THE UNDOCUMENTED WORKER: THE CONTROVERSY TAKES A NEW TURN*

Amid the economic and political unrest now troubling the nation there is a growing concern over the influx of undocumented immigrants. In recent years this concern has encouraged proposed legislation to stem the tide of illegal immigration from Mexico.[1] It has been Congress, specifically the House of Representatives, which has led the body politic to draft and enact legislation which would achieve this aim.[2] Sparked by claims that undocumented workers were taking much needed jobs from legal residents, thus further aggravating an already unhealthy economy,[3]

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1. It was during the Nixon Administration that the government's most recent attempts to curb the flow of undocumented aliens commenced. H.R. 2328, the first of these bills was introduced in 1970. The bill recommended that a criminal penalty be imposed on employers for the hiring of undocumented individuals. Members of the House Subcommittee considered the penalty too harsh, difficult to enforce, and vague in that there were no guidelines to determine the meaning of "knowingly" employing unauthorized workers. H.R. 16188, supported by the AFL-CIO in the 92d Cong., provided a multifaceted plan to remove the employment incentive from undocumented aliens. The bill was reported out by the House Judiciary Committee on August 17, 1972, and was passed by the House on September 12, 1972. H.R. 982 embodies the provisions for both H.R. 2328 and H.R. 16188 and was introduced to the 93d Cong. by the Judiciary Committee and adopted by the House on May 3, 1973. It was not reported out of the Senate Judiciary Committee in 1974, but was reintroduced before the House Judiciary Committee in January, 1975 and was reported out of Committee as H.R. 8713 for consideration by the full house. *See Hearings Before Subcommittee No. 1 of the Committee on the Judiciary*, H.R. 93d Cong., 1st Sess., § 1, at 1 (1973) (hereinafter cited as *1973 Hearings*); Los Angeles Times, July 31, 1975, § 1, at 6.

The concerns of many regarding the influx of undocumented aliens are frequently based on figures published by the Immigration and Naturalization Service (INS) that indicate the number of undocumented aliens taken into custody. For example, in fiscal year 1970, the INS located 343,000 undocumented aliens at a cost to the government, according to published reports, of $35 million dollars. *See Hearings Before Subcomm. No. 1 of the Comm. of the Judiciary*, H.R. 92d Cong., 2d Sess., pt. 4, at 1009 (hereinafter cited as *1972 Hearings*). The number of unauthorized workers apprehended in 1971 numbered 420,000 compared to only 370,000 admitted lawfully the same year. In fiscal year 1972, the INS located 505,949 deportable aliens, a 20 percent increase over fiscal year 1971, and an amount exceeding by 121,000 the number of aliens legally admitted as immigrants in fiscal year 1972. Of this total, 98,680 were found to be employed in agriculture, and 102,911 were employed in industry and other occupations. *See 1973 Hearings*, note 1 *supra*, at 7, 76. According to L.W. Gilman, Southwest Regional Immigration Commissioner, 689,619 deportable aliens were apprehended in fiscal year 1974. The Van Nuys News, Aug. 20, 1974, 5-A.

2. *Id.*

3. *See* RODINO, *The Impact of Immigration on the American Labor Market*, 27 RUT. L. REV. (W' 74). Congressman Peter Rodino, Chairman of the House Judiciary Committee, is a chief proponent of legislation that would bring about the desired affect of curtailing the employment of undocumented workers and has co-authored legislation to that effect.

It is interesting to note that the current movement attempting to terminate

the House considered the first major legislative proposal on the subject in 1970.[4] This proposal, commonly known as the Rodino Bill, has served as a model for subsequent political measures to curb the influx of undocumented workers.[5] The main feature of all of the proposed congressional legislation has been a provision which would impose a penalty upon employers who *knowingly* hire undocumented workers.[6]

By contrast, the individual states have been reluctant to enact legislation similar to that proposed by Congress. One reason for this stems from the notion that Congress possesses plenary power with respect to immigration.[7] The existence of the Immigration and Nationality Act[8] (hereinafter referred to as INA) has cemented the idea of federal preemption, and has surely deterred

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the continued employment of undocumented workers comes at a time when the economy and employment rate are in distressing states. A review of American labor and immigration policy reveals that during similar periods of economic downtown, identifiable alien groups have frequently been the target of irrational governmental and societal tensions. It is arguable that the presently proposed Congressional response to the current labor situation is no different than the irrational responses proposed to correct prior adverse economic conditions where again the alien was the subject of attack. For an excellent discourse on the government's capricious reactions to immigration during comparable periods of economic hardship *see* CARDENAS, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66 (1975); HIGHAM, *American Immigration Policy In Historical Perspective*, 21 LAW & CONTEMP. PROB. 212 (1956); JAFFEE, *The Philosophy of Our Immigration Law*, 21 LAW & CONTEMP. PROB. 359.

Although some claim that as many as 3 million undocumented aliens still reside in the United States undetected, the actual number of undocumented aliens can only be approximated. Their impact on employment, balance of payments, welfare rolls, etc., cannot be precisely measured and figures purporting to show precise monetary impact should be examined with caution.

4. *See* note 1 *supra.*

5. *Id.*

6. The employment of undocumented aliens has never been a ground for prosecution. Presently, § 274(a) of the Immigration and Nationality Act (hereinafter cited as INA) enables the prosecution of citizens for harboring, transporting and smuggling of illegal aliens. Ordinary employment practices are not considered harboring.

The provisions that impose the penalties for hiring undocumented workers are discussed at length in the text that follows *infra.*

7. One state that attempted to implement legislation that would affect the hiring of undocumented workers was California. Section 2805 of the California Labor Code provided that:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.
>
> (b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) and not more than five hundred dollars ($500) for each offense.
>
> (c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).

This section, however, was later declared unconstitutional by two different divisions of California's Court of Appeals on different grounds. The two cases were: Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974); DeCanas v. Bica, 40 Cal. App. 3d 976; 115 Cal. Rptr. 444 (1974) (later reversed by the U.S. Supreme Court, 96 S. Ct. 933. *See* discussion in text accompanying notes 13-21 *infra*).

8. 8 U.S.C. § 1101 *et seq.* (1970).

many states from going forward with the idea of proposing similar legislation.[9]

To date, however, congressional attempts to formulate legislation to control the employment of undocumented aliens have failed to receive the majority support of both houses. Support in the House has been more than sufficient,[10] but each bill passed by the House has suffered an ignominious fate in Senate committees.[11] Even with the more current reports portending a senatorial decision to end the congressional deadlock,[12] a recent Supreme Court decision[13] may prove to have a greater impact on the matter.

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9. Article 1, § 8, cl. 4 of the U.S. CONST. reads as follows: "The Congress shall have the power . . . to establish a uniform rule of naturalization . . ." The Supreme Court in a long list of cases has affirmed the notion that Congress has the exclusive power to regulate immigration. *See e.g.*, Passenger Cases, 48 U.S. (7 How.) 283 (1849); Henderson v. Mayor of New York, 92 U.S. 259 (1879); Chy Lung v. Freeman, 92 U.S. 275 (1976); Fong Yue Ting v. United States, 149 U.S. 698 (1893); DeCanas v. Bica, 96 S. Ct. 933 (1976).

10. Both H.R. 16188 and H.R. 982 passed the House by sizeable margins. *See* 118 CONG. REC. 30186 (1972) (hereinafter cited as 118 CONG. REC.) and 119 CONG. REC. 14209 (1973) (hereinafter cited as 119 CONG. REC.).

11. A chief reason given for its failure has been the lack of support of Sen. Eastland, Senate Chairmen of the Committee on Immigration. It is believed that Eastland's disapproval stems from his fear that such legislation would jeopardize the availability of cheap labor for farmers. An advocate of the former "Bracero Porgram" of the early fifties (the program provided American farmers with laborers from Mexico, Central and South America), Eastland has not come out openly to admit this to be his reason, but it is common knowledge among those following these bills that Eastland would not support, for a number of years (for a possible change in his position *see* note 11 *infra*), any legislation unless it included a provision that would reintroduce a program similar to the former Bracero Program.

12. Los Angeles Times, Mar. 16, 1976, Pt. II, 1-2. In an article written by Frank del Olmo the following was reported:

> In a surprising turnaround, it now appears that the U.S. Senate will pass a bill which U.S. immigration officials hope will bring illegal immigration under control.
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> The situation changed suddenly when a powerful committee chairmen in the Senate quietly decided to sponsor a bill that would penalize employers who knowingly give jobs to illegal aliens. Hearings on the bill are scheduled to open Wednesday in Washington D.C.
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> The important senator is James Eastland, (D-Miss.) a large plantation owner who is chairmen of both the Senate Judiciary Committee and its subcommittee on immigration which has not met for the last seven years.
>
> Previously, it had been widely assumed by congressional observers that it was Eastland who—by keeping the immigration committee inactive—was almost single-handedly holding up the passage of a federal law that would penalize the employer of illegal aliens.
>
> But Eastland apparently had a change of heart recently . . .
>
> Eastland's decision to introduce an illegal alien bill was made public in the Congressional Record of March 4. Even top U.S. immigration officials did not know of it before then . . .
>
> Eastland's bill is similar in many respects to the Rodino Bill . . .
>
> The Eastland bill also would set up a system whereby an employer who cannot meet his labor needs by recruiting domestic workers could apply to the U.S. Department of Labor for permission to "import foreign workers" . . .
>
> If put into effect, this section of the bill would resurrect on a small scale the old bracero program . . . .

13. DeCanas v. Bica, 96 S. Ct. 933 (1976).

I. DECANAS V. BICA: THE COURT OPENS THE WAY FOR STATE PARTICIPATION

The United States Supreme Court in *DeCanas v. Bica*,[14] held that California Labor Code Section 2805(a) was not an unconstitutional attempt to regulate immigration, and if construed as consistent with the INA was not preempted by that Act and therefore not violative of the supremacy clause of the *Federal Constitution*.[15] The Court reaffirmed the prior contention that the power to regulate immigration is exclusively in the federal government.[16] However, the Court did distinguish between the power to regulate immigration and the power to subject aliens to valid state regulations.[17] Justice Brennan, speaking for the Court, defined the regulation of immigration as a "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[18] Justice Brennan then reasoned that Section 2805(a) was not a constitutionally proscribed regulation of immigration, rather he classified it as a "local regulation" with only perhaps a "speculative and indirect"[19] impact on immigration. Being only a regulation of aliens rather than a regulation of immigration, Brennan then noted that state regulation of employment was clearly within the state police power.[20] The Justice finally concluded that absent congressional action, Section 2805(a) would not be an invalid state incursion on federal powers because the *Constitution* does not itself require preemption of state regulation of aliens.[21]

The Court has thus held that Congress has not in the enactment of the INA precluded states from regulating the employment of undocumented aliens. As a result of the *DeCanas* decision, individual states are now free to enact legislation regulating the employment of undocumented workers so long as it does not affect the regulation of immigration. Consequently, the apparent deadlock that currently besets congressional attempts at passing legislation relating to this matter may no longer be of significance.

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14. *Id.*
15. U.S. CONST., art. VI, cl. 2.
16. 96 S. Ct., at 933 (1976).
17. *Id.*
18. *Id.*
19. *Id.*, at 937.
20. *Id.*
21. *Id.* The Court did not resolve the question of whether Section 2805 unconstitutionally conflicts with federal law in the form of the INA. The case was remanded, pending a more definite statutory construction of Section 2805 to determine if in fact it did conflict with federal law.

With the states free to implement their own legislation, the federal government may choose not to act until states themselves have been given an opportunity to enact legislation. On the other hand, Congress may feel it necessary to adopt legislation that would produce uniform guidelines to be followed by all states.

At this point in time, it is unclear which of the two government entities will eventually enact controlling legislation. The prospects, however, for the enactment of federal or state legislation designed to deal with the situation has improved. With this increased possibility that legislation will be passed, a review of previously proposed legislation will be germane in that these proposals may serve as models for future legislation.

To begin, a review of proposed federal legislation will be made, followed by a look at California's Section 2805. The authors hope to reveal by this examination that there exist inherent constitutional dangers in the bills currently being considered which if passed in their present form would pose severe employment consequences to members of the Chicano community.

II. PROPOSED FEDERAL LEGISLATION: H. R. 982

The federal government's most recent attempts to enact legislation for the purpose of decreasing the flow of undocumented workers began in the early seventies. In 1972[22] and 1973[23] the House approved legislation that was designed to eliminate the incentive for the current immigration, namely, employment opportunities. The prototype of this legislation is H.R. 982,[24] commonly referred to as the Rodino Bill. H.R. 982 was passed by the House in 1973,[25] and proposed to reduce the flow of undocumented workers by implementing a three tiered system of sanctions which penalized employers if they were found guilty of *knowingly* hiring aliens without proof of the applicant's or employee's eligibility to work.[26]

> According to Section (b)(1) of the Bill, it would be:
> . . . unlawful for any employer or any person acting as an agent for such an employer, or any person who for a fee, refers an alien for employment by such an employer, *knowingly to employ, or refer for employment any alien in the United States who has not been lawfully admitted to the United States for permanent residence*, unless the employment of such alien is authorized by the Attorney General . . . [emphasis added][27]

Congruently, the Attorney General could make a finding based upon "[e]vidence or information he deems persuasive,"[28] that the employer knowingly hired an illegal alien. The Attorney

22. H.R. 16188, 92d Cong., 2d Sess. (1972).
23. H.R. 982, 93d Cong., 1st Sess. (1973).
24. *Id.* The key provisions of H.R. 982 were to amend § 274(b)(1)-(3) of the I.N.A., 8 U.S.C. § 1324.
25. 119 CONG. REC., at 14195.
26. *See* discussion that follows in text accompanying notes 27-30 *infra.*
27. H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(1).
28. Section (b)(2) of H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(2).

General could thereupon, in accordance with the bill, issue a citation[29] for the violation of Section (b)(1) of H.R. 982.

Should the Attorney General subsequently find within a two year period after the issuance of a citation for a previous violation that the employer had again violated Section (b)(1), then the Attorney General could assess a penalty of "[n]ot more than $500 for each alien in respect to whom any violation of paragraph (b)(1) is found to have occurred."[30]

Finally, if after an employer has been assessed a civil penalty under the bill the employer violates the section again, Section (c) of H.R. 982 states that the violator, "[S]hall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding $1000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs."[31]

A key provision of H.R. 982 relates to the employer's duties with respect to the inquiry the employer must make in order to avoid the sanctions set forth in the Bill. Section (b)(1) of H.R. 982 states that:

> . . . an employer . . . shall not be deemed to have violated this subsection if he has made a *bona fide inquiry* whether a person hereafter employed or referred by him is a citizen or alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence or is authorized by the Attorney General to accept employment.[32] [emphasis added]

Accordingly, the Bill would require that the employer make a *bona fide inquiry* into the employee's or applicant's status. This requirement, however, is presumably satisfied if a signed statement in writing, conforming with regulations prescribed by the Attorney General, is obtained from the applicant or employee and which states that the signor was either a citizen of the United States, a person lawfully admitted for permanent residence or an alien authorized by the Attorney General to accept employment.[33]

Legislation that duplicates H.R. 982 would not be without serious problems. These problems were not unknown to the proponents of the Bill.[34] But despite their knowledge, the Bill still

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29. *Id.*
30. Section (b)(3) of H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(3).
31. Section (c) of H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(c).
32. H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(1).
33. Section (b)(1) of H.R. 982, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(1).
34. *See generally* 119 CONG. REC., at 14195-14204.

passed the House and was sent over to the Senate for consideration.[35]

The discussion that follows touches upon the problems uncovered by the opponents of H.R. 982.

A. The Employer's Affirmative Enforcement Duty

According to the language of H.R. 982, the burden of implementing the Bill falls upon the employer for (s)he is the individual who must examine applicants and employees as to their legal status. The legal basis for the Bill rests upon the principal that the Congress can make any law necessary and proper to carry out its constitutional functions, including the delegation of an affirmative duty on an employer to enforce a statute.[36]

Notwithstanding the existence of legislative precedents supporting the imposition of this affirmative duty on employers like that proposed by H.R. 982, there is still a question whether the imposition of such a duty is advisable in this context.

On its face no ascertainable standard to determine legal status is presented by the Rodino Bill. Standards, however, are an essential element of notice.[37] Nevertheless, wide discretionary powers have traditionally been granted to administrators by Congress and this practice has been upheld by the Supreme Court:

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35. The House's course of action on this matter underscores the government's apparent disregard for the dire consequences that will befall Chicanos. Congressmen were aware of the serious problems latent in H.R. 982, but ignored them, and instead chose the most expeditious solution that, in return, spells trouble for Chicanos.

Congress is not alone in this recent serge of governmental acts, which continue to further erode the legal rights of Chicanos. Just this term, the Supreme Court in the case, United States v. Martinez-Fuerte, 19 CrL. 3356 (July 7, 1976), handed down a decision which will subject Chicanos and other Latinos to additional harassment at the hands of government officials; in this case, agents of the INS, at fixed "checkpoint" areas.

The supporters of H.R. 982 and decisions like *Martinez-Fuerte*, argue that the inconvenience caused by a check of one's legal status is minor. But what in the minds of a few is a "minor inconvenience," is in the minds of others an act of degradation and oppression.

36. One example of the power of Congress, in this area, is the Labor Code which places a civil, then a criminal penalty on an employer who fails to comply with federal minimum wage and hour laws. 29 U.S.C. § 211(c). (Employers are also required to "make, keep, and preserve" appropriate wage and hour records; §§ 211(d) permits "regulations and orders regulating, restricting, or prohibiting industrial homework"). In addition, on numerous occasions, nongovernmental individuals are made enforcers of laws which proscribe conduct defined as mala prohibitum (conduct prohibited to protect the public welfare, safety and health). Consequently, it is not unusual for Congress to enact a law which imposes a quasi-administrative duty on nongovernmental individuals.

37. *See generally* Coates v. Cincinnati, 402 U.S. 611 (1971) (a statute cannot be so broad as to enable the infringement of constitutionally protected rights); Gooding v. Wilson, 405 U.S. 521 (1972); Grayned v. City of Rockford, 408 U.S. 108 (1972); Hobbs v. Thompson, 448 F.2d 460 (5th Cir. 1971); United States v. Hymans, 463 F.2d 618 (10th Cir. 1972); Corp. of Haverford College v. Reecher, 329 F. Supp. 1206 (E.D. Pa. 1971).

> Congress may declare its will, and after fixing a primary standard, devolve upon administrative officials the powers to fill up the details by prescribing administrative rules and regulations.[38]

A duty can be delegated to an employer, acting in a *quasi-administrative* capacity, without definite guidelines.[39] So long as the primary standard is explicit, grounded in custom, and appropriate for administrative or judicial review, implementive rules and regulations can be discretionary.[40]

Discretion rests with the employer as censor and enforcer. Within this *quasi-administrative* context, the employer would be required to certify legal status. Enforcement authority could not be abused; decisions would have to be based on persuasive evidence, and a balance struck between regulation and individual rights.[41] The requirement of factual data[42] would seem to imply documentation; thus enabling the employer to base his decision on an acceptable, though tenuous, criterion.[43] A wide latitude for discretionary judgment would be afforded employers, but this would not protect job applicants and employees against an employer's discriminatory conduct when couched in unequal enforcement terms.[44] This is where the absence of explicit enforcement guidelines would threaten equal employment opportunity.

Some jurisdictions have approached this problem of discretion by avoiding overbroad language.[45] For example, the Second

38. United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, at 77 (1932) (also a primary standard cannot be undone by administrative rules and regulations); Karaholeos v. Sec. of H.E.W., 445 F.2d 660 (D.C. Cir. 1971); Gradley v. United States, 447 F.2d 273 (8th Cir. 1971); Arizona State Dept. of Pub. Welfare v. Dept. of H.E.W. (9th Cir. 1971); H. Wetter Mfg. Co. v. United States, 458 F.2d 1035 (6th Cir. 1971),; Lohf v. Casey, 330 F. Supp. 357 (D.C. 1971).

39. *See generally* Fahey v. Mallonee, 332 U.S. 245 (1947); Boddie v. Connecticut, 401 U.S. 379 (1971); Bell v. Burson, 402 U.S. 542 (1971); Fuentes v. Shevin, 407 U.S. 92 (1972); North-Am Agricultural Products v. Hurden, 435 F.2d 1158 (7th Cir. 1970); General Motors Corp. v. Burns, 316 F. Supp. 806 (D. H.H. 1970).

40. *See* cases listed in note 39 *supra.*

41. *See generally* Permian Basis Area Cases, 390 U.S. 747 (1968); Gainesville Utilities Dept. v. Florida Power Corp., 420 U.S. 528 (1971); Federal Power Comm. v. Louisiana Power & Light Co., 406 U.S. 642 (1972); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 755 (1972); Long v. Robinson, 432 F.2d 979 (4th Cir. 1970); Gulf Oil Corp. v. Hickle, 435 F.2d 447 (D.C. Cir. 1970).

42. *See* cases listed, *id.*

43. The use of documentation would be tenuous because of the existence of forged documents. In 1974, immigration officers intercepted 15,825 fraudulent or altered immigration papers compared to 11,587 for the previous year. INS agents confiscated 1,143 forged entry documents, and 1,005 fraudulent citizenship papers in just twenty-one days from July 8 to July 29, 1974. Van Nuys News, Aug. 20, 1974, 5-A.

44. *See* Edelman v. California, 344 U.S. 357 (1953). A complaint alleging a violation of the equal protection clause requires proof of *systematic and discriminatory enforcement* rather than just unequal enforcement. The enforcement of a statute in one instance, though unenforced on numerous occasions, is insufficient evidence of a denial of equal protection.

45. *See* note 37 *supra.*

Circuit maintained that due process required an *ascertainable standard* and *procedural certainty* in the selection of applicants for public housing.[46] Conversely, the denial of a right or privilege through administrative indiscretion or too broad a grant of authority violates due process.[47] Discretion, therefore, must be reasonably exercised:

> The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit . . . . Absolute and uncontrolled discretion invites abuse.[48]

An unreasonable, capricious or arbitrary enforcement effort by employers would be unacceptable.[49]

Enforcement could not contradict or exceed the purpose and scope of the legislation, but must bear a reasonable relation to it.[50] An unequal enforcement practice which camouflages cases of discriminatory application would be violative of the bill's limited objectives.[51] Such an unbridled use of discretion has long been condemned:

> . . . when we remember that this action or nonaction may proceed from enmity or prejudice from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power . . . . (dictum)[52]

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46. *See* Holmes v. N.Y. City Housing Authority, 398 F.2d 262 (2d Cir. 1968), which held that the Civil Rights Act, 42 U.S.C. § 1983, and the due process clause, require that selective and exclusionary determinations derive from ascertainable standards and procedural certainty.

47. *See* Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968). The contested statute set no guidelines or standards by which administrators could reasonably base approval or disapproval of non-profit corporate charters. This violated the fourteenth amendment because a classification must bear a reasonable relation to the objective sought; and no such rational basis existed to justify the statutory distinction between profit and non-profit corporations.

48. Hornsby v. Allen, 326 F.2d 605, at 610 (5th Cir. 1964). "Since licensing consists in the determination of factual issues and the application of legal criteria to them, a judicial act, the fundamental requirements of Due Process are applicable to it." (Dictum) at 608. *See also* Francis v. Fitzpatrick, 129 Conn. 619, 30 A.2d 552, 145 A.L.R. 505; Glickor v. Michigan Liquor Control Commission, 160 F.2d 96 (6th Cir. 1947); Niemotko v. Maryland, 340 U.S. 268 (1951) (arbitrary refusal to grant a license or permit to one group when other groups have obtained permits under similar circumstances constitutes denial of equal protection).

49. *See* Nebbia v. New York, 291 U.S. 502 (1934). *See also* DeLaughter v. Borden Corp., 431 F.2d 1358 (5th Cir. 1970); United States v. Rocah, 453 F.2d 1062 (5th Cir. 1971); Lucas v. Wisconsin Electric Power Company, 466 F.2d 642 (7th Cir. 1972).

50. *Id.*

51. *See* Yick Wo v. Hopkins, 188 U.S. 356 (1886). An ordinance which vested the Board of Supervisors of San Francisco City and County the discretion to grant or withhold their assent for the use of wooden buildings as laundries was held arbitrary, and acknowledged neither "guidance nor restraint," when applied in a discriminatory manner.

52. Baltimore v. Radicke, 49 Md. 217, at 230 (1878). When legislation "is

Considering the proliferated use of fabricated documents,[53] the common physical identity shared by citizens of Mexican ancestry with many undocumented persons, the incentive to cut production costs by paying lower wages,[54] and existing laws against racial discrimination in employment, the Bill would place on employers a near impossible assignment without more definite guidelines. The injunction that ". . . no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,"[55] could not be observed. Whenever an employer solicits applicants for employment, hires mestizos[56] in support of affirmative action, or releases Chicano employees to cut production overhead, the uncertainty posed by the duty[57] would predictably subject the *quasi-administrator* to a charge of either nonenforcement or employment discrimination. Evasion of this dilemma would most likely be achieved by mechanically complying with the *bona fide inquiry* requirement,[58] and rejecting all workers who resemble the stereotyped image of undocumented persons.

Such a law, though founded on a pro-citizen labor premise, could potentially subject citizens to discrimination on the basis of racial or national origin. This would become more certain with the inclusion of individuals already predisposed to prejudicial behavior to perform the federally imposed function. Acting within this federal capacity, an employer's invidious use of racial or national origin criteria to deny employment would implicate the federal government in conduct already prohibited at the state and federal level;[59] that is, conduct which might possibly *encourage* discrimination based upon an invidious classification. Certainly, the discriminatory effect on many citizens would be broader in scope when federally sanctioned.

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so clearly unreasonable, arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it," courts are justified in setting it aside as a plain abuse of authority (dictum) at 229.

53. *See* note 43 *supra.*

54. *See* 1972 Hearings, *supra* note 1.

55. Lanzetta v. New Jersey, 306 U.S. 451, at 453 (1939). Due process is violated by a statute when the ". . . terms it employs to indicate what it purports to denounce are . . . vague, indefinite, and uncertain. . . ." at 458.

56. The offspring of a Spaniard or Portuguese and American Indian parent.

57. *See* Connally v. General Construction Co., 269 U.S. 385, at 391 (1926). An affirmative duty based upon a primary standard must be reasonably understandable.

58. *See* text accompanying notes 77-78 *infra.*

59. *See* Reitman v. Mulkey, 387 U.S. 369 (1966). A state law rendering null and void an anti-discriminatory housing statute was held violative of equal protection. Significant state involvement in private discrimination was violative; and so also was state action which *encouraged* rather than commanded discrimination. Repeal of the old law was a *significant involvement,* because by its action the state lifted the restriction on discrimination and thereby encouraged it. The Court reserved the right to judge significant state involvement on a case-by-case basis. *See also* Gordon v. Lance, 403 U.S. 7 (1971); Adams v. Egley, 338 F. Supp. 617 (S.D. Cal. 1972); Bullock v. Washington, 468 F.2d 1000 (1972).

Resident aliens would also be adversely affected. This would run contrary to the Berger Court's removal of barriers to employment for aliens. Alienage has been declared a *suspect classification,* requiring *strict scrutiny review* of laws denying welfare benefits to resident aliens,[60] exclusion from a state bar association,[61] and prohibition from state civil service employment.[62] Even alienage, the once monolithic bar to resident aliens seeking federal civil service employment,[63] has been cracked by recent court decisions.[64] An immigration law inconsistent in effect with existing anti-discrimination precedents would only hamper this trend.

The danger posed by an unbridled delegation of authority to employers, *significantly involving* the federal government in instances of discriminatory application,[65] would impinge upon protected rights. Federal guarantees of due process and equal protection to *all persons*, including citizens and resident aliens, are embodied in the fifth amendment.[66] A pattern of unequal en-

60. *See* Graham v. Richardson, 403 U.S. 365 (1971). State statutes which discriminated against resident aliens applying for welfare assistance, supplemented in part by federal funds, violated the equal protection clause of the fourteenth amendment because the term *person* includes both citizens and resident aliens. Alienage as a classification requires more than just a rational basis, but a *compelling state interest. See also* Oyama v. California, 332 U.S. 633, 644-646 (1948); Korematsu v. United States, 322 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

61. *See* In re Griffiths, 413 U.S. 717 (1975). The Court cited Bradwell v. State, 83 U.S. (16 Wall) 130, 139 (1873) (the right to practice law is not a *privilege or immunity* within the meaning of the fourteenth amendment; but held that standards used as a basis for determining eligibility for admission to the state bar cannot include alienage as a disqualifying element. *See also* Truax v. Raich, *supra* note 12 (rights to occupation cannot be denied on racial or national origin bases); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (state which adopts suspect classification bears a heavy burden of justification).

62. *See* Sugarman v. Dougall, 413 U.S. 634 (1973). Specificity of standards and qualifications for exclusion is permissible but not blanket exclusion. Consequently, tenth amendment powers granted to the individual states to select their officers is somewhat limited, but only to the extent that alienage cannot be used as a blanket bar to employment.

63. UNITED STATES CIVIL SERVICE COMMISSION PAMPHLET 64, FEDERAL EMPLOYMENT OF NONCITIZENS, 5 C.F.R. § 338.101(a). A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

64. See Jalil v. Hampton, 460 F.2d 923 (D.C. Cir. 1962) *cert. den.*, 409 U.S. 887 (1972) (remanded for further consideration); Wong v. Hampton, 333 F. Supp. 527 (N.D. Cal. 1971) (held unconstitutional a bar to alien employment by federal government for failure to present a *compelling state interest*); Faruki v. Rogers, 349 F. Supp. 723 (D.C. 1972) (declared unconstitutional 22 U.S.C. § 910, which restricts eligibility as foreign service officers to persons who have been citizens for ten years).

65. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961) (state involvement is ". . . that degree of state participation and involvement in discriminatory action which was the design of the [f]ourteenth [a]mendment to condemn.") Here it could be implied that the employer and the federal government act as *joint participants* in the immigration plan. *See also* Henry v. First National Bank of Clarksdale, 444 F.2d 1310 (5th Cir. 1971); Adams v. Miami Police Benevolent Assoc. Inc., 454 F.2d 1318 (5th Cir. 1972); Robinson v. Davis, 447 F.2d 754 (4th Cir. 1971).

66. For the purpose of federal legislation, fifth amendment due process does

forcement, would be equivalent to a denial of equal protection.[67] This would develop, for example, if Chicanos but not undocumented Canadians, were required to certify their legal status upon application for employment. Proof of such a practice would be extremely difficult to obtain, but once gathered, would subject this application of the federally imposed duty to *strict scrutiny review.*

B. Potential Discriminatory Application

Close analysis of H.R. 982 lays bare the possibility that discrimination could occur under three different circumstances. The first transgression could arise should an employer mechanically exclude from the job application process all persons whose status appears illegal. The second could surface during the actual application process since it has not been determined whether a uniform application of the *bona fide inquiry* would be triggered by every applicant and employee, or simply those resembling the stereotype description. A third discriminatory application could occur after the issuance of a citation. A cited employer who might not have been originally reluctant to hire Chicano applicants might be less apt to consider them; or worse, decide to systematically exclude them. All three possibilities were recognized and analyzed during the official debates on H.R. 982, but solutions proposed to overcome them were ignored.

C. The Employee's Initial Contact

The mechanical exclusion of certain individuals may be the product of various factors. For instance, the onus placed on the employer to determine legal status may encourage an arbitrary exclusion of suspect persons from employment opportunities without substantial proof.[68] Of crucial consideration is the absence of any

include an equal protection principle. *See* Shapiro v. Thompson, 394 U.S. 618 (1969), at 641-642. Thus, the resident alien's right to earn a livelihood is assured.

67. *Id.*

68. According to Congressman Roybal, California's attempt at a similar solution through enactment of § 2805, *supra* note 7, exposed a tendency by employers to react fastidiously:

> Experience with the law [§ 2805] showed that employers sought to minimize their exposure to the legal penalties with the result that they refused to hire persons of such backgrounds. There were many occasions when I received calls from parish priests and from ministers who complained that employers were asking questions about the status of some of their parishioners, and, in some cases, were firing them when the worker could not verify his status immediately. Some employers would not even interview anyone who was of Asian background or who had a Spanish surname. In contrast, persons with caucasion features, whether here illegally or not, were not subjected to this unfair treatment.

Such a response became widespread even before the legislation took effect; thus, demonstrating the awesome impact that the law had on employers. Similar to H.R. 982, the California law did not expressly focus on any group, but its opera-

provision in the Bill which would establish a full proof system of identification.[69] A computerized identification system using a metallic card and radioactive tracers in the chemicals used to develop the picture on the card was suggested, but unincorporated in the Bill.[70] Unfamiliarity with the technical language of the INA which specifies the criteria for alien employment might also promote an exclusionary attitude. By generally rejecting applicants who pose an undesirable risk of culpability, employers would not have to attempt an interpretation of the Act. Qualified applicants would be denied fair consideration by employers frightened into evading potential liability.[71] The duty to determine employment eligibility thus fastened on inexpert persons would appear to be unfair for employers as well as ethnic minorities.[72]

Employers have insisted that they are not qualified to act as inspectors for the INS.[73] It is generally felt that the determination of legal status more properly belongs to the immigration service. Such employer anxiety emanates from an ignorance of the law and the specter of a damaged reputation. This feeling merits support considering the complexity of immigration law. However, opposition to the Bill by some employers is motivated solely by monetary concerns. It is certainly more profitable to employ persons who match or surpass normal production outputs for lower wages. This practice is presently immunized from prosecution by Section 274(a) of the INA, which effectively excludes unscrupulous employers from penalties for harboring aliens. Perhaps both arguments are so intertwined as to form a cohesive basis for employer opposition. Nevertheless, questions about inadequate guarantees for civil rights persist.

Proponents of the Bill assert the existence of its incorporated anti-discrimination provisions.[74] Penalties could not attach unless an employer accepts an applicant or retains an employee of known undocumented status.[75] Once an employer makes a *bona fide inquiry* of his employee and has been assured that the individual is an authorized worker no guilt would attach.[76] Proof of a written statement to that effect, on forms supplied by the Attorney

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tive impact effectively burdened persons most resembling mestizos. *See* 1973 Hearings, *supra* note 1, pt. 5, at 84.

69. *See* Hearings Before Subcomm. No. 1 of the Comm. on the Judiciary, H.R., 92d Cong., 1st Sess., pt. 1, at 132, 147 (hereinafter cited as 1971 Hearings).

70. *Id.*

71. Persons classified as *employees* would include all persons who contract for personal services, including household chores, thereby enlarging the potential scope of discriminatory application. *See* 119 CONG. REC. 14197.

72. *Id.*, at 14202.

73. *Id.*

74. *Generally* t 14179-14209 *id.*

75. *Id.*, at 14185 (remarks of Congressman Rodino).

76. *Id.*

General, would constitute a *prima facie* case.[77]

The Bill does not foreclose the acceptance of mere verbal assurances of a worker's legal status as sufficient proof of employer compliance. Unless regulations are formulated requiring a thorough examination of qualifying documents, unscrupulous employers need only ask: "are you a citizen or alien eligible to work?" A positive response would seemingly immunize the employer from prosecution because even if it was later discovered that undocumented persons were employed, the employer could testify that he had made a bona fide inquiry of the applicant or employee. Someone accused of nonenforcement could simply claim his deception by the unauthorized worker.[78] Proof of an employer's lack of good faith compliance with the law, or that he did *knowingly* hire or continue to employ an undocumented person would appear unobtainable in many cases.[79] Without requiring a more searching inquiry into a worker's legal status, the Bill's advertised objective would permit facile circumvention. But even a more delineated inquiry, involving documentary review and statutory interpretation, would seriously hamper Chicanos desirous of employment.[80]

Refusal to consider for employment any person of questionable legal status is enhanced by the desire to avert *unnecessary* contact with government enforcement agencies. Congressman William M. Ketchem, during the May 3, 1973 debates on H.R. 982, asked the following rhetorical question:

> Do you really believe that under the terms of this Bill employers will willingly hire Mexican-Americans when by so doing they may open themselves to harassment . . . by Immigration and Naturalization people . . . even when he was demanded proof of citizenship?[81]

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77. *Id.*

78. Within such a legislative scheme only an undocumented worker would be subject to prosecution for violation of 18 U.S.C. § 911, which reads: "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1000 or imprisoned not more than three years or both." *See* GORDON & ROSENFIELD, IMMIGRATION LAW & PROCEDURE, § 4.20b (hereinafter cited as GORDON & ROSENFIELD).

79. This task would be extremely difficult in light of the importance the House has placed on defining the inculpating word *knowingly*. As Congressman Dennis stated:

> The key word is 'knowingly.' There is no offense committed by the employer unless he 'knowingly' employs the illegal alien contrary to law. If he does that, he is guilty of an offense. He is guilty of an offense if he employs these people in the future knowingly; he is guilty if he has illegals in his employ when the law goes into effect, and he knows it and he 'knowingly' continues to keep them in his employ. But in neither case is he guilty except with guilty knowledge, which is proper to any criminal statute. *Id.*, at 3308.

80. *See* text accompanying notes 69-72 *supra*.

81. *See* 119 CONG. REC., 14186.

The Congressman's answer was direct: "Why should he, there are lots of other people to hire with no problem."[82] Employers, many of whom are already overburdened with government paper work, would probably not welcome further involvement with another government agency. Where involvement would include government surveillance of a company's operation, employer reaction would become more counterproductive. The obvious solution would be to avoid hiring workers of Latin descent.

Should an employer discriminate solely upon the ground of ethnic background, an arguable violation of the Equal Opportunity Employment Act[83] would occur. Section 704(a) of Title VII provides: "It will be an unlawful employment practice for an employer to otherwise discriminate against any individual with respect to . . . terms, [or] conditions of employment because race, color, religion or national origin." The intent of this section was to guarantee equal opportunity in the job market for all citizens.[84] It attempts to eliminate invidious classifications as determining factors of employment, and mandates that attention be focussed upon an individual's ability, capacity, efficiency, performance and training.[85] Consequently, an employer's decision to discriminate against mestizos based upon a desire to avoid future confrontation with the INS would violate the Civil Rights Act of 1964.[86]

D. The Practical Limits of the Civil Rights Act

Many supporters of the Bill have been quick to argue that if an individual felt that he had been discriminated against, he could redress his grievances by initiating action against the employer for violating the equal employment provisions of the Civil Rights Act of 1964. Although this might be true in theory, the practical value of this remedy is very limited.

Application to the Equal Employment Opportunity Commission (hereinafter E.E.O.C.) results in a lengthy delay before a final decision is rendered. The statute states that sixty days prior to filing his complaint with the E.E.O.C., the applicant must exhaust all state and local remedies.[87] The Commission must receive the charge within thirty days after the deference period. An

82. *Id.*
83. 42 U.S.C. §§ 2000e-(1)-(17).
84. COOKSEY, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417 (1966).
85. *Id.*, at 421.
86. 42 U.S.C. § 2000e-(5)(g).
87. For an excellent discussion of the mechanics of the statute *see* AFFELDT, Title VII in the Federal Courts Private or Public Law Part I, 14 VILL. L. REV. 671 (1969).

investigation must be made as to reasonable cause and a copy of the complaint served on the respondent. If cause exists, conciliation is the first objective. If terms are mutually accepted, the parties in conflict can sign an agreement whereby the employer agrees to abolish unfair practices in return for dropping the action. But if an employer does not want to conciliate, an action must be brought against him in the courts. The Commission currently has a two-year back log of cases.

Only when the Attorney General discovers a "pattern or practice of resistance" by employers to the Civil Rights Act, can the charging party go directly to court and bypass state and Commission remedies.[88] Even though the individual has been afforded the right to bring a private action under the statute, to do so would rapidly deplete any money one had saved. In reality, therefore, people who would most suffer from a discriminatory application of the Bill, could ill afford to consider bringing an action against the employer.

From the standpoint of the affected person, the proposed legislation would place him in a precarious position. Presently employers are prohibited from violating the Civil Rights Act, and a redress of grievances can be secured from the Attorney General. However, the initiative for any action would still rest with the individual worker. Far too often the unskilled, undereducated, and unemployed laborer stands in awe of businessmen, which, when coupled with his lack of legal sophistication, discourages direct petitioning for relief. Recognizing this passivity employers might be less apt to comply with guaranteed protection. Shielded by the worker's unfamiliarity with means of legal redress, employers could discriminate on the basis of race or national origin without fear of retribution. As a result, legislation similar to the proposal discussed herein would adversely burden the minority laborer. The Justice Department would be caught in the middle and left with the unenviable task of determining the validity of an employer's decision, especially since any employer could claim compliance with the Rodino Bill's bona fide inquiry. Clearly, the first line of enforcement would either become seriously eroded, or, minus the initiative of the affected person, disguise the discrimination and place a further encumbrance on the Chicano worker.

E. The Question of Uniform Application

The Bill's announced purpose to ferret out undocumented aliens could fail if its application affects only Latin Americans. Warnings about this potential abuse have been sounded in Con-

88. 42 U.S.C. § 2000e-(6).

gress, because the common perception of unauthorized aliens centers on one ethnic group—those of "Mexican origin."[89] A myriad of nationalities comprise this condemned population,[90] but enforcement emphasis would be narrow. This has been noted by Congressman Edward R. Roybal:

> This legislation is really directed at just a certain group in the United States, and no one else because if it were directed at everyone, at every resident, then every employer would have to have in his possession the form recommended by the committee, one that would be given to every employer by the Attorney General and would require certain information of each and every employee in the United States.[91]

Restrictionists seemed unconcerned about the absence of a requirement to examine *all* job applicants and employees, thus permitting employers to single out mestizos for questioning. When asked whether the employer would be required to question everyone, Congressman David W. Dennis casually observed: "It is not required to do it. If he wants to . . . the law gives him that opportunity but he is not required to do it."[92]

Persons possessing the identifiable features of Mexican Nationals, primarily Chicanos and other Latins, would be subjected to a pungent selectivity. Congressman Steven D. Symnts, recognizing this potential stated: ". . . This Bill if passed into law will be demeaning to many of my Mexican-American constituents, as it will force unnecessary harassment to them when seeking employment . . . ."[93] Congressman George H. Mahon concurred: ". . . in my own area we have many Mexican-American workers. This Bill as now written would impose an intolerable and unac-

89. *See* 119 CONG. REC., *supra* note 71, at 14186. Congressman Ketchem has contended that the *gun sight* of the legislation is *aimed* right down the throat of every American of Mexican descent in the United States.

90. According to Table 23B of the ANN. REP. OF THE IMMIGRATION AND NATURALIZATION SERVICE (1973), at 83, there were approximately sixty-five (65) different nationalities of people deported. Of this group of sixty-five nations, only nineteen (19) are populated by people of Latin descent.

91. *See* 119 CONG. REC. 14202.

92. *Id.*, at 14184. A reading of the congressional debates gives one the impression that Congressman Dennis, as well as others, were cognizant of the great burden to be imposed on employers and the potential discriminatory consequences. Congressman Roybal related the following:

> The employers with whom I talked . . . say that this [the determination of legal status] is the responsibility of the Department of Immigration and not their responsibility. . . . He, the employer, is the first to admit he is not trained to do this job; therefore, he should not be forced to do it. The employer will also be the first to say that he does not want the job anyway. It is just as simple and as clear as that.

To reduce this burden, and to diminish the anxiety it would produce, Dennis and others like him endorsed the proposition that the employer should not be obligated to secure proof from *all* of one's employees or applicants. In the haste to resolve this issue, the danger of selective enforcement would be unleashed against anyone suspected of being undocumented. At 14201.

93. *Id.*, at 14187.

ceptable burden upon our people."[94] This was keynoted by Congressman Abraham Kazen, Jr.: ". . . What I do not want to happen is for every single one of our native born Mexican-Americans to be second class . . . put to the humiliation of having to sign statements prepared by the Attorney General or someone else before they can earn a livelihood for themselves and to feed, clothe and educate their families."[95]

This gives rise to an equal protection issue if only dark skinned persons are subject to an inquiry. Although direct state involvement would not exist, the existence of repugnant legislation violative of the fifth amendment's equal protection concept would apply.[96] In the landmark case of *Yick Wo v. Hopkins*,[97] the Supreme Court stated: "Though the law itself be fair on its face, and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the *Constitution*."[98] The Court concurred with the language in *Barbier v.*

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94. *Id.*, at 14196.

95. *Id.* This would just add another aggravation to a long list of degradations already leveled against the Chicano community. Congressman Donald H. Clausen has observed:

> Mexican-Americans are proud and hardworking people but they have related to me the constant pressure and harrassment they face simply because they are of Mexican descent. I try to put myself in their position and ask why should I be singled out to display identification and verification of birth place in order to obtain or retain a job. I know of no other group in these United States that is treated in this manner. Nor do I feel that any group should be. That is why I believe that this Bill, or any other that could possibly encourage any form of discrimination no matter how subtle, no matter how innocent in appearance, would set a dangerous precedent. At 14192.

96. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969).

97. 118 U.S. 356 (1886).

98. *Id.*, at 375-374. *See also* Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, concurring: "Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause . . . ."); Collins v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972); Thompson v. Mazo, 421 F.2d 1156, 1160 n.10 (D.C. Cir. 1970) ("Allegations that the federal government has filed to display equal respect and concern for the rights of one group of citizens . . . are measured against the 'pledge of protection of equal laws,' Yick Wo v. Hopkins . . . which is implied in the fifth amendment."); Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969) ("It [the fourteenth amendment] also forbids unequal enforcement of valid laws, where such unequal enforcement is the product of improper motive."); Shock v. Tester, 405 F.2d 852, 855 (8th Cir. 1969) ("It [the fourteenth amendment] prohibits discriminatory administration of valid statutes . . . [and] [i]t is proper for a person adversely affected to bring action under 42 U.S.C. § 1983 on the grounds that he has been denied his rights under the equal protection clause of the Constitution."); Sister of Prov. of St. Mary of Woods v. City Evanston, 335 F. Supp. 396, 404 (N.D. Ill. 1971) ("Plaintiffs however aptly point out that proof of purpose and effect may establish racial discrimination despite the seeming neutrality of the statute or ordinance."); United States v. Robinson, 311 F. Supp. 1063, 1065 (W.D. Miss. 1969) ("Although an act or statute may be valid on its face, intentional discriminatory enforcement thereof

Connally,[99] which enumerated certain unacceptable discriminatory practices. Two such practices were held proscribed by the equal protection clause: (1) no impediment could be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; (2) no greater burdens could be laid upon those in that same calling and condition.[100] Furthermore, once a classification is established, it has been held in other cases that the equal protection clause of the fourteenth amendment requires ". . . that everyone placed within a classification be treated similarly."[101]

Assuming for a moment the enactment of H.R. 982, its provisions would have to be applied equally to conform with *Yick Wo*. But two job applicants, one Latin and the other an Anglo, would tempt most employers to scrutinize the former and casually accept the latter. Even though an Anglo applicant could be an illegal alien, his opportunities for employment would unfairly exceed those of mestizo citizens. Consequently, the abominable damage so dreaded by the Bill's proponents [i.e. an illegal alien taking employment from a citizen] could just as easily occur under these circumstances.[102]

Equal treatment would be sacrificed to ease the burden on employers posed by the affirmative duty,[103] encouraging a selective attitude based upon a racial classification. Such an application of a statutory directive would severely encumber workers of

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can render its discriminatory enforcement constitutionally invalid."); Lovelace v. Leechburg Area School District, 310 F. Supp. 579, 583 (W.D. Pa. 1970) (". . . it has been plain law that 'invidious discrimination' in the administration 'with an evil eye and an unequal hand' of a regulation fair on its face is unconstitutional under the Fourteenth Amendment.").

99. 113 U.S. 27 (1884).

100. *Id.*, at 31. In Consolidated Water Power & Paper Co. v. Bowles, 146 F.2d 492 (Emer. Ct. App. Wash. 1944), the complainant alleged that unfairness and unreasonableness resulted from a regulation as interpreted by the administrator, because it drew a distinction between complainant's products and others of equal quality, thereby imposing upon the complainant a competitive handicap which it had not previously suffered. The court in ruling in favor of the complainant, responded as follows: "It is generally regarded as essential to fair treatment that all persons who are similarly situated be dealt with upon an equal basis." at 495. *See also* Booth Fisheries Corporation v. Bowles, 153 F.2d 449, 451 (Emer. Ct. App., Chicago 1946) ("This court has held that unless the apparent discrimination is required to effectuate one of the purposes of the act a regulation must be held to be arbitrary and capricious if its provisions are such that all persons who are similarly situated are not dealt with upon an equal basis but greater burdens are laid upon one than are laid upon the others in the same calling and condition."); Supak v. Porter, 158 F.2d 803, 807 (Emer. Ct. App., St. Paul 1945) ("It is essential to fair treatment that all persons who are similarly situated be dealt with upon the same basis; that no greater burdens be laid upon one than are laid upon others in the same calling and condition."); G.R. Kinney Co., Inc. et al. v. Porter, 157 F.2d 683, 688 (Emer. Ct. App. New York 1946).

101. United States v. Holmes, 387 F.2d 781, 785 (7th Cir. 1968); Skinner v. State of Oklahoma ex rel. Williamson, 316 U.S. 535 (1942). *See also* cases cited at note 98 *supra*.

102. *See* notes 97-101 *supra*.

103. *See* note 92 *supra*.

distinctive Latin appearance. This would run counter to the Court's interpretation in *Yick Wo*:

> . . . whatever may have been the intent of the ordinances, as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial of that equal protection of the laws which is secured . . . to all . . . by the provisions of the 14th Amendment of the Constitution . . . .[104]

F. Effect After a Citation is Issued

An employer would realistically be less likely to employ people of Mexican origin once cited.[105] Citation would promote greater care in the selection of workers, but the simpler adjustment would be to ignore all persons who present a potential risk. The latter option would appear even more attractice since no opportunity for a hearing after an initial citation is provided. This means that a cited employer would not have the right to challenge the first issuance of a citation at a hearing. Opportunity for a hearing would become available only after a second violation of the Bill was cited;[106] and an employer would have to wait until that time to challenge the first citation. The lapse of time imposed upon an accused employer in pursuit of a hearing would prejudice his attitude. Evidence of his initial innocence may even have vanished; therefore, the extra precaution adopted to avoid a second citation would tend to destroy fairness in application. Discrimination would proceed against suspect workers based upon any imagined connection with a future citation.

G. Citation Without Due Process

The *Constitution* of the United States provides that no person shall be deprived of life, liberty, or property without due process of law.[107] This precept also applies to administrative procedures wherein a person's constitutional rights may be infringed.[108] When these rights of life, liberty or property are at stake, the law demands that an individual be given adequate notice of the agency's action and the opportunity for a fair hearing in which he may confront his accusers and present opposing evidence.[109]

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104. Note 97 *supra*, at 373.
105. *See* text accompanying notes 96-100 *supra*.
106. H.R. 982 *amending* 8 U.S.C. § 1255, INA § 245-INA § 247(b)(2).
107. U.S. CONST. The fifth amendment applies the concept of due process to the federal government and due process is extended to the states via the fourteenth amendment. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).
108. *See* DAVIS, ADMINISTRATIVE LAW, ch. 7 (1972); ROGGE, AN OVERVIEW OF ADMINISTRATIVE DUE PROCESS, 19 VILL. L. REV. 1-81, 197-276 (1973).
109. FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 62 (1941): "There are certain criteria of fairness in the hearing

The fact that these rights are placed in jeopardy under the provisions of this bill[110] leads one to the conclusion that enforcement of its provisions must be made with full observance of procedural due process by the Attorney General.[111]

Under a proposed amendment to H.R. 982,[112] the Attorney General is ordered to serve a citation on the employer informing him of an apparent violation of the anti-employment provision if he deems the evidence persuasive. The amendment, like the original bill, does not provide for a hearing in which the employer may challenge the issuance of the citation for the initial violation. Typically, a citation has meant an order or summons by which a defendant is directed or notified to appear before a court or tribunal.[113] It has also been defined as a writ commanding a person to appear for a specified purpose in a court of competent jurisdiction.[114] It would appear, however, that the framers of H.R. 982, have given a different definition to the word citation.[115] Here the citation would be neither a summons nor a writ requesting the employer to appear; instead, it is a record of the employer's initial violation which is to be retained in the files of the local office of the Immigation and Naturalization Service. No opportunity is given the accused to appear before a court, or administrative tribunal, in conformity with the normal use of a citation and due process. Nevertheless, by looking beyond the word *citation*

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process which, in the absence of clear evidence of inapplicability in particular circumstances, should regularly be observed. Before adverse action is to be taken by an agency, whether it be denying privileges to an applicant or . . . before discipline is imposed upon him, the individual immediately concerned should be appraised not only of the contemplated action with sufficient precision to permit his preparation to resist, but, before final action, he should be appraised of the evidence and contentions brought forward against him so that he may meet them. He must be offered a forum which provides him with an opportunity to bring his own contentions home to those who will adjudicate the controversy in which he is concerned. The forum itself must be one which is prepared to receive and consider all that he offers which is relevant to the controversy."

110. H.R. 982 *amending* 8 U.S.C. § 1324 *to* INA § 274(b)(1).

111. *See* GORDON & ROSENFIELD, *supra* note 78, at § 9.16. With respect to fines and penalties issued in accordance with the I.N.A., it has been concluded that an adjudication of liability is an administrative function and that the Attorney General in performing this function must observe the constitutional requirement of due process. Within this precept is included the right to a fair and reasonable process with adequate opportunity to present evidence and defenses. *See generally* Lloyd Saubaudo Societa v. Elting, 287 U.S. 29 (1932); Campagnie Generale Transatlantique v. Elting, 75 F.2d 944 (2d Cir. 1935); United States v. Seaboard Surety Co., 239 F.2d 667 (4th Cir. 1956); British Empire Steam Nav. Co. v. Elting, 74 F.2d 204 (2d Cir. 1934), *cert. den.* 295 U.S. 736.

112. H.R. 982 *amending* 8 U.S.C. § 1324 *to* INA § 274.

113. *See generally* Adams v. Citizen Bank, 136 So. Rptr. 107 (1931); Burrage v. Hunt Production Co., 114 S.W.2d 1228 (1938).

114. *See* Sheldon v. Sheldon, 100 N.J. Eq. 24 (1926).

115. Congressman Rodino has remarked that, "[t]he citation itself is a warning to the employer, and if that employer were to do it a second time, then this is an indication again that the employer is not exercising good faith and the citation could be used as evidence in proving 'guilty knowledge' on the part of the employer." 118 CONG. REC. 8260.

and examining the effect of the Attorney General's decision, it is apparent that by issuing the citation, the Attorney General has in fact made a final determination to the effect that the employer has committed an offense which may lead to further civil and criminal sanctions upon subsequent violations.

The Attorney General's decision to issue a citation without a hearing contravenes the rule established by the Supreme Court in *Opp Cotton Mills v. Administrator*,[116] which held that due process of law mandates a fair hearing before an administrative decision becomes final. The issuance of a citation, though not exacting a penalty from nor imposing imprisonment upon the employer, is proof that he has committed an offense which is indeed punishable if further violations occur. The citation itself indicates that the employer has committed an offense and is in effect a final order made by the administrative agency that the employer may not commit another violation without being civilly or criminally fined. The absence of a hearing to confront and contest the initial violation is an infringement of due process constitutional rights.[117] The Court in *Opp Cotton Mills*, stated that an adjudicatory fair hearing under these circumstances must be held: "[the] demands of due process do not require a hearing, at the initial stage or at any particular point . . . as long as the requisite hearing is held before the final order becomes effective."[118]

It is essential that the hearing be at the time the first violation is said to have occurred, for it is at this particular point in time that the witnesses may be gathered and the circumstances are fresh in the employer's mind. As the Supreme Court stated in *Armstrong v. Manso*,[119] the right to adequate notice and a fair hearing "must be granted at a meaningful time and in a meaningful manner."[120] At a later date, witnesses may be deceased or the undocumented persons may have already been deported, in which case it will be difficult for the employer to oppose the alleged violation or prove he made a *bona fide inquiry* into the status of the alien. The employer must be given the opportunity to confront and cross-examine his accusers and their evidence at a time preceding the possible issuance of a citation. Where no

116. 312 U.S. 126 (1941). The case involved the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which gave authority to an administrator to set a minimum wage for the textile industry. The minimum wage order became final upon pronouncement by the head administrator, at which time a hearing was provided. The Court held that procedural due process was satisfied since the hearing was provided *at the time the administrative decision became final and thus effective* (emphasis added).

117. *Id.*

118. *Id.*, at 152-153 (1942).

119. 380 U.S. 545, 552 (1965). The hearing required by due process must be "appropriate to the nature of the case."

120. *Id.*, at 552.

such opportunity is allowed an individual may be held culpable for an offense for which he is totally innocent.[121]

Further, the Supreme Court in *Goldberg v. Kelly*,[122] declared that procedural due process requires that a pretermination evidentiary hearing be held when public assistance payments to welfare recipients are discontinued. The recipient must be given timely and adequate notice detailing the reasons for the proposed termination and an effective opportunity to defend the action by confronting any adverse witnesses and by presenting his own argument and evidence. Although the state allowed written submissions, the Court stated that the individual must be allowed to state his position orally, since writings may not offer the flexibility afforded by oral argument nor satisfactorily illuminate testimony where credibility and veracity are in question. This is especially true in a situation where an employer can be cited for hiring undocumented persons on persuasive evidence or information. This information may consist of hearsay and other objectionable evidence,[123] therefore, the defendant should be given the opportunity to contest its admissibility.

It is clear that the employer's interest in not being erroneously cited for an alleged violation outweighs the governmental interest in preventing any increase in its administrative burdens. This same contention was held in *Goldberg*, in which the interest of the eligible welfare recipient to his uninterrupted receipt of public assistance was asserted to clearly outweigh the state's competing concern to prevent any increase in its fiscal and administrative responsibilities.

As was also stated by Justice Harlan in *Snidach v. Family Finance Corp.*:[124]

> Due process is afforded only by the kinds of 'notice and hearing' which are aimed at establishing the validity, or at least probable validity, of the underlying claim against the alleged
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> . . . .

The government must thus show that a valid claim against the employer exists prior to the issuance of the citation. The citation

121. *See* Bell v. Burson, 402 U.S. 535, 542 (1971). The Court stated: ". . . it is fundamental that . . . due process requires that when a State seeks to terminate an interest . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case'. . ."

122. 397 U.S. 254 (1970).

123. During the congressional debates, Congresswoman Elizabeth Holtzman asked whether a citation could be served on the basis of hearsay evidence or illegally obtained information. Congressman Eilberg, a major supporter of the Bill answered: "The citation will be served if evidence or information is elicited which persuasively demonstrates that the alien was not authorized to work and this fact was known to the hiring authority who did not make a *bona fide inquiry*." In other words, the use of hearsay evidence was not denied or discounted by Congressman Eilberg. 119 CONG. REC. 14200.

124. 395 U.S. 337, at 343 (1969).

is a final decision of the Attorney General declaring that the employer has committed a wrong; therefore, due process is denied if no opportunity is presented to rebut this allegation of wrongdoing on the part of the defendant.

III. PROPOSED FEDERAL LEGISLATION: H.R. 8713

On July 14, 1975, H.R. 8713 was passed by the House Judiciary Committee[125] to be presented to the entire House, presumably sometime during the next congressional session. This Bill, on its face, appears to correct many of the serious defects contained in H.R. 982. H.R. 8713, nevertheless, is not without controversy as subsequent examination reveals.

A. Employer's Opportunity to Respond

Of particular interest is the fact that H.R. 8713 contains two sections that seemingly alleviate constitutional issues raised by H.R. 982. Section (b)(2) of H.R. 8713 states:

> If, on evidence or information he deems persuasive, the Attorney General, after affording an opportunity to *respond to and rebut such evidence* reasonably concludes that an employer . . . employs, or . . . continues to employ . . . any alien in the United States who has not been admitted . . . the Attorney General may serve a citation. (emphasis added).

A noticeable change from the procedure proposed by H.R. 982 has been introduced by H.R. 8713. According to H.R. 8713, the employer would be afforded an opportunity to rebut and respond to the charge made by the Attorney General of employing an undocumented worker.[126] As the previous discussion indicates,[127] no such opportunity was provided by H.R. 982 at a simi-

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125. H.R. 8713, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(2)(b)(c)(d).

126. Another difference between H.R. 8713 and H.R. 982 relates to the absence in H.R. 8713 of language describing the employer's duty. It will be recalled that § (2)(b)(1) of H.R. 982 provided that an employer would not be deemed to have violated that section if (s)he had made a *bona fide inquiry* as to an individual's status. Furthermore, this inquiry could be prima facially established by a statement signed by the applicant or employee confirming his or her eligibility to work.

Section (2)(b)(1) of H.R. 8713 does not mention any similar requirement relating to a bona fide inquiry into an individual's status. In fact there is no mention of any affirmative duty leading one to believe that it is possible that the drafters of H.R. 8713 yielded to the argument that it was improper to impose upon employers the task of determining the employer's or applicant's legal status. Instead, H.R. 8713 might be read narrowly and interpreted to apply only to those situations where the employer knows, other than by directly asking the employee, that the individual is in this country without proper documentation. Whether or not this is a proper construction of the bill is not clear. Consequently, this adds another controversy to other questions already surrounding the meaning of the language of H.R. 8713. *See* discussion in text *infra* with respect to other problems concerning H.R. 8713.

127. *See* text accompanying notes 117-126 *supra.*

lar juncture in time. This Section also provides an opportunity for judicial review of the decision to issue a citation should the employer object to it.[128]

At first examination, it would appear that the inclusion in Section (b)(2) of an opportunity for rebuttal and subsequent judicial review effectively quashes any issue concerning denial of procedural due process. Nevertheless, issue may still be taken with this section.

Foremost is the complaint that evidence offered by the employer rebutting the initial charge of hiring an undocumented worker will not be heard by an impartial tribunal, as there is no provision for the use of an impartial judge or hearing officer to hear the testimony offered by both sides. Rather, the evidence is apparently presented to other individuals within the Attorney General's office. Consequently, the evidence offered by opposing parties is considered by officials of the same office who are also responsible for issuing the charge. Such a procedure raises the serious question of whether an impartial tribunal, required by due process of law, is being provided.

Secondly, it is interesting to note that Section (b)(4) of H.R. 8713 provides that prior to the assessment of a civil penalty for a violation of Section (b)(2) a second time, a hearing will be conducted before an immigration officer.[129] This means that a hearing must be conducted by an officer of the immigration department before the Attorney General's office decides to impose a civil penalty for violating Section (b)(2).[130]

Assuming the discussion at Section G of Part II above with respect to the *finality* of the Attorney General's decision to issue a citation and the inherent due process problems is valid,[131] it is arguable that there is no genuine basis for justifying the two different procedural frameworks i.e., not providing for an impartial officer to hear the evidence respecting the initial charge of hiring

128. Proposed Section (2)(b)(2) of H.R. 8713 reads in part:
The procedure prescribed by and the provisions of chapter 7 of title 5, United States Code, shall apply to and shall be the sole and exclusive procedure for the judicial review of a citation served by the Attorney General. An action for judicial review of a citation may be filed in the appropriate judicial district not later than sixty days from the date of issuance of the citation.

129. Section (2)(b)(4) of proposed H.R. 8713 states:
A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur. . . . The hearing shall be of record and conducted before an immigration officer designated by the Attorney General individually and or by regulation, and the proceedings shall be conducted in accordance with requirements of title 5, section 554 of the United States Code.

130. *See* note 130 *supra.*

131. *See* text accompanying notes 117-126 *supra.*

an ineligible worker, while providing for a hearing before an impartial officer on a second violation. It was probably felt by the drafters of H.R. 8713 that there would be no need for providing for a hearing before an impartial hearing officer in light of the provision furnishing the opportunity for judicial review of the Attorney General's decision to issue a citation. This, coupled with the fact that the initial citation is viewed only as a warning,[132] apparently convinced proponents of the Bill that there would be little reason to be apprehensive about any reaction by employers due to the fact that they would have to go before officials in the Attorney General's office in order to contest the alleged charges.[133] This assumption, however, may be somewhat presumptious.

On the one hand, providing an opportunity to contest the charge made by the Attorney General before other officials of that same office, as mentioned above, certainly does not generate the same feeling of impartiality that accompanies a hearing conducted before an independent judicial or administrative officer. Further, furnishing the opportunity for judicial review of the decision made by the Attorney General's Office may be of little comfort to the employer who has already incurred expenses in preparing for his defense before the Attorney General.[134] Influenced by these two factors, the employer may simply adopt the position that he will not hire anyone who might subject him to prosecution.

B. Anti-Discrimination Provision

To avoid the adverse consequences produced by the employers' potential categorical decision not to hire people of Latin descent, the drafters of H.R. 8713 included a provision allegedly de-

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132. *See* Congressman Rodino's comment on the nature of a citation, quoted at note 116 *supra*.

133. Again, in this context, the negative reaction would develop from an attitude that in order to avoid any unwanted confrontation with government officials, the simple solution is to ignore applicants who might draw undesired attention.

134. Additional expenses will undoubtedly be incurred following a decision to seek judicial review of the Attorney General's disposition. As a possible consequence of this prospect of additional expenses being incurred, employers might purposely elect to foresake the remedy of judicial review, instead choosing to allow the citation to stand and thus avert the expense posed by judicial review. Thereafter, the employer would refuse to consider individuals of Latin descent for employment, thereby avoiding any future issue regarding the status of the employees. If, of course, the employer elects to carry out such a scheme, (s)he will have violated the precepts of equal employment opportunity. But due to the difficulty, in most cases, of proving allegations of discrimination in this type of situation, (*see* discussion in text, Section B of Part III), coupled with the fact that all too often the people discriminated against lack the financial resources and legal sophistication necessary to prosecute an action (*see* text accompanying notes 88-89 *supra*), the employer's unscrupulous employment decisions might go unchallenged. Moreover, whether a provision can ever be effectively designed to prevent the occurrence of the problem outlined above, is uncertain. *See* text accompanying note 139 *infra*.

signed to prevent discrimination. Section 3 of the proposed amendment to Section 274 reads:

> Whenever the Attorney General has reasonable cause to believe that an employer or agent of the employer has failed or refused to hire or has discharged any individual, or that any person has failed or refused to refer any individual for a fee for employment because of such individual's national origin, the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief . . . as he deems necessary.[135]

This Section also indicates that the Attorney General's authority, as provided by section 3, is in addition to his powers under the Equal Employment Opportunity Act.[136] Again, the attempt here is to correct one of the major objections to H.R. 982—the charge of potential discrimination, violative of the precepts of equal employment opportunity.[137]

What facts or evidence will bring about the requisite "reasonable cause to believe" that the employer has discriminated on the basis of national origin so as to justify a suit by the Attorney General is uncertain. This language may be strictly interpreted to mean that the Attorney General must demonstrate the existence of some pattern or practice of discrimination before bringing the action. If this is a proper interpretation of this Section, serious problems may arise in the situation where the employer has already employed a few individuals of Latin descent and thereby can simply point to them as proof of his supposed lack of discriminatory practice and intent. Thus, a misleading impression is created where the employees are simply decoys offered to hide the employer's real feelings that are reflected in subsequent employment decisions not to hire people of Latin descent. This situation is not improbable and the task of proving it would be quite difficult.

It is important to note that no matter which scheme the victim of discrimination in employment selects to utilize in protecting his rights of equal employment opportunity, whether it be under the EEOA or under a provision like that contained in H.R. 8713, the problem is just as troubling. Attempting to prove that despite the employer's apparent non-discriminatory practices, he is in fact discriminating against others and not making a serious effort to implement the commands of the doctrine of equal employment opportunity as subsequent situations arise, could be quite arduous.

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135. Section 3 of H.R. 8713, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(3).
136. 42 U.S.C. §§ 2000e-(1)-(15) (1970) (hereinafter cited as EEOA).
137. *See* discussion in text accompanying notes 84-87 *supra*.

This is especially true where evidence of the *crime* so to speak, is improperly compromised by the presence of a few *token* brown skinned individuals. This problem will be most acute in the industries that currently rely heavily upon the employment of undocumented workers. To shield themselves from future scrutiny by the Attorney General, employers could simply hire a few workers eligible to work, and from that point on reject anyone who might appear to them as a potential source of concern. The question, then, seemingly becomes one of percentages, "how many individuals of noticeable foreign extraction must the employer employ to counter a charge of discrimination—10%, 20%, etc., of their present work force? This is a difficult question to answer; but the problem exists, and unless the language of H.R. 8713 or any similar legislation is liberally construed and vigorously enforced, Section 3 will lack the potency necessary to actually put employers on notice that in their hiring decisions they may not violate the equal employment rights of Chicanos without being subject to liability.[138]

C. *Inclusion of an Amnesty Provision*

One of the many concerns of those individuals opposed to H.R. 982 is the absence of any provision which would exclude from its trappings those individuals who have lived and worked in the United States for an extended period of time. The threat posed by the Rodino Bill is that it would work to uproot families who may have been in this country for a number of years but who have failed to seek *legal* permanent residence. This uprooting would be particularly unfair to those families who have contributed to the development of this country[139] and who may also have United States born children, in which case detection by the INS

138. It is important to note that the doctrine of equal employment opportunity means little unless it is practiced and safeguarded at each and every opportunity. Therefore, unless this section, or any similar legislation, is enforced vigorously, any act which would impose a penalty on employers who hire ineligible workers should not be considered because of the potentially disastrous consequences that could befall the Chicano community.

139. It is difficult for even the most unyielding restrictionists and proponents of these bills to argue against the fact that due to the presence of many undocumented workers, not only has the economy gained from their labor, but their accumulation of equities, payment of taxes, and consumption power have contributed to the general welfare of this country. *See* remarks made by opponents of H.R. 982 in 119 CONG. REC. 14193. For additional comments on the contributions made tho this country by many undocumented workers and their legal brethren *see generally* MORIN, AMONG THE VALIENT (1966), *also* GALARZA, SPIDERS IN THE HOUSE, WORKERS IN THE FIELD (1970).

It would be tragic to uproot these individuals, motivated by the goal of self improvement, for conduct often encouraged by federal policies and citizen entrepreneurs. For an extensive treatment of this latter point *see* CARDENAS, *United States Immigration Policy Toward Mexico: An Historical Perspective*, note 3 *supra*.

and subsequent deportation would work a severe hardship to the family.[140]

The drafters of H.R. 8713, recognizing the serious consequences posed by a law that would threaten the continued existence of a family that had already established itself in this country included a provision that authorizes the granting of permanent residence status to an undocumented person who has been *continuously present* in this country since June 30, 1968 and whose close relatives are citizens.[141] Another provision would permit the Attorney General to grant permanent residence to any undocumented person whose deportation would result in *unusual hardship.*[142]

Whether the amnesty provision adequately resolves the problem is debatable. If the provision granting permanent residence to people whose deportation would result in unusual hardship is construed in a manner so as to encompass situations where a family has accumulated the same equities as a family who has been in this country more than seven years, but who themselves may have been here only for four to five years, then the need for revising the *cut-off* date of June 30, 1968 may not be necessary. Realistically, there are situations where a family may be here a shorter period of time but who should justifiably be treated no differently than the family who has been here longer. Consequently, they should be given a comparable opportunity to adjust their status as that given to other families qualifying under the cut-off provision.

In any event, any legislation that might be eventually adopted should contain a provision similar to the one in H.R. 8713, which offers amnesty, and hence protection, to families who rightfully deserve it. To do otherwise would be unfair.[143]

IV. CALIFORNIA LABOR CODE SECTION 2805 (a)

As mentioned earlier, Section 2805(a) makes it unlawful for an employer "to knowingly employ an alien not entitled to lawful residence if such employment would have an adverse effect on lawful resident workers." A person guilty of violating this California Labor Code section faces imposition of a fine of $200.00 to $500.00 for each offense.[144]

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140. For a fuller discussion of this matter *see* Note, *Deportation Proceedings: There Must Be a Right to Appointed Counsel,* 3 CHICANO L. REV. 195 (1976).
141. § 4 H.R. 8713, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(4).
142. § 4 H.R. 8713, *amending* 8 U.S.C. § 1324, I.N.A. § 274 *to* § 274(4).
143. *See* text accompanying notes 141-42 *supra. See also* Note, *Deportation Proceedings: There Must Be A Right To Appointed Counsel,* 3 CHICANO L. REV. 195 (1976).
144. California Labor Code § 2805(b); *see* complete text at note 7 *supra.*

As written, Section 2805(a) is totally devoid of any of the protections that were discussed previously with respect to proposed federal legislation.[145] Consequently, challenges similar to those raised against H.R. 982 e.g., denial of procedural due process and potential discriminatory application, might be advanced against Section 2805(a), and it is doubtful that this section as presently enacted can withstand these constitutional attacks.[146]

Thus, should the California legislature repeal Section 2805 (a) and draft new legislation, it would most certainly have to draft it in a manner as to eliminate the threat of denial of equal employment opportunity and also extend to the employer procedural due process protections of a fair and impartial hearing. Without these protections the tangential effects of Section 2805(a)'s enforcement, like the federal proposals, will fall heavily on Chicanos.[147]

CONCLUSION

In light of the Supreme Court's decision in *DeCanas v. Bica*, we know that states may regulate labor but it can not do so if it directly affects the regulation of immigration.[148] In this respect, a state could properly draft legislation that prohibits employment of undocumented workers.[149] But it also has the task of assuring against violations of the doctrines of equal employment opportunity and due process. However, the desirability of having the states enact this legislation instead of the federal government is open to serious question. Should the states choose to enact this legislation, they are precluded by *DeCanas* from including a section that extends amnesty or other protections that would necessarily involve them in the regulation of immigration. This would violate the Court's position that only the federal government can regulate in this area.[150] Nevertheless, regardless of whether it is the federal government or the states that eventually enact this form of legislation, in either case, the potential adverse effects on

145. *See* text accompanying notes 68-86, 89-107, 108-126 *supra.*

146. *See* comments by Prof. Krattenmacher at a conference on immigration law in Note, *The Undocumented Alien And DeCanas v. Bica: The Supreme Court Capitulates To Public Pressure*, 3 CHICANO L. REV. 148 (1976) at n. 66 where he states in part:

> DeCanas is a 'sterile' case in that the California court held § 2805 unconstitutional in the abstract and the Supreme Court reversed that decision as such. . . . Whether the statute can ever be constitutional as applied to any given fact situation is a totally different question. My hunch is that the state court will find § 2805 unconstitutional in that context as well. . . .

147. *See* part 11 *supra.*

148. *See* text accompanying notes 13-20 *supra.*

149. *See* text accompanying notes 18-19 *supra.*

150. *See* text accompanying notes 12-20 *supra.*

the Chicano community must be of the utmost concern to legislators or a further erosion of Chicano's rights will most certainly occur.

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