason race creates a much stronger case is that Title VII does not allow for race to ever enter in as a bona fide occupational qualification. Florida Bar Journal at 70, April 1988, Mary Greenwood.

39. According to the 1973 Supreme Court case of McDonnell Douglas Corp., the plaintiff, in this case the foreign student, need only fulfill the following requirements in order to prove a prima facie case of discrimination: (1) The plaintiff was a member of a protected group; (2) the plaintiff applied for a position for which he was qualified; (3) he was rejected for the position; and (4) the position remained open. McDonnell Douglas Corp., 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See also, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

40. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Discrimination against the foreign student on the basis of national origin does not have to be intended or overt. If testing "limits, segregates or classifies" employees in a manner that deprives certain students of employment opportunities or adversely affects his status as an employee, it is unlawful. See 42 U.S.C. § 703 (a) (2). A policy by an employer is considered unlawful when the requirements operate to disqualify a protected class at a substantially higher rate than American applicants. Griggs, 401 U.S. at 426.

41. The requirement to be qualified has been held to only require minimum qualifications for the job. See, Burdine v. Texas Department of Community Affairs, 647 F.2d 513 (5th Cir. 1981); Aikens v. United States Postal Service Board, 665 F.2d 1057 (D.C.Cir. 1981); Hagans v. Andrus, 651 F.2d 622 (9th Cir. 1981), cert. denied, 454 U.S. 859,102 S.Ct. 313, 70 L.Ed.2d 157; Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979).

42. See footnote 32 regarding the determination of a suspect class.

43. ILL. ANN. STAT. Ch. 122, para. 103-292 (Smith-Hard 1987).

44. The appropriations committee of the Minnesota Legislature has tied funding for the University system to the requirement that the University require a certain test battery of foreign students.

45. For a further discussion regarding disparate treatment discrimination
based on national origin see Bell v. Home Life Insurance Company, 596 F.Supp. 1549 (D.C. N.C. 1984) holding that an alien from New Zealand was not discharged because of his nationality. This employee was an insurance salesman who did not meet the quota for sales. The court here held that if a plaintiff could show discrimination because of his accent "he would establish a prima facie case of national origin discrimination." Id., at 1550, citing Berke v. Ohio Department of Public Welfare, 628 F.2d 980 (6th Cir. 1980). This case held that a foreign accent is a "linguistic character of a national origin group." Bell, at 1555. The court in Berke held that the plaintiff had a good command of the English language but she had a pronounced accent. The plaintiff was denied two positions based on her accent and that this denial amounted to discrimination on the basis of national origin. Berke at 981. The Court further awarded plaintiff back wages determined by the pay grade she would / should have been at had defendants not discriminated against her. See also, Carino v. University of Oklahoma Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) which held that a university employee established a prima facie case of discrimination based on national origin because he was precluded to apply for a supervisory position because of his accent. Id., at 818. A plaintiff was held to have established a prima facie case of discrimination based on national origin because of his accent when he was not considered for a position based on his surname and his accent. This applicant was not permitted to finish the job application because of these characteristics. See Case No. AL 68-1-155E at 1 FEP Cases 921.

An interesting case which considered accent is Fragante v. City and County of Honolulu, 49 FEP 437, 49 EPD (CCH) p38, 783 (9th Cir. 1989). This case involved a man who applied for a position as a clerk who had a heavy Filipino accent. He was denied the job because of his accent. The Court upheld the refusal to hire stating that the ability to speak English clearly here was a bona fide occupational qualification. It was necessary that he speak English clearly. Id., at . ___ This case can be distinguished from the arguments put forth in support of the language proficiency requirements. This gentleman had a "heavy accent". The Court in Fragante did uphold the earlier holdings of Berke, Bell, and Carino in that a plaintiff who proves he has been discriminated against solely because of his accent does establish a prima facie case of national origin discrimination. Many of the ITAs applying for positions with the universities do not have "heavy accents" but because they are members of a certain class, namely international teaching assistants, they must be tested. With respect to English Only rules, the Court has held that English Only rules are a logical response to certain problematic situations, i.e., in this case, police recruits were prohibited from speaking Spanish while in training. The court went on to hold that "proficiency in English is a necessary goal if it is to facilitate communication among officers." Flores v. Hartford Police Department, 25 FEP Cases 180 (DC CT 1981). This case also discussed the merits of a Puerto Rican recruit's successful discrimination claim. He was as
qualified as his peers and was dismissed from training based on subjective evaluations and without justification. Id., at 190. This case was brought under the 1964 Civil Rights Act, 42 U.S.C. §1981 and 42 U.S.C. §1983. See also, Mejia v. New York Sheraton Hotel, 459 F. Supp. 375 (1978) which focused on an employee not successfully bringing a claim for discrimination because she was not qualified for the job based on her office skills and it was for this reason that she was not granted the promotion, not because she could not speak English clearly.


