
Winter 1980

Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The Scorched Earth Approach to Immigration Control

Charles Duryea Smith

Juan Ernesto Mendez

Follow this and additional works at: <https://scholarship.law.unc.edu/ncilj>



Part of the [Commercial Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Charles D. Smith & Juan E. Mendez, *Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The Scorched Earth Approach to Immigration Control*, 6 N.C. J. INT'L L. 19 (1981).

Available at: <https://scholarship.law.unc.edu/ncilj/vol6/iss1/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Employer Sanctions and Other Labor Market Restrictions on Alien Employment: The "Scorched Earth" Approach to Immigration Control

by Charles Duryea Smith* and
Juan Ernesto Mendez**

I. Introduction

The United States has experienced a new wave of immigration during the past few years. Immigration is a deep-rooted part of America's history, yet it presents today a somewhat different face. Large proportions of the recent non-European arrivals are refugees fleeing persecution in their homelands. An unverifiable number of others enter without inspection or are nonimmigrants who overstay their visas and wish to remain permanently. The presence of these aliens against the backdrop of the United States' current economic problems has spotlighted the debate over U.S. immigration policies as a fundamental and pressing issue facing the nation. The debate is likely to become increasingly heated and to involve diverse organizations and individuals who previously have not voiced opinions on immigration because, in 1978, the Congress and the President created the Select Commission on Immigration and Refugee Policy and charged it with analyzing immigration impacts and formulating recommendations for reform in the area.¹ The Select Commission will report to the Congress and the President by March 1981.² Regard-

* Special Assistant to Chairman, Senator Spark M. Matsunga (D-Hawaii), United States Commission on Proposals for the National Academy of Peace and Conflict Resolution; Legal Consultant, Select Commission on Immigration and Refugee Policy, 1979-1980; A.B. 1964, Oberlin College; M.A. English Literature 1967, Washington University, Saint Louis; J.D. 1972, Boston University.

** Alien Rights Law Project Staff, Washington Lawyers' Committee for Civil Rights Under Law; Board of Directors, Amnesty International—U.S.A.; Abogado 1970, Catholic University, Mar del Plata, Argentina.

¹ Immigration and Nationality Act—Refugee Policy, Pub. L. No. 95-412, § 4, 92 Stat. 907 (1978) (codified at 8 U.S.C. § 1151 note (Supp. III 1979)).

² SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, UNITED STATES IMMIGRATION POLICY AND THE NATIONAL INTEREST (March 1981). The report was released just before this article went to print. The proposals in this article differ from many of those proposed by the Commission, so it should be referred to especially in the area of Employer Sanctions, which the Commission recommended.

less of its recommendations, termination of the Select Commission will resituate immigration policy squarely in the public arena.

Broadly speaking, the federal government controls migration into the United States by concentrating on three places. First, to create legality and to prevent illegality, it erects barriers outside the United States by requiring visas for foreign visitors and immigrants, establishing their terms and conditions, and then screening applicants. Second, the government places control mechanisms at the border by designating certain locations, including interior international airports, as ports of entry at which all foreign arrivals are inspected for legal admission and by patrolling the land borders to apprehend persons trying to enter undetected. Third, the government operates in the interior of the United States to apprehend persons in the country illegally and to deter them and others from entering and staying in contravention of the law. It is this third area of interior deterrence which this article addresses.

Immigration policy is not stated and implemented solely through the Immigration and Nationality Act (INA).³ Reform efforts should therefore encompass more than the overhaul of that Act. For instance, immigration policies are shaped indirectly by many local, state, and federal regulatory policies and by state and federal court decisions in addition to the practices of the Immigration and Naturalization Service (INS). The result is a frequently unintentional but verifiable extension of immigration enforcement responsibilities to other sectors of society. This extension is evident, for example, in enforcement of immigration laws by state and local police, in restrictions placed on the availability to noncitizens of government benefits based on need, and in the obligation of Food Stamps adjudicators to report to INS the information obtained from applicants regarding their status if legality is in doubt.⁴ The labor market, however, is the immediate arena for this extension of enforcement responsibilities. There are a variety of measures, proposed or already in effect, that restrict access to certain jobs or force labor market participants into investigative and enforcement functions.

The dominant motivation behind this diffusion of investigative and enforcement functions is apparently the discouragement of immigration, both legal and illegal, by enlisting untrained official and private citizen efforts in the detection of aliens who may be present in the United States in violation of the law. This philosophy can be described as a "scorched earth" approach to controlling immigration, closing doors on immigrants and discouraging them from exercising rights while simultaneously placing enforcement responsibility to an alarming degree in the hands of a growing number of government agents and private individuals.

³ 8 U.S.C.A. §§ 1101-1503 (West 1970 & Supp. 1980).

⁴ 7 U.S.C.A. § 2020(e) (West 1973 & Supp. 1980). In addition, persons applying for a new social security card or a replacement have been required since 1978 to submit documentary evidence of age, identity, and citizenship or lawful alien status. 20 C.F.R. §§ 422.107, 422.110 (1980); 43 Fed. Reg. 20,973, 20,975 (1978).

The term "scorched earth" is not an exaggeration, for the practices and proposals are meant explicitly to deprive those noncitizens, whose presence or activities in the United States are in fact or in perception not sanctioned by law, of the means to obtain food, shelter, clothing, education, and medical care and also to deprive them of protection from exploitation, violence, and invasion of privacy. These policies are animated by the assumptions that foreign migration to the United States is an acute crisis not unlike war and that the Constitution should permit distinctions between citizens and aliens, the latter receiving no more than minimal due process. These assumptions exist, despite the fact that the Constitution nearly always speaks in the inclusive term of "persons" rather than the exclusive term of "citizens." These assumptions are dangerous. A crisis mentality, particularly one without a firm analytical foundation, risks not only damage to the American heritage of respect for human rights and of constitutional freedoms but also a reversion to the attitudes of less civilized periods in American history such as attitudes which resulted in the Alien and Sedition Acts and the notorious Palmer raids. "Scorched earth" policies will therefore undermine trust and move the nation toward isolationism and fear.

The following five topics will illustrate the "scorched earth" approach to immigration policy and what are at best ambivalent policies toward noncitizens. The topics are labor certification of applicants for permanent residency, discrimination by private employers, the policies governing access by immigrants to state public employment and also to federal public employment, and proposals for employer sanctions for hiring illegal aliens. As will be seen, the topics are interrelated in that ambivalent attitudes and an "us versus them" mentality are necessary parts of the "scorched earth" policy.⁵

Nevertheless, it is true that there is a clear need to control migration into the United States. There are more foreigners who wish to live in the United States than can be accepted. Therefore, there must be an immigration policy to choose those whom the United States will permit to enter and live within the country.

Despite the tremendous pressures from worldwide population growth, the fears of Americans beset by inflation and unemployment should not be projected on foreigners. It is particularly important today that immigration and its control be placed in proper perspective so that it does not dominate other concerns of U.S. society. Thus, it is particularly troubling to observe the drift toward enforcement of immigration policies, but not immigration laws per se, by federal, state, and local

⁵ For reasons of space availability, we will only address some of the more egregious aspects of this connection between the labor market and enforcement of immigration policy. It would doubtless be of substantial interest to explore other aspects of this policy, such as the restrictions on unemployment insurance and on employment training benefits.

agencies and departments other than the Immigration and Naturalization Service.