47. Id.

48. See 42 U.S.C. § 703 (a) (2).


52. Griggs, 401 U.S. 424, 425. This was also the case in the other relevant cases dealing with disproportionate impact. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) requiring a written aptitude test; Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) requiring a test of verbal skills; Dothard v. Rawlinson, 433 U.S. 321 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977) with height and weight requirements in a prison guard position; New York City Transit Authority v. Beazer, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979) prohibiting employment of drug addicts, this prohibition was upheld; Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) also requiring a written examination, this case rejected a bottom-line defense, holding that just because the bottom line statistics have a higher percentage of minorities, this will not make the test valid. The court looked to the different levels of the testing process and saw that a disproportionate number of minorities failed the test but the employer promoted, of those who passed, a higher number of minorities.

53. Watson v. Fort Worth Bank and Trust, ___ U.S. ___, 108 S.Ct. 2777, ___ L.Ed.2d ___ (1988). This case focused around the employers' promotions based on a subjective evaluation of the employee. Several Appellate Court cases have been decided prior to Watson allowing the use of subjective criteria, see, e.g., Antonio v. Wards Cove Packing Co., 810 F.2d 1477 (CA9 1987) (en banc); Griffin v. Carlin, 755 F2d 1516, 1522 (CA11 1985).
54. The TEACH test, developed at Iowa State University, and used by other institutions including the University of Minnesota and the University of Missouri, is not used as a part of the criteria to award teaching assistantships. Rather, it is used to evaluate ITA achievement at the end of the ITA training course. While the test is considered subjective by many individuals, it has been normed and validated in a manner consistent with tests such as SPEAK. We are grateful to Barbara Plakens of Iowa State University for drawing this distinction between tests used for placement and tests used to measure ITA course achievement to our attention.


57. Id. at 38.


59. In determining if there has been discrimination against an ITA based on their national origin it is helpful to consider the Uniform Guidelines On Employee Selection Procedures found at 29 C.F.R. Ch. XIV (7-1-8 Edition). This guideline provides suggestions to eliminate adverse impact or disparate treatment and also disparate impact. See § 1607.3. With respect to validity studies which may be utilized in formulating tests like SPEAK or TEACH see § 1607.5 and .7. For a discussion of Disparate Treatment see § 1607.12.

For further information see the EEOC Compliance Manual at § 623.10 ¶ 4010 which focuses on discrimination on the basis of manner of speaking or accent. This section summarizes those cases discussed in footnote 45 supra. See also ¶4035 which sets out the elements of the prima facie case of discrimination based on national origin. The plaintiff can successfully bring this claim if the employer cannot show a legitimate non-discriminatory reason for the discrimination. The guideline went on further to state that a characteristic related to national origin, in order to support a claim for national origin discrimination must be an immutable trait to be covered under Title VII. The guidelines, quoting Carino, stated that "an accent is not easily changed for a person who was born and lived in a foreign country for a good length of time and therefore an accent would appear to approach that sort of immutable characteristic." Id., at 26 FEP at p. 21,391 (W.D. Oklahoma 1981). An accent has been declared a natural characteristic that flows from national origin. See Berke, 628 F.2d at 981.

60. U.S. Constitution, Amend. XIV.
61. U.S. Constitution, Amend. V.
62. U.S. Const. Amend XIV.
64. 8 U.S.C. §1101 (a) (22).
67. Id., at 38.
68. The Immigration Service has regulated the admission of aliens and also the conditions under which an alien has the right to employment over and above an American citizen. This will be discussed later in §4D regarding the Immigration Reform and Control Act.
69. 456 F.2d 577 (3d Cir. 1972).
70. Id., at 578.
71. Sugarman v. Dougall, 413 U.S. 634, 647, 93 S.Ct. 2842, 37 L.Ed.2d 368 (1973), involving a civil service position. The Supreme Court held invalid New York's blanket statutory prohibition against the employment of aliens in the competitive classified civil service. The court recognized the political exception, but in this case the statute was too broad and it was indiscriminately applied. This is another example of overbreadth as was discussed supra.
72. Ambach v. Norwick, 441 U.S. 68, 74, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) involving a public school teaching position which was denied to two resident aliens who met the state requirements for certification. The Supreme Court reasoned that the position of public school teacher "is so bound up with the operation of the state as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."

75. National Ass'n For Advancement of Colored People v. Medical Center, Inc., 667 F.2d 1322 (C.A.Del. 1981), Dowdell v. City of Apoka, 511 F. Supp. 1375 (Fla.198_ ) holding that all that must be shown is that the defendant received federal financial aid and had used criteria or methods of administration which resulted in discrimination against blacks or persons of a different national origin. See also, Jackson v. Conway, 476 F. Supp. 896, aff'd 620 F.2d 680 (C.A. Mo. 1979). But see, Gomez v. Illinois State Bd of Educ., 811 F.2d 1030 (7th Cir. 1987) which held that a claim by non-native English speaking students for inadequate implementation of a program for identifying and placing students with limited English proficiency did not state claims under the Fourteenth Amendment and Title VI without allegations of discriminatory intent. The Court did hold that the plaintiffs had stated a cause of action under the regulations promulgated without needing to allege intent. The Court cited Guardians Association v. Civil Service Commission, 463 U.S. 582 and Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976) which provided that a plaintiff could maintain a suit alleging a discriminatory impact claim according to 34 C.F.R. § 100.3. See also, Castaneda v. Pickard, 648 F.2d 989 (C.A. Tex. 1981) holding that discriminatory intent must be shown in employment discrimination suits; Lora v. Bd. of Ed. of City of New York, 623 F.2d 248 (C.A.N.Y. 1980) holding that a board of education cannot be held liable for a violation of equal protection or Title VI without a showing of discriminatory intent.

76. A plaintiff must be an intended beneficiary of the federal funds. Mosely v. Clarksville Memorial Hospital, 574 F. Supp. 224 (D.C. Tenn. 1983) an example of standing occurred in Young v. Pierce, 544 F. Supp. 1010 (D.C. Tex. 1982) when a group of black applicants for public housing programs brought a suit against the Department of Housing and Urban Development alleging that the department and other local agencies maintained racially segregated housing and the black plaintiffs were eligible for public housing but denied due to their race. In other words, the plaintiffs were directly affected by the outcome of the suit.


78. Guardian's Ass'n, 463 U.S. 682, at _. The recipient of the federal funding may only be liable to the individual if the discrimination was intentional. The creators of Title VI did not see fit to sanction those employers receiving federal funding for inadvertent discrimination. See also Martin Cardinal Glennon Memorial Hospital, 599 F.Supp. 284 (E.D.Mo. 1984).


84. 8 U.S.C. 1101 (a) (15) (F)(i).

85. 8CFR 214.2(f)(9) allow an F-1 student to work on campus if it does not displace an American citizen student. He is limited to 20 hours per week while school is in session and the student may work full-time when school is not in session providing the student intends to register for the term.


87. See Bhandari v. First Nat. Bank of Commerce, 829 F.2d 1343 (5th Cir. 1987) quoting Jones v. Alfred Mayer Co., 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) which interpreted § 1981 as not as broad as the plain meaning would have you believe, i.e., that States and Territories must grant each and every group of humans the same rights. The Court discussed the tracing of the Civil War Statutes in the 1866 Civil Rights Act and determined that §1981 derived in part of §1 of the 1866 act and focused the statute's protections for racial discrimination. See, Runyon v. McCravy, 427 U.S. 160,170, 96 S.Ct. 2586, 2594, 49 L.Ed.2d 415 (1976).

See also, General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 386, 102 S.Ct. 3141, 3147, 73 L.Ed.2d 835 (1982) holding that § 1981 was designed principally to extirpate the black codes.

88. 8 U.S.C. §1101 (a) (22).

89. Bhandari, 829 F.2d at 1346.

90. See e.g., Whitine v. Jackson State University, 616 F.2d 116, rehearing denied 622 F.2d 1043 (C.A. Miss. 1980) holding that intent may be inferred in the same manner as the intent is inferred from Title VII charges.


92. Id.

Appendix A: State Statutes

California 1977:

The governing board of a school district may, for the purposes of providing bilingual instruction, foreign language instruction, or cultural enrichment, in the schools of the district, subject to the rules and regulations of the State Board of Education conclude arrangements with the proper authorities of any foreign country, or of any state, territory, or possession of the United States, for the hiring of bilingual teachers employed in public or private schools of any foreign country, state, territory, or possession. To be eligible for employment the teacher must speak English fluently. Any persons so employed pursuant to his section shall be known as a "sojourn certificated employee."

No person may be hired as a sojourn certificated employee by a school district unless he holds the necessary valid credential or credentials issued by the Commission for Teacher Preparation and Licensing authorizing him to serve in a position requiring certification qualifications in the school district proposing to employ him. Such person may be employed only for a period not to exceed two years, except that thereafter such period of employment may be extended from year to year for a total period of not more than five years upon verification by the employing district that termination of such employment would adversely affect an existing bilingual or foreign language program or program of cultural enrichment and that attempts to secure the employment of a certificated California teacher qualified to fill such positions have been unsuccessful. The commission shall establish minimum standards for the credentials for sojourn certificated employees.

Florida 1983:

§240 246 Faculty members; test of spoken English

The Board of Regents shall adopt rules requiring that all faculty members in the State University System, other than those persons who teach courses that are conducted primarily in a foreign language, be proficient in the oral use of English, as determined by a satisfactory grade on the "Test of Spoken English" of the Educational Testing Service or a similar test approved by the board.
Ilinois 1987:

§100& Oral English language proficiency

§8e. The Board of Governors of State Colleges and Universities shall establish a program to assess the oral English language proficiency of all persons providing classroom instruction to students at each of the State Colleges and Universities and campuses thereof under the jurisdiction, governance or supervision of the Board, and shall ensure that each person who is not orally proficient in the English language attain such proficiency prior to providing any classroom instruction to students. The program required by this Section shall be fully implemented to ensure the oral English language proficiency of all classroom instructors at each of the State Colleges and Universities and campuses thereof under the jurisdiction, governance or supervision of the Board by the beginning of the 1987-88 academic year. Any other provisions of this Section to the contrary notwithstanding, nothing in this Section shall be deemed or construed to apply to, or to require such oral English language proficiency of any person who provides classroom instruction to students in foreign language courses only.

New Mexico

Article XII§8 Teachers to learn English and Spanish

The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.

Meaning of section.-This section does not require that all teachers in the state be proficient in both English and Spanish or that all teachers who teach Spanish-speaking pupils be proficient in both English and Spanish. The clear intent is to teach English to Spanish-speaking students and to assure that the Spanish and English languages will always be available to prospective teachers in the teachers' colleges and that Spanish-speaking pupils will be provided the means and methods to learn the English language as well as other subjects of learning. 1968 Op.Att'y Gen. No. 68-15.

North Dakota 1987:

§ 15-10-13.1 Faculty - English language proficiency.

Any professor, instructor, teacher, or assistant at a state institution of higher education must exhibit proficiency in the English language. Any deficiency must be remedied by special training or course work provided by the institution.
Oklahoma:

§ 3224 (added by laws 1982, c. 47, §1, effective June 1, 1982)

It is the intent of the Oklahoma Legislature that all instructors now employed or being considered for employment at institutions within The Oklahoma State System of Higher Education shall be proficient in speaking the English language so that they may adequately instruct students.

Each college and university of the State System shall provide an annual report to the President Pro Tempore of the Senate and the Speaker of the House of the Oklahoma Legislature by January 1 of each year setting forth the following information:

1. Procedures established to guarantee faculty members have proficiency in both written and spoken English; and
2. Procedures established to inform students of grievance procedures regarding instructors who are not able to speak the English language.

Title of Act:
An Act relating to schools; stating legislative intent that all instructors must be proficient in speaking the English language as a condition of employment at institutions within The Oklahoma State System of Higher Education; requiring all state universities to report certain information; establishing procedures for student complaints; directing codification; setting an effective date; and declaring an emergency. Laws 1982, c. 47.

§3225. Complaints

Any student may file a complaint of violation of this act with the office of president of any publicly supported college or university in the State of Oklahoma. It shall be the duty of said president to inquire after such complaints and report said complaints and disposition to the State Regents annually.
Pennsylvania 1989

Senate Bill Number 539; Session of 1989
Faculty fluency in English

An Act: Requiring institutions of higher education to evaluate their faculties for fluency in the English language; providing for certifications as to that fluency; imposing penalties; and conferring powers and duties upon the State Board of Education.

1. This act shall be known and may be cited as the English Fluency in Higher Education Act
2. The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise: "Board:" The State Board of Education of the Department of Education; "Department:" The Department of Education of the Commonwealth; "Instructional Faculty:" Every member of an institution of higher education, other than visiting faculty, who teaches one or more undergraduate credit courses at a campus of that institution within this commonwealth except: 1) such courses that are designed to be taught predominantly in a foreign language; 2) student participatory and activity courses such as clinics, studios, seminars and laboratories; 3) special arrangement courses such as individualized instruction and independent study courses; and continuing education courses.
3. Evaluation of fluency.
Each institution of higher education operating in this commonwealth shall evaluate its instructional faculty for fluency in the English language in the classroom. Such fluency shall be evaluated using varied and appropriate criteria, such as personal interviews, peer and student observations and evaluations, publications, professional presentations, tests or any other appropriate criteria which effectively evaluates such fluency.
4. Certification
By September 1 of each year, each institution of higher education operating in this commonwealth must file with the department a certification stating that the instructional faculty members hired either since the effective date of this act or hired subsequent to the last annual certification are fluent in the English language, as provided in Section 3.
5. Noncompliance.
If an institution of higher education operating in this commonwealth does not comply with Section 4, the Secretary of Education may impose a $10,000 penalty for each course taught by an uncertified faculty member, as provided for in Section 3 and 4.
6. Regulations
The board shall promulgate regulations to implement sections 4 and 5. This act shall take effect in 60 days.
Tennessee:

Senate Joint Resolution 211 (May, 1984)

A resolution requesting the State Board or Regents and the University of Tennessee Board of Trustees to consider establishing policies relative to the English speaking ability of foreign nationals employed as faculty members.

Whereas, it has come to the attention of some members of the General Assembly that some of the faculty members of our public colleges and universities are foreign nationals and that their English speaking ability is somewhat limited; and

Whereas, while these faculty members are certainly valuable additions to our public college and university faculties, particularly in the engineering field, they must be able to converse with students if their effectiveness as a faculty member is to be realized by their students; now, therefore,

Be it resolved by the Senate of the Ninety-third General Assembly of the state of Tennessee, the House of Representatives concurring, that the State Board of Regents and the University of Tennessee Board of Trustees are encouraged to consider the adoption of policies which will require that all faculty members in the public colleges and universities in Tennessee, other than persons who teach courses that are conducted primarily in a foreign language, be proficient in the oral use of English, as determined by a satisfactory grade on the "Test of Spoken English" of the Educational Testing Service or a similar test approved by the respective board.

Texas:

House Bill 638  1989 Session

An Act: relating to the requirement that each institution of higher education establish a program or short course to assist certain faculty members to become proficient in the use of the English language. Be it enacted by the legislature of the state of Texas:

Section 1. Chapter 51, Education Code, is amended by adding Section 51.917 to read as follows: Sec.51.917. Faculty members: use of English. (a) In this section:

1. "Institution of higher education" has the meaning assigned by Section 61.003 of this code but does not include a medical or dental unit.

2. "Faculty member" means a person who teaches a course offered for academic credit by an institution of higher education, including teaching assistants, instructors, lab assistants, research assistants, lecturers, assistant professors, associate professors, and full professors.

3. "Governing board" has the meaning assigned by Section 61.003 of this code. The governing board of each institution of higher education shall establish a program or a short course the purpose of which is to: 1) assist faculty members whose primary
language is not English to become proficient in the use of English; and 2) ensure that courses offered for credit at the institution are taught in the English language and that all faculty members are proficient in the use of the English language, as determined by a satisfactory grade on the "Test of Spoken English" of the Educational Testing Service or a similar test approved by the board. c) A faculty member may use a foreign language to conduct foreign language courses designed to be taught in a foreign language. d) This section does not prohibit a faculty member from providing individual assistance during course instruction to a non-English-speaking student in the native language of the student. e) Each institution of higher education shall submit to the Texas Higher Education Coordinating Board a description of the program or short course established under this section and the coordinating board shall approve and monitor the program or short course established at each institution of higher education. f) The cost of such English proficiency courses as determined by the coordinating board shall be paid by the faculty member lacking proficiency in English. A faculty member must take the course until deemed proficient in English by his or her supervisor. The course will be deducted from said faculty member's salary.

Section 2: a) Each institution of higher education shall submit the description of the program or short course established under this Act to the Texas Higher Education Coordinating Board not later than September 1, 1990. b) If the coordinating board determines that an institution of higher education has failed to establish a program or short course within the time provided by this Act, the coordinating board shall notify the comptroller of public accounts, who shall withhold from the fiscal year 1991 appropriations to that institution for instructional administration an amount equal to five percent of the amount appropriated to that institution for fiscal year 1990 for that purpose. c) This Act take effect September 1, 1989.

Section 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.
Appendix B

42 U.S.C. § 2000e - 2 unlawful employment practices

Employer Practices

(a) It shall be an unlawful employment practice for an employer -

(l) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way 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.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on the job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (l) it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.
Seniority or merit system; quantity or quality of production ability tests; compensation based on sex and authorized by minimum wage provisions

(h) . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.
Appendix C

CIVIL RIGHTS RESTORATION ACT OF 1987
Public Law 100-259

An act to restore the broad scope of coverage and to clarify the application of
Title IX of the Education Amendments of 1972, . . . , and Title VI of the Civil Rights Act of
1964.

Findings of Congress

Sec.2. The Congress finds that -

(I) certain aspects of recent decisions and opinions of the Supreme Court have
unduly narrowed or cast doubt upon the broad application of . . . Title VI of the
Civil Rights Act of 1964; and (2) legislative action is necessary to restore the prior
consistent and long-standing executive branch interpretation and broad,
institution-wide application of those laws as previously administered.

Civil Rights Act Amendment

Sec.6. Title VI of the Civil Rights Act of 1964 is amended by adding at the end of the
following new section: "Sec. 606. For the purposes of this title, the term
'program or activity' and the term 'program' mean all of the operations of -

"(1)(A) a department, agency, special purpose district, or other instrumentality of a
State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance
and each such department or agency (and each other State or local
government entity) to which the assistance is extended, in the case of
assistance to a State or local government;

"(2)(A) a college, university, or other post secondary institution, or a public system
of higher education; or

"(B) a local educational agency (as defined in § 198(a)10), of the Elementary and
Secondary Education Act of 1965), system of vocational education, or other
school system.
"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship -

~"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), (3);

any part of which is extended Federal financial assistance.
Appendix D
Immigration and Nationality


(a) Prohibition of discrimination based on national origin or citizenship status

(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 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.

(2) Exceptions

Paragraph (1) shall not apply to-
(A) a person or other entity that employs three or fewer employees,

(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 2000e-2 of Title 42, or

(C) discrimination because of citizenship status which is otherwise required in order to comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.

(3) Definition of citizen or intending citizen

As used in paragraph (1) the term "citizen or intending citizen" means an individual who-

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

(B) is an alien who-

(i) is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title, and
(ii) evidences an intention to become a citizen of the United States through completing a declaration of intention to become a citizen; but does not include

(I) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986 and

(II) an alien who has applied on a timely basis, but has not been naturalized a citizen within two years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service’s processing the application shall not be counted toward the two year period.
Appendix E

42 U.S.C. §1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.