Beyond this impact on the profile of American society, the immigration laws of the United States represent short-run responses to global problems which must be addressed by all nations. Though the United States must reject the concept of opening its doors to all who want to enter, as that would constitute an abdication of sovereignty, it cannot wall itself off from the rest of the world. Because the pressure to migrate to the United States is considered stronger in Third and Fourth World nations, it is that pressure that U.S. policies must address. The United States must join with other nations to address the problems of population growth, a fair and equitable distribution of resources, balanced economic development, and human rights, because these forces promote international migration of persons. Otherwise, persons from lesser developed countries will increasingly seek to migrate to the United States, and this nation will increasingly use "scorched earth" policies to stem the tide. Only by addressing causes of international migration on a global scale instead of merely parochially can the vicious cycle be avoided.

II. Labor Certification of Applicants for Permanent Residence

The impact of foreign immigration upon the U.S. labor market is a major immigration policy concern.⁶ Nonquota immigrants,⁷ based primarily on a family relationship to a U.S. citizen, are not subject to an impact on labor test or any national, hemispheric, or global annual numerical ceiling. Other "family reunification" categories, first,⁸ second,⁹ fourth,¹⁰ and fifth preferences,¹¹ for certain relatives of U.S. citizens and permanent residents, are subject to hemispheric and country-specific annual ceilings, but not to an impact on labor test. For the remaining immigrant visas that are numerically limited,¹² third preference for professionals, scientists, and artists,¹³ and sixth preference for skilled and unskilled laborers,¹⁴ a prerequisite for visa issuance is a Department of Labor (DOL) certification obtained by the prospective employer. The labor certification indicates a specific labor market need and that there

⁶ Most immigrants receive visas under either the family reunification or refugee provisions. Refugee Act of 1980, 8 U.S.C.A. § 1157 (West Supp. 1980).

⁷ Nonquota immigrants are "special immigrants" as defined in 8 U.S.C. § 1101(a)(27) (1976), and spouses and children of U.S. citizens and parents of U.S. citizens over 21, 8 U.S.C.A. § 1151(a)-(b) (West 1970 & Supp. 1980).

⁸ 8 U.S.C.A. § 1153(a)(1) (West Supp. 1980).

⁹ *Id.* § 1153(a)(2).

¹⁰ *Id.* § 1153(a)(4).

¹¹ *Id.* § 1153(a)(5).

¹² The Immigration and Nationality Act, as amended, sets an annual worldwide ceiling of 270,000, 8 U.S.C.A. § 1151(a) (West Supp. 1980); an annual quota of 20,000 for any nation, which includes 600 for a colony, *id.* § 1152(a),(c); and establishes six preference classes with worldwide percentage distribution limits and a nonpreference class, *id.* § 1153(a).

¹³ *Id.* § 1153(a)(3).

¹⁴ *Id.* § 1153(a)(6).

will be no adverse effect on domestic wages and working conditions.¹⁵

Although third and sixth preference visas each have a maximum allocation of ten percent of the total number of preference visas issued, "fewer than five percent of the immigrants presently in the United States have become so by means of labor certification."¹⁶ In 1978, only six percent of legal immigrants entered without reference to family relationships.¹⁷ Thus, as a mechanism to protect the domestic labor force, labor certification is essentially ineffective and costly.¹⁸ In the last fiscal year, the DOL spent over \$4.7 million to administer the program.¹⁹ In addition, much time is spent by some 8,000 state and local officials in reviewing labor certification applications and making preliminary judgments concerning the potential impact on the U.S. labor market. Processing time varies from region to region, ranging from two and one-half months in one state employment service to nine months in another.²⁰ After the labor certification process is completed, a third or sixth preference application will take a year to process through the INS and the appropriate consular post abroad.²¹

It is not surprising, then, that most applications for labor certification are filed on behalf of employees who are already in the United States working in the jobs they seek to have certified. The procedure thus becomes, in effect, a "selective amnesty" for certain undocumented workers. According to a DOL 1976 report, fifty-seven percent of the immigrants with labor certifications changed not only jobs but also occupations within two years of their arrival.²² This fact tends to support the view that the labor certification procedure affords no real protection for the domestic labor market. Moreover, the long and elaborate application procedures require the active participation of employer-applicants, who are thus in a position to determine employees' legal or illegal immigration status by filing, withdrawing, or not actively pursuing employees' applications.

The present labor certification procedures should be replaced by a more rational, cost-efficient method of correlating the level of immigration entries with the needs of the U.S. labor market. The INS should maintain a periodically revised schedule of occupations for which there is an oversupply of labor in the United States. Applicants with bona fide

¹⁵ *Id.* § 1182(a)(14).

¹⁶ SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, SEMIANNUAL REPORT TO CONGRESS 41 (March 1980) (testimony of Aaron Bodin, Chief, Division of Labor Certification, U.S. Dep't of Labor).

¹⁷ Select Commission on Immigration & Refugee Policy, Working Paper, Restructuring the Preference System: Goals, Categories and Immigrant Characteristics 1 (April 17, 1980).

¹⁸ Wildes, *The Department of Labor: Toward a Sound Approach to Labor Certification*, AMERICAN COUNCIL FOR NATIONALITIES SERVICE, 57 INTERPRETER RELEASES, July 24, 1980, at 357.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 358.

²² *Id.* at 359.

offers of jobs which do not appear on the list would be eligible to obtain a visa under the third or sixth preferences, provided there are enough visa numbers available under those categories for their countries of origin. An applicant whose occupation is included in the schedule should be allowed to obtain an exemption from the list if the employer can show that he has been unable to fill the vacancy with qualified workers already in the United States. Exemption procedures would thus be substantially similar to the present system of certification. The proposed system would simplify admissions when their impact on labor is predetermined to be nondetrimental. At the same time it would allow for flexibility in individual cases as long as the interested parties can show that their specific cases will not violate the principle behind labor certification of avoiding detrimental impacts on the U.S. labor force due to immigration.

In addition, because the present labor certification system is disproportionately weighed in favor of more highly educated immigrants, the system encourages the continuing migration of professionals from Third World nations to the United States.²³ This draining effect can be avoided by the simplified system proposal as long as the schedules of professions and occupations are carefully drawn and accurately reflect U.S. labor needs.

By a costly and inefficient mechanism, the current procedures for labor certification provide no real protection for the labor force and, more significantly, discourage aliens who are eligible for immigration benefits from applying for them because of the long delays and high costs in attorneys' fees, publications, and other procedures involved. An otherwise eligible alien also has the burden of finding an employer willing to wait for several months before hiring him and also willing to go through the bureaucratic procedures that labor certification demands. In this manner, current regulatory requirements operate as stumbling blocks for immigrants and become part of an overriding policy of using the labor market to impose unnecessary restrictions on their admission to the United States.

Thus, improvements could be had through the proposed system of maintaining an updated roster of occupational supply, noting those occupations for which jobs are scarce and which require protection from further competition. The proposed system would enable DOL's resources to be more efficiently used and would streamline this part of the immigration system. At the same time, the proposed system would promote the policy behind the present system, protection of the U.S. labor force from undue competition.

III. Private Employment Discrimination

The equal protection clause of the fourteenth amendment prohibits

²³ See, e.g., 8 U.S.C. § 1182(j)(1)(c) (Supp. I 1977), on the return home of medical trainees.

discriminatory treatment of aliens in state public employment opportunities. *Yick Wo v. Hopkins*²⁴ and *Truax v. Raich*²⁵ established that aliens are persons within the meaning of the fourteenth amendment and that their right to work is protected as a matter of property by the due process clauses of the fifth and fourteenth amendments. It is also long established, however, that those constitutional provisions do not reach discrimination of a purely private nature. Nevertheless, federal statutes have made it illegal to discriminate privately on the basis of race, religion, or national origin with respect to employment.

Two major statutes proscribe such private employment discrimination. First, Title VII of the Civil Rights Act of 1964²⁶ forbids discrimination in hiring and promotion practices by private employers on the basis of national origin, among other reasons. In *Espinoza v. Farah Manufacturing Co.*,²⁷ however, the Supreme Court held that Title VII does not prohibit discrimination by employers on the basis of alienage. Espinoza was a permanent resident alien who was denied employment by Farah because of a company policy against the employment of aliens. The Court defined national origin as "the country where a person was born, or more broadly, from which his ancestors came."²⁸ Farah employed many citizens who, like Espinoza, were of Mexican origin; thus, Espinoza could only allege discrimination based on alienage and not nationality. Based on the legislative history of Title VII, the Court found no congressional intent to make discrimination against aliens in private employment unlawful. Consequently, it held that the term "national origin" does not embrace citizenship requirements. This holding has been uniformly interpreted by the lower courts as meaning that Title VII affords no protection to aliens against employment discrimination based on citizenship.²⁹

The other federal statute dealing with discrimination is section 1981 of the Civil Rights Act of 1870, which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.³⁰

The Supreme Court has not yet reached the question of whether section

²⁴ 118 U.S. 356 (1886).

²⁵ 239 U.S. 33 (1915).

²⁶ 42 U.S.C. § 2000e-2(a) (1976).

²⁷ 414 U.S. 86 (1973).

²⁸ *Id.* at 88.

²⁹ *Garcia v. Gloor*, 609 F.2d 156, 162 (5th Cir.), *vacated*, 618 F.2d 264 (5th Cir. 1980) (forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin); *Dowling v. United States*, 476 F. Supp. 1018, 1022 (D. Mass. 1979); *Novak v. World Bank*, 20 Fair Empl. Prac. Cas. 1166, 1167 (D.D.C. 1979).

³⁰ 42 U.S.C. § 1981 (1976).

1981 prohibits employment discrimination on the basis of alienage, but it has explicitly applied section 1981 to purely private discrimination based on race.³¹

In the lower courts, it seems well settled that section 1981 prohibits some types of discrimination in employment.³² The courts are widely split, however, on what bases of discrimination section 1981 prohibits. Some have said that it only protects against racial discrimination.³³ Other courts have decided explicitly that section 1981 does not apply to discrimination on the basis of national origin.³⁴ In at least one case, however, there is dicta to the effect that the statute reaches alienage.³⁵

In *La Fore v. Emblem Tape and Label Co.*,³⁶ the United States District Court for the District of Colorado rejected the notion that section 1981 applies only to racial discrimination and held squarely that the statute applies to a private employer who has discriminated against a Mexican-American on the basis of his Spanish surname. The court stated that "if plaintiff can prove that an identifiable class of which he is not a member receives more favorable treatment than plaintiff because of that class distinction, then plaintiff is entitled to the protection of § 1981."³⁷ In two other cases on this issue in which lower courts have discussed the legislative history of section 1981, opposite holdings were reached. In *De Malherbe v. International Union of Elevator Constructors*,³⁸ the United States District Court for the Northern District of California held that section 1981 has neither the intent nor the effect of prohibiting private employment discrimination on the basis of alienage. In *Guerra v. Manchester Terminal Corp.*,³⁹ however, the United States Court of Appeals for the Fifth Circuit found, on the basis of the trial court's detailed analysis of the legislative history, that section 1981 has such an intent.⁴⁰

If the Supreme Court settles this dispute, it will most likely put its decision in line with its holding in *Espinoza* and determine that section 1981 does not prohibit private discrimination on the basis of alienage. In

³¹ *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968).

³² *Young v. ITT*, 438 F.2d 757 (3d Cir. 1971); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970).

³³ *Manzanares v. Safeway Stores*, 593 F.2d 968, 972 (10th Cir. 1979) (holding, however, that alleged discrimination on the basis of Spanish surnames amounts to racial discrimination for being nonwhite); see also *Runyon v. McCrary*, 427 U.S. 160, 167 (1976).

³⁴ *Saad v. Burns*, 456 F. Supp. 33, 37 (D.D.C. 1978); *Budinsky v. Corning Glass Work*, 425 F. Supp. 786 (W.D. Pa. 1975); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15 (E.D. Pa. 1975).

³⁵ *Holton v. Crozer-Chester*, 419 F. Supp. 334, 336 (E.D. Pa. 1976).

³⁶ 448 F. Supp. 824 (D. Colo. 1978). See also *Manzanares v. Safeway Stores*, 593 F.2d 968, 972 (10th Cir. 1979).

³⁷ 448 F. Supp. at 826.

³⁸ 438 F. Supp. 1121, 1142 (N.D. Cal. 1977).

³⁹ 498 F.2d 641 (5th Cir. 1974).

⁴⁰ *Id.* at 653-54. The same court later said that discrimination against Mexicans in *Guerra* had strong racial overtones. *Campbell v. Gadsden County Dist. School Bd.*, 534 F.2d 650, 654 n.8 (5th Cir. 1976).

the meantime, the widespread practice of restricting employment access or promotions to citizens while denying them to lawful permanent residents continues unabated. Relegating lawful permanent residents to a second-class category regarding employment opportunities not only results in an unfair treatment of permanent residents but also discourages immigration.

Therefore, attorneys have suggested that Congress rewrite section 1981 to make clear that it reaches all forms of discrimination, whether public or private, including that based on citizenship.⁴¹ Federal legislation in this area is necessary to protect a discrete and insular minority and to establish uniformity in the field. The purpose of the proposed amendment would be to establish nationally uniform conditions of admission to and residence in the United States to be applied to all noncitizens. The new statute obviously would not prohibit discrimination on the basis of status; it is legitimate for employers to refuse to hire aliens not duly authorized to accept employment. If alienage is the sole basis for discriminatory action, however, the amendment should allow an alien to bring a claim against the employer regardless of that alien's immigration status. Therefore, section 1981 should be amended to add the following sections:⁴²

- (b) "All persons" as used in paragraph (a) shall include citizens and noncitizens;⁴³
- (c) "Contracts" as used in paragraph (a) shall include contracts for employment, whether in the public or private sector, with employers employing more than — workers;
- (d) Nothing in this section shall be construed to conflict with regulations which may be promulgated regarding the employment of noncitizens in the federal civil service.⁴⁴

Although both Title VII and section 1981 could be amended, a modification of the latter is preferable, mainly because the case law under section 1981 is unsettled and there is some judicial precedent for the proposition that section 1981 prohibits private employment discrimination based on alienage. In addition, section 1981 covers a broader range of conduct than Title VII, going beyond employment into contracting. Procedurally, section 1981 provides immediate access to federal courts without requiring a prior exhaustion of administrative remedies.⁴⁵ Section 1981 also offers plaintiffs broader remedies than Title VII in that back-pay damages are not limited to a two year period,⁴⁶ and punitive⁴⁷ and compensatory damages for humiliation, embarrassment, and mental

⁴¹ Memorandum from P. Thompson to L. Low, Section 1981 of the Civil Rights Act and Discrimination by Private Employers on the Basis of Alienage, at 47 (July 28, 1980) (prepared for the Alien Rights Law Project) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

⁴² See text accompanying note 30 *supra*.

⁴³ But see text accompanying notes 41-42 *infra*.

⁴⁴ Thompson Memorandum, *supra* note 41, at 54 n.1.

⁴⁵ *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975).

⁴⁶ 42 U.S.C. § 2000e-5(g) (1976) (two year back pay limitation for Title VII actions);

anguish are available.⁴⁸ Finally, a section 1981 plaintiff will enjoy a longer statute of limitations than he would under the very strict terms of Title VII.⁴⁹

Unless these statutory changes are enacted or court interpretations of section 1981 more effectively accomplish the same result, the ability of private employers to discriminate against lawfully admitted noncitizens will continue to grow in the U.S. labor market. The effect is to create an underclass of workers whose alienage is the reason for not being hired or promoted to certain jobs. Such unrestricted discrimination against lawful resident aliens severely limits their access to significant occupational opportunities and keeps them confined to jobs with limited career development where control by employers is almost totally unrestricted. This denial of access to meaningful jobs is a pervasive aspect of the "scorched earth" approach to immigration control.

IV. State Public Employment and Licensing

Alienage is a suspect classification under the Supreme Court's interpretation of the fourteenth amendment. In the leading case of *Sugarman v. Dougall*,⁵⁰ the Court held that state action that discriminates in public employment against certain persons on the basis of their citizenship or alienage is therefore subject to strict scrutiny. Other decisions of the Supreme Court applied the same principle to state licensing practices.⁵¹ Consequently, states are constitutionally barred from restricting public employment access of noncitizens as well as aliens to the "common occupations of the community," including the practice of professions. This line of decisions is based not only on the Court's traditional approach to fourteenth amendment equal protection guarantees, but also on Congress' plenary power over immigration policy. State restrictions on the type of occupations available to noncitizens amount to placing conditions for admitting immigrants into the United States, conditions which only Congress is constitutionally allowed to establish.

Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975) (two year back pay limitation not applicable to section 1981 actions).

⁴⁷ *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975).

⁴⁸ *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976); *Gore v. Turner*, 563 F.2d 159 (5th Cir. 1977); *Plummer v. Chicago Journeyman Plumbers' Local 130*, 452 F. Supp. 1127 (N.D. Ill. 1978).

⁴⁹ Under Title VII, a plaintiff must file his claim with the EEOC within 180 days of the alleged violation, or within 300 days if there has been deferral to a state or local agency. Following notice of his right to sue from the EEOC, the Title VII plaintiff must bring suit within 90 days. 42 U.S.C. § 2000e-(5)(e)-(f). Under section 1981, which does not impose its own limitation period, the plaintiff must proceed under the limit imposed by the most appropriate state statute, such as personal injury and contract claims statutes. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975).

⁵⁰ 413 U.S. 634 (1973).

⁵¹ *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

The most recent trend in Supreme Court cases, however, has been one of opening up exceptions to the general rule. In *Foley v. Connelie*,⁵² the Supreme Court affirmed New York's policy of restricting access to employment as state troopers to U.S. citizens.⁵³ In *Ambach v. Norwick*,⁵⁴ the Court upheld a New York rule that restricts the hiring of public school teachers to U.S. citizens or permanent residents who declare their intention to become citizens.⁵⁵ In both cases, the Court departed from the strict scrutiny standard and applied a rational relationship test, finding in each instance that there was a rational relationship between the interest sought to be protected and the limiting classification. In this manner, the Court has retreated somewhat from its position regarding congressional plenary power over immigration policy by allowing states to set restrictions on the public employment of lawfully admitted permanent residents. The decisions also effectively open the door to future exceptions to "common occupations of the community" that have heretofore been open to noncitizens. For instance, the rationale for *Foley* is that state troopers perform functions that go to the "heart of representative government"⁵⁶ because they are cloaked with substantial discretionary power and execute broad public policy; the same rationale conceivably might be extended to private security guards. In *Ambach*, a similar decision was based on the fact that education is perhaps the most important function of state and local government;⁵⁷ that rationale conceivably might be legislatively extended to private school teachers.

Thus, although *Sugarman v. Dougall* has not been overruled, important and open-ended exceptions have been carved out. In fact, challenges to the rulings in *In re Griffiths* and *Flores de Otero* relating to professional licensing are finding their way to the Supreme Court on the basis that lawyers, for example, perform an equally important governmental function by being officers of the court.⁵⁸ *Foley* and *Ambach*, therefore, are important in that they appear to open the door for additional exceptions to the *Yick Wo* doctrine of prohibiting state public employment discrimination based on alienage.⁵⁹ The lower courts, both in state and federal cases, seem to be applying the *Foley* exception narrowly.⁶⁰

⁵² 435 U.S. 291 (1978).

⁵³ *Id.* at 300.

⁵⁴ 441 U.S. 68 (1979).

⁵⁵ *Id.* at 80-81.

⁵⁶ 435 U.S. at 297-300. *See Sugarman v. Dougall*, 413 U.S. at 647.

⁵⁷ 442 U.S. at 76.

⁵⁸ *State v. State Bd. of Law Examiners*, 601 P.2d 174 (Wyo. 1979).

⁵⁹ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁶⁰ *See, e.g.*, *Ramirez v. Sloss*, 615 F.2d 163 (5th Cir. 1980); *United States v. Tsuda Maru*, 479 F. Supp. 519 (D. Alaska 1979); *Andrade v. Nadel*, 477 F. Supp. 1275 (S.D.N.Y. 1979); *De Malherbe v. International Union of Elevator Constructors*, 476 F. Supp. 649 (N.D. Cal. 1979); *C.D.R. Enterprises v. Board of Educ.*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd mem. sub. nom. Lefkowitz v. C.D.R. Enterprises*, 429 U.S. 1031 (1977); *Miranda v. Nelson*, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.*, 413 U.S. 902 (1973); *In re Park*, 484 P.2d 690 (Alaska 1971); *Arizona State Liquor Bd. v. Ali*, 27 Ariz. App. 16, 550 P.2d 663 (1976); *Raffaelli v. Committee of Bar*

The trend opened by *Foley* and *Ambach*, however, has already produced the effect of virtually eliminating alienage from the list of suspect classifications which require strict judicial scrutiny under fourteenth amendment analysis.

This judicial development also operates to place more burdens and restrictions on lawfully admitted noncitizens and closes doors to their pursuit of constructive vocations in the United States. It not only qualifies the equality of treatment that should be central to immigration policy, but also creates unnecessary tensions in the labor market. *Foley* type restrictions will push more aliens into private sector employment opportunities where they are most likely to compete with unskilled U.S. citizens. Such restrictions may also lower the efficiency of governmental services by forcing governments to draw their expert personnel from a reduced pool of labor supply. Most likely, they will operate to increase discriminatory effects on those ethnic minorities most easily identified with the concept of "alien" throughout the country.

Clearly, there are certain government positions that should be restricted to U.S. citizens. Elective and nonelective positions that are vital to broad decisions and execution of public policy are among them. Representative government demands that truly important governmental functions that affect the citizenry at large be restricted to those who are an integral part of that citizenry. It is important, however, that restrictions of this nature be carefully and narrowly drawn, both to avoid infringing the equal protection clause and to provide stability to this area of employment discrimination law.

The amendment to section 1981 proposed in section III of this article could accomplish this end. The proposed amendment of section 1981 would remove the post-*Sugarman* restrictions on alien employment while allowing states to restrict to their citizens those functions that go to the heart of representative government.

V. Federal Public Employment of Aliens⁶¹

A. *History and Current State of the Law*

General federal policy has consistently prohibited the employment of aliens in the federal service within the United States. The policy has

Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (en banc); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (en banc); Ruiz-Cano v. County of San Diego, 98 Cal. App. 3d 803, 159 Cal. Rptr. 602 (1979); Millett v. Hoisting Engineers' Licensing Div., 377 A.2d 229 (R.I. 1977); Nielsen v. Washington State Bar Ass'n, 90 Wash. 2d 818, 585 P.2d 1191 (1978) (en banc); Herriott v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972) (en banc); State *ex rel.* Mansfield v. State Bd. of Law Examiners, 601 P.2d 174 (Wyo. 1979).

⁶¹ The original version of the federal employment of aliens portion of this article was prepared by co-author Charles Smith in his role of full-time legal consultant to the Select Commission on Immigration and Refugee Policy. Important guidance on that version was provided by the Commission's Deputy Director Dr. Ralph Thomas.

been initiated by an administrative agency, by presidential order, and by the Congress. First, the Civil Service Commission was created in 1883⁶² to oversee and advance the merit system, and its initial rules limited competitive examination posts to citizens.⁶³ This policy withstood challenge until 1976, when the U.S. Supreme Court's decision of *Hampton v. Mow Sun Wong*⁶⁴ voided it for being beyond the Commission's authority. It was reinstated through executive order;⁶⁵ today, the Office of Personnel Management's Rule 7.4 carries out that policy.⁶⁶ With very narrow exceptions, only U.S. citizens are eligible to be examined for and offered competitive civil service posts. Since 1938, Congress, too, has imposed restrictions on the use of federal funds to pay the salaries of aliens in the United States. Initially a response to unemployment during the depression, the congressional ban on alien federal employment continues today, though modified by refugee- and nationality-based exceptions and by general alien employment authority given to certain departments and agencies.⁶⁷ This section will describe the traditional policy and its current methods of implementation and will then analyze the usefulness of continuing that policy in the future.

On September 2, 1976, President Gerald Ford issued an executive order⁶⁸ to reinstate the traditional policy of excluding aliens from the competitive federal service. This order was issued in response to the Supreme Court's five to four decision three months earlier in *Hampton v. Mow Sun Wong*.⁶⁹ *Mow Sun Wong* held that the Civil Service Commission's regulation limiting entry to examinations for the federal competitive service to citizens and U.S. nationals⁷⁰ was outside the scope of Commission authority and violated the due process clause of the fifth amendment. The Supreme Court in *Mow Sun Wong* did not consider the general constitutionality of the bar to lawful permanent resident alien employment in the competitive civil service. It decided only the issue of whether the Commission properly could rely upon the argued justifications for its rule. The Court found the Commission's sole concern to be "the promotion of an efficient federal service."⁷¹ The administrative convenience of a simple exclusion policy was not shown to be necessary for efficiency so as to excuse the Commission from applying personnel expertise to alien employment.

⁶² Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (codified in scattered sections of 5 U.S.C.).

⁶³ See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 106-13 (1976). The author estimates that approximately 60% of all federal employees are in the competitive service.

⁶⁴ 426 U.S. 88 (1976).

⁶⁵ Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1980).

⁶⁶ *Id.*

⁶⁷ 31 U.S.C. § 699b (Supp. III 1979).

⁶⁸ Exec. Order No. 11,935, 5 C.F.R. § 7.4 (1980).

⁶⁹ 426 U.S. 88 (1976).

⁷⁰ Nationals are either citizens or noncitizens who owe permanent allegiance to the United States; the principal noncitizen nationals are American Samoans.

⁷¹ 426 U.S. at 114.

The Court held that "broadly denying this class [of lawfully admitted permanent resident aliens] substantial opportunities for employment . . . deprives its members of an aspect of liberty."⁷² These aliens were admitted to residency in the United States as a result of congressional and presidential decisions. Therefore,

due process requires that the decision to impose that deprivation of an important liberty be made either at a comparable level of government or, if it is to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.⁷³

The Court explicitly assumed without deciding that the Congress or the President constitutionally might have such discriminatory power. Given this broad hint, presidential action quickly followed and thereby located the question in the arena of policy determinations.

B. Executive Order 11,935

President Ford's Executive Order 11,935, which became Office of Personnel Management Rule 7.4,⁷⁴ substantially accomplished what the stricken Commission regulation had done.⁷⁵ The Order and the Rule state:

- a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
- b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
- c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.⁷⁶

The background and policy basis for the Executive Order were set forth by President Ford in a letter to Congress dated September 2, 1976.⁷⁷ The points of that letter merit highlighting. First, the President interpreted the Supreme Court's decision in *Mow Sun Wong* to mean that the Congress or the President might broadly prohibit the employment of aliens in the civil service. The Executive Order was issued by presidential authority, but urged Congress to address the issue as well. Second, the general ban on alien employment in the competitive service has a long history; President Ford concluded that its preservation was in the national interest at that time. Third, exceptions to the general ban are limited to service efficiency and the national interest and could arise in

⁷² *Id.* at 116.

⁷³ *Id.*

⁷⁴ 5 C.F.R. § 7.4 (1980).

⁷⁵ Challenges to the order have not been successful to date. Plaintiff's claim under 42 U.S.C. § 1981 was rejected in *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979). *Mow Sun Wong* recently lost another appeal before the Ninth Circuit Court of Appeals. *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980).

⁷⁶ 5 C.F.R. § 7.4 (1980).

⁷⁷ 41 Fed. Reg. 37,303 (1979).

specific cases or from specific circumstances. Finally, he stated that before aliens are ever "precipitously" employed in the competitive service, there must be "an appropriate determination that it is in the national interest to do so."⁷⁸

The President's letter thus implies that nonprecipitous opening of competitive service employment opportunity to lawful permanent resident aliens might be appropriate and in the national interest. It indicates, too, that the question is subject to rational judgment and that both the Congress and the President are appropriate policymaking institutions. The thrust of the letter is that the status quo should be maintained pending careful review and policy decision.

More than four years and one administration have passed since President Ford's letter. The need for immediate review and policy modification is supported by persuasive arguments that the Executive Order is of dubious constitutional validity.⁷⁹ Presidential authority to issue such a regulation can only be based on the President's power to appoint federal officers.⁸⁰ In *Mow Sun Wong*, the government cited *Myers v. United States*⁸¹ as authority, but that case dealt only with the power to remove an officer without the advice and consent of the Senate and was later limited to specific causes of removal.⁸² Further, statutory authority to regulate admission of individuals to the civil service⁸³ does not vest the President with any broad power to exclude large classes of individuals; explicit congressional authorization is necessary where "substantial restraints on employment opportunities of numerous persons"⁸⁴ are imposed. Finally, the Executive Order may violate the "due process" clause of the fifth amendment under the principle announced in *Bolling v. Sharpe*⁸⁵ because the Order does not specify the national interest on which it is based nor explain why it is beneficial for the "efficiency of the service." Courts would be bound to examine carefully those claimed interests before justifying the discriminatory treatment prescribed by the Order.⁸⁶

C. The Legislative Branch Prohibition

Congress has not legislated in response to President Ford's letter. Congress has, however, voted restrictions on the federal employment of

⁷⁸ *Id.* at 37,304.

⁷⁹ J. Kramer, Federal Employment of Aliens (Aug. 1, 1980) (paper prepared at Covington and Burling for the Alien Rights Law Project) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

⁸⁰ U.S. CONST. art. II, § 2, cl. 2.

⁸¹ 272 U.S. 52 (1926).

⁸² *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁸³ 5 U.S.C. § 3301 (1976).

⁸⁴ *Greene v. McElroy*, 360 U.S. 474, 506 (1959).

⁸⁵ 347 U.S. 497 (1954).

⁸⁶ *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 605 (1976).

aliens for more than four decades. Section 602 of the Treasury, Postal Service and General Government Appropriations Act of 1980⁸⁷ carries forward congressional restrictions that have been included routinely in appropriations bills since 1938.⁸⁸ Under section 602 of the 1980 Act, 31 U.S.C. § 699b, no federal monies may be used to compensate any federal officer or employee whose post of duty is in the continental United States unless such person: (1) is a U.S. citizen; (2) on the date of enactment of the Act, September 29, 1979, was in the U.S. service, was eligible for citizenship, had filed a declaration of intent to become a citizen, and was residing in the United States; (3) owes allegiance to the United States (covers nationals from American Samoa and Swains Islands); (4) is a lawful permanent resident from Cuba, Poland, South Vietnam, or the Baltic countries (Estonia, Latvia, Lithuania); (5) is South Vietnamese, Cambodian, or Laotian and was paroled into the United States as a refugee between January 1, 1975 and September 29, 1979; (6) is a citizen of Israel or the Republic of the Philippines or a national of "those countries allied with the United States in the current defense effort," defined as having mutual defense treaties with the United States—Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Republic of China (Taiwan), Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, El Salvador, France, Federal Republic of Germany, Greece, Guatemala, Haiti, Honduras, Iceland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Thailand, Trinidad and Tobago, Turkey, United Kingdom, Uruguay, and Venezuela;⁸⁹ or (7) is being employed temporarily as a translator or for no more than sixty days "in the field service . . . as a result of emergencies."⁹⁰

Congress has exempted certain governmental units from the general ban on employing aliens. These include: National Aeronautics and Space Administration,⁹¹ Department of Defense,⁹² International Communications Agency (relating to skill in foreign language),⁹³ Foreign Agricultural Service until 1974,⁹⁴ Foreign Service Institute of the Department of State,⁹⁵ Public Health Service (consultants and fellowship recipients),⁹⁶ Library of Congress (up to 15 positions),⁹⁷ Smithso-

⁸⁷ 31 U.S.C. § 699b (Supp. III 1979).

⁸⁸ For a list of the appropriations bills, see the annotations after 31 U.S.C. § 699b (1976 & Supp. III 1979). See also Act of March 28, 1938, ch. 55, § 5, 52 Stat. 148.

⁸⁹ Telephone conversation between Charles Smith and Consular Affairs counsel, Office of the Legal Advisor, Dep't of State, May 1980. Taiwan's retention on the list by the Department of State is uncertain following the Carter Administration's changes in diplomatic and treaty relationships.

⁹⁰ 31 U.S.C. § 699b (Supp. III 1979).

⁹¹ 42 U.S.C. § 2473(b)(10) (1976).

⁹² 31 U.S.C. § 700 (1976 & Supp. III 1979).

⁹³ 22 U.S.C. § 1474(1) (Supp. III 1979).

⁹⁴ 7 U.S.C. § 435 (expired 1974).

⁹⁵ 22 U.S.C. § 1044(e) (1976).

⁹⁶ 42 U.S.C. § 209(h) (1976).

nian Institution (scientific and technical positions),⁹⁸ and the Postal Service.⁹⁹

D. Impact of Prohibitions

The most current data on the number and status of aliens lawfully in the United States are compiled by the Immigration and Naturalization Service through its annual alien address report program. For fiscal year 1979, INS data show 5,058,400 aliens reporting,¹⁰⁰ slightly more than two percent of the U.S. population, of whom approximately 4,700,000 are lawful permanent residents and refugees.¹⁰¹ Of this total lawful permanent resident and refugee population, approximately 3,500,000 come under the section 699b refugee- and nationality-based exceptions to the general ban. Thus, congressional policy under section 699b permits federal employment of at least seventy-four percent of the alien population authorized to work in the country.¹⁰²

The federal competitive service contains approximately 1.8 million jobs. Federal civilian jobs excepted from competitive examination, such as Schedules A and C and the Postal Service, comprise about one million positions.¹⁰³ For aliens to be hired for excepted positions not covered by

⁹⁷ 2 U.S.C. § 169 (1976 & Supp. II 1978).

⁹⁸ 20 U.S.C. § 46a (1976).

⁹⁹ See United States Postal Service, Personnel Series Handbook P-11, § 312.2 (May 1980). The Postal Service has adopted a policy of full access by all permanent residents and refugees to all its positions at level PS-19 or below except for those designated "sensitive." *Id.*

¹⁰⁰ Because some aliens lawfully here do not report, the data represent an undercount of unknown magnitude.

¹⁰¹ IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, ANNUAL REPORT (1979). Although 31 U.S.C. § 699b (Supp. III 1979) in its general rule and exemptions speaks in terms of lawful permanent residents, refugees, and nationals of certain countries and makes no distinctions based on immigration status, the numbers drawn from INS data exclude foreign nationals who do not have permanent residence or refugee status but who nevertheless may have permission to work in the United States without violating the terms of their admission. This would include, for example, foreign students who are in the country on nonimmigrant visas. As nationals of countries designated in section 699b, such students would be technically eligible for federal service employment. Because their stay is limited to the term of their studies, they are unlikely candidates for federal employment; therefore, their numbers have not been included in the INS data.

¹⁰² IMMIGRATION AND NATURALIZATION SERVICE, DEP'T OF JUSTICE, ANNUAL REPORT (1979). These aliens include immigrants from the following countries who have not become citizens: Mexico (1,003,470 lawful permanent residents reporting in 1979), Canada (269,643), The Philippines (217,575), Italy (176,531), South Korea (154,914), and Vietnam (89,039 plus 41,443 refugees). *Id.*

There is no reason to believe that the percentage of whatever the actual count of refugees and lawful permanent residents in the United States is would be out of line with the 74% figure. Neither the number nor the percentage are adjusted by an age profile excluding alien children or retirees who are not part of the working population. INS-reported data do not permit an age-nationality breakdown. There is no reason to believe that an age-nationality profile would change significantly the percentage of aliens permitted to be employed by the federal government, however. It is likely, though, that the proportion of working age people, from the non-citizen immigrant population is somewhat higher than the working age figures for the U.S. population as a whole because immigrants tend to be young adults.

¹⁰³ Office of Personnel Management, Central Personnel Data File: Overview Report (Feb. 1980).

Executive Order 11,935 or, under the Order, for tasks for which American citizens cannot be found (usually requiring highly technical skills),¹⁰⁴ section 699b requirements must be met or the jobs must be in agencies or departments having general authority to hire aliens.

As of February 1980, out of a domestic civilian federal workforce of 2,765,488, there were 5,497 alien employees, which includes temporary and short term as well as permanent employees.¹⁰⁵ The Veterans Administration employs 238,491 persons, of whom 2,891 are aliens.¹⁰⁶ Within the Army civilian workforce of 335,426, only 278 are aliens.¹⁰⁷ Thus, although Congress seems to have created massive exceptions to the general ban principle, the reality is less far-reaching than the law would indicate. The proportion of aliens employed by the federal government is only 0.2 percent of the total domestic civilian federal workforce, while aliens eligible to work make up about 1.5 percent of the total U.S. population.¹⁰⁸

The number of alien applicants and rejections for the approximately one million noncompetitive federal service positions are unknown. Without that data, inferences of bias on the part of the government cannot be drawn even though the number of aliens hired by the federal government is small. Questions about possible bias, however, certainly are appropriate. Thus, it is appropriate to ask whether alien applications are relatively low as compared to citizen applications and, if so, whether that is due to a general belief on the part of both aliens and federal officials that alien federal employment is barred. Similarly, one can ask whether executive officials are adhering to a general pattern of discouraging and rejecting the employment of aliens.

E. A Policy Question

The current general executive policy of no federal employment of aliens derives from the principle that employment in the federal sector is a benefit or right accruing only from citizenship. The exceptions to the Executive Order are tied tightly to specific personnel needs that cannot be met by citizens or other U.S. nationals. Specific legislative exemptions for departments and agencies under section 699b, on the other hand, reveal that Congress is carving out exceptions almost to the point of turning the general ban principle on its head. Unlike department and agency exemptions that arguably arise from particular agency or expertise needs, these section 699b exceptions simply combine nationality and immigration status or arise from nationality as identified by a mutual

¹⁰⁴ In practice, when executive departments or agencies hire aliens in accordance with the Executive Order exceptions, appointments are made on an excepted service basis, even though the specific position previously was listed in the competitive service.

¹⁰⁵ See note 103 *supra*.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Figures derived from text accompanying notes 100-102 *supra*.

defense treaty. Citizens from fifty-one nations, slightly less than one-third of the 163 nations of the world, are covered to varying extents by section 699b.

In terms of the present U.S. immigration profile, the Congress in section 699b denies only one out of every four lawful permanent residents and refugees possible federal employment. Thus, through exceptions Congress has effectively reversed the general rule of discrimination.

Although political and legal challenges to the federal hiring policy toward aliens may continue, legal authority today permits federal discrimination against aliens in the federal service as long as that policy is set at the proper level of government, by the Congress or the President. This permissible discrimination appears to be sanctioned in Justice Rehnquist's dissent in *Mow Sun Wong*,¹⁰⁹ as well as in the majority opinion, as Justice Rehnquist argued only that the Commission rule was a proper exercise of delegated authority. Though the issue was not litigated, the Justices in both the majority and the dissent did not oppose the view that the question is one of policy and not of law, the law directing only the procedures to be used to reach an exclusionary or inclusionary end. The consequence is that today there is no legal compulsion for the President or Congress to adopt one principle over the other.

As a result of the present state of the law, challenges to the Executive Order have taken the form of petitions directed to the President to change or eliminate the rule by another executive decision. Such requests have been made by public interest and community based organizations whose constituencies include large numbers of permanent residents.¹¹⁰

F. The Arguments for a General Ban and Our Opinions

The present policy and practice is not soundly based in the national interest and in fact has a negative impact on civil rights, government services, and the overall labor market. A policy of full access by permanent residents and refugees, with carefully drawn exceptions for positions with policy-making functions or whose power affects the citizenry broadly, would be much sounder.

1. Domestic and International Tradition

The present policy is based on a long-standing domestic tradition dating back nearly one hundred years. Moreover, it is in keeping with what seems to be the practice of most other nations. A United Nations survey of domestic law published in 1966 showed that only Ethiopia did

¹⁰⁹ 426 U.S. at 124-25 (Rehnquist, J., dissenting).

¹¹⁰ Mexican American Legal Defense and Education Fund and Covington & Burling, Memorandum on Section 602 of Public Law 95-81, at 22 (1978) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*).

not restrict public service posts to nationals.¹¹¹ This generalized practice seems to be founded on the view that national governance is a duty and a privilege flowing from the concepts of nationality and national sovereignty.

The U.S. tradition, however, has become as much one of growing exceptions to a general ban as one of a general pattern of not hiring aliens. Despite international tradition, the United States is above all a unique country. More than any other country in the world, the United States is a "nation of immigrants." Recognizing this fact, the Supreme Court urged in *Mow Sun Wong* that the nation should not root its attitudes toward immigrants in the nineteenth century:

Moreover, it must be acknowledged that in 1883 there was no doubt a greater inclination than we can now accept to regard "foreigners" as a somewhat less desirable class of persons than American citizens. A provincial attitude toward aliens . . . has been implicitly repudiated by our cases requiring that aliens be treated with the dignity and respect accorded to other persons.¹¹²

Furthermore, the United States might be better served by establishing its principles toward immigrant non-nationals without regard to the practices of other nations. As in the encompassing area of human rights, the United States should set standards for other nations to emulate.

2. *National Security and Allegiance*

A second argument for retaining a general ban is the presumption that persons who have a national loyalty elsewhere cannot maintain a loyalty to the United States. Admittedly, it is difficult to make a qualitative presumption about a subjective attribute for which nationality is but one factor. The above presumption is nevertheless subject to criticism.

Lawful permanent residents have only one domicile, the United States. They serve in the Armed Forces and are subject to conscription;¹¹³ they pay taxes; and, as the Supreme Court reiterated in *Mow Sun Wong*, "it is settled that aliens may take an appropriate oath of allegiance."¹¹⁴ Furthermore, the Postal Service has been able to identify by level and sensitivity those positions that require special inquiry for a lawful permanent resident to be hired. Aliens are also employed in sensitive agencies such as NASA and ICA. Practice, then, shows that alienage is not a firm barrier to security clearance, loyalty, or allegiance.

3. *An Incentive to Naturalize*

A third argument made is that citizenship is the ultimate goal in the admission of permanent residents and there must be incentives to induce

¹¹¹ United Nations Department of Economic and Social Affairs, *Handbook of Civil Service Laws and Practices*, at 329, U.N. Doc. ST/TAO/M 29 (1966).

¹¹² 426 U.S. at 107.

¹¹³ 50 U.S.C. app. §§ 453, 454(a) (1976).

¹¹⁴ 426 U.S. at 109.

permanent residents to adopt U.S. citizenship. Access to federal employment is thus presented as a feature that makes naturalization an attractive proposition for lawful permanent residents. While immigration itself may properly have economic motives, the United States may want citizenship to be sought and cherished for its intrinsic value. If this is the U.S. goal, it can best be accomplished by ensuring that an immigrant's citizenship interests are unselfish. It is possible, too, that an alien employed by the federal government would be more likely to naturalize as a gesture of loyalty. The complexity and delicacy of the highly personal decision to naturalize should not be disturbed. Holding out federal employment as an incentive to naturalize may skew a decision that ought to be reached on grounds pertaining to U.S. values and history without regard to job prospects.

4. Employment Competition

A fourth argument for the present system is that it preserves a number of jobs for American citizens in an era of persistent unemployment. The problems of the depression, which led Congress to enact section 699b, remain present today albeit in a less critical form. A supporting argument is that recent additions to the labor force in the form of immigrants should more appropriately go to the private sector because it is there and not in the government where growth takes place and to which recent additions should contribute.

It may be erroneous, however, to view the labor market as having two distinct parts, government and nongovernment. One can posit that economic analysis would show that excluding lawful permanent residents and refugees from federal employment has an exaggerated impact on job opportunities and wage levels in selected sectors of the labor market, especially entry levels that promise upward mobility in service and manufacturing industries. If this theory be true, it could harm citizens in locales where noncitizen immigrants cluster, such as urban centers that contain large populations of minority youth and other disadvantaged workers seeking private employment. Federal employment also may be concentrated in urban centers; opening federal employment opportunities to aliens may reduce competition for private employment. Finally, a federal exclusionary policy toward aliens may contribute both to citizen insensitivity to immigrants and to increased conflict, fostered by the appearance of federal approval of second-class status for immigrants and by private sector competition. The federal government's obligation to citizens is paramount, but it is open to question whether giving preference to citizens over aliens in federal employment meets that obligation.

5. Federal-State Consistency

It is equally open to question whether the federal policy of exclusion is valid when a similar state policy would be clearly unconstitutional. As

discussed in section IV of this article, the current state of the law on access by immigrants to state public employment is quite different from that at the federal level. States may not discriminate between aliens and citizens in their employment and licensing laws unless they show a "compelling government interest" in drawing distinctions against aliens, who are within a "suspect classification."¹¹⁵ In 1978 and 1979, the Supreme Court found citizenship to be a proper qualification for state troopers¹¹⁶ and for teachers.¹¹⁷ In both cases, the Supreme Court found a sufficient state interest because the jobs involved governmental functions calling for the "formulation, execution or review of broad public policy"¹¹⁸ and going to "the heart of representative government."¹¹⁹

State cases in this area are based on the fourteenth amendment, and because of Congress' plenary power over immigration and the President's discretionary authority in implementing congressional decisions, it is clear that similar arguments do not apply to the federal government from a constitutional point of view. It is anomalous, however, for the federal judiciary to place more stringent standards upon the states in the area of public employment than it does upon the federal government itself. The legal conclusion that, because of plenary powers, the federal government may discriminate more broadly against aliens than may state governments, does not direct a policy conclusion that such discrimination is proper. If it is appropriate for states to meet equal protection standards in applying citizenship requirements to their employees, it should be no less so for the federal government.

Three principles appear to be set forth by the Supreme Court in its state employment discrimination cases: (1) "common occupations of the community" cannot be denied to residents, regardless of citizenship; (2) sweeping limitations by states on alien employment are impermissible; and (3) states may identify citizenship as relevant to particular jobs that pertain to governmental functions affecting the broad conduct of the citizenry, such as law enforcement and education. The federal government should set the same standards for itself.

6. Treaty Negotiation

The government's brief in *Mow Sun Wong* stated that one more reason to continue the policy of a general ban is that holding out special benefits to foreign nationals may be useful in negotiating international treaties.¹²⁰ From the list of section 699b exceptions, though, it is not

¹¹⁵ See *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948).

¹¹⁶ *Foley v. Connelie*, 435 U.S. 291 (1978).

¹¹⁷ *Ambach v. Norwick*, 441 U.S. 68 (1979).

¹¹⁸ 441 U.S. at 74; 435 U.S. at 296 (both cases quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

¹¹⁹ 441 U.S. at 74 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

¹²⁰ Petitioner's Brief for Certiorari at 61, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

evident that federal employment has been a useful bargaining chip. In France, for instance, U.S. citizens are not given reciprocal access to foreign positions. Section 699b exceptions also reveal federal employment eligibility for persons from the communist countries of Cuba and Poland and refugees from Southeast Asia. On the other hand, persons from some friendly countries without mutual defense treaties with the United States, including Sweden, Ireland, Switzerland, and Egypt,¹²¹ do not have such preference. Further, nationality does not play a direct role in the Executive Order exceptions, nor is it pertinent to the departments and agencies that Congress permits to hire aliens. The American Civil Liberties Union, in its brief on behalf of *Mow Sun Wong*, stated the essence of the difficulty with the bargaining chip argument: "The notion that resident aliens may be used as 'bargaining chips' to obtain benefits for American citizens residing abroad truly 'shocks the conscience' and violates the first principles of due process of law."¹²²

G. Further Arguments Against a General Ban

Finally, two other reasons militate against the maintenance of the status quo. First, the narrow and limited exceptions to the general ban have resulted in a cumbersome procedure to establish when conditions have been met for hiring noncitizens. Determinations that citizens are not available to fill certain positions involve costly administrative proceedings and in many cases simply are not made. The result is harmful to the efficiency of agencies in certain areas, particularly where needs and shortages of personnel are difficult to predict and congressional or presidential policies lack flexibility.

Second, in areas where permanent residents tend to be of one single national origin, such as the Mexicans in the Southwest, the present policy only aggravates an existing pattern of employment discrimination based on race and national origin.

H. Conclusion

The only sure function of the current policy and practice is the discouragement of immigration by closing employment opportunities to permanent residents and refugees. The practice is thus another instance of using the labor market as a means to implement a nonexplicit immigration policy. It also represents an unfortunate aspect of a diffuse policy toward immigrants which maintains them in an inferior or second-class status. This policy is especially unacceptable when no valid national interest is served and when, in fact, there are clear indications that it creates negative side effects in the field of civil rights and economic opportunity for all members of the community.

¹²¹ See note 89 *supra*.

¹²² Amicus Curiae Brief at 18 n.3, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (American Civil Liberties Union).

A more sensible and simple approach would be a policy of full access to federal positions for immigrants, refugees, and other aliens duly authorized to work, with exceptions carved out for functions where citizenship is undoubtedly relevant—such as representing the United States before foreign governments—or whose power affects the citizenry directly and broadly, such as a judge or any high federal policy-maker.

Congress, therefore, should enact comprehensive legislation in this area, an action that is clearly within its powers. Such legislation should secure the general principle of access, with exceptions for fundamental government functions and national security-sensitive positions. The agencies then should be directed to issue guidelines to determine when such exceptions apply¹²³ and to establish recruitment and hiring standards reflecting the general access principle.

The general principle of access fits within U.S. traditions of openness and freedom, enhances competition and thus efficiency, and is one hallmark of an open as opposed to a closed society. It, of course, admits exceptions where necessary and justifiable. The opposite principle, closing job opportunities, is the present policy and is part of an emerging "scorched earth" attitude toward aliens, including lawful immigrants. When the federal government sets such standards and legitimizes such attitudes by doing so, it acts as a beacon for similar actions by other levels of government and by private enterprise. "Scorched earth," in this way, becomes not the exception but the rule.

VI. Employer Sanctions

Employer sanctions are laws that penalize the hiring of a person not legally permitted to work. For example, when the Fair Labor Standards Act prohibits oppressive child labor,¹²⁴ it imposes employer sanctions through the rationale that government should protect those who need protection and cannot protect themselves.¹²⁵ Except for the Farm Labor Contractor Registration Act of 1963,¹²⁶ federal law today does not regulate private employer hiring of persons by immigration or citizenship status.¹²⁷ Federal law, generally, does not require a private employer to

¹²³ Kramer, *supra* note 79, at 36.

¹²⁴ 29 U.S.C. § 212 (1976). Penalties include criminal prosecution, *id.* § 216(a), and injunctive relief, *id.* § 217, for both employment and the transportation and sale of goods in which oppressive child labor is used.

¹²⁵ Other rationales for government interference in the market economy include ensuring decent wages and working conditions, protecting group action, preventing monopolistic practices, promoting equal access, and remedying past injury. The gamut of traditional policy reasons should be kept in mind when thinking about employer sanctions.

¹²⁶ 7 U.S.C. § 2045(f) (1976) (indirect regulation of alien by regulation of migrant worker employer who violates the Act if he employs an illegal alien and is subject to civil and criminal sanctions for such violation).

¹²⁷ Twelve states have employer sanction laws. CAL. LAB. CODE § 2805 (West Supp. 1980); CONN. GEN. STAT. ANN. § 31-51k (West Supp. 1980); DEL. CODE ANN. tit. 19, § 705 (1979); FLA. STAT. ANN. § 448.09 (Supp. 1979); KAN. STAT. ANN. § 21-4409 (1974); ME. REV. STAT. ANN. tit. 26, § 871 (West Supp. 1980); MASS. ANN. LAWS ch. 149, § 19C (Michie Supp. 1981);

determine affirmatively that a job applicant or employee is a citizen or a noncitizen legally in the United States, holding individual INS permission or a visa authorizing such employment.¹²⁸

Through the "harboring" exception to section 274 called the "Texas proviso," the INA makes this explicit:

Any person . . . who . . . (3) wilfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor or shield from detection, in any place, including any building or any means of transportation . . . any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or of any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.¹²⁹

The felony of harboring an illegal alien, with its "Texas proviso," illuminates but does not dispose of the employer sanctions issue in the immigration debate.

If the "Texas proviso" were repealed and "harboring" be deemed to include employment, the law would contain a stringent and comprehensive employer sanction, the possibility of felony penalties against employers who hire aliens whose presence in the United States is illegal. The present asymmetry of deporting the undocumented alien worker without penalizing the employer would be removed. To some, the harshness of alien deportation would thereby find its equal in felony consequences to the employer.

Employer sanctions accomplished by removing the employers' harboring exception in the INA, however, are not only unlikely as a political matter, but also prosecutorially unpromising. The offense does not warrant such severe punishment and the high scienter standard, "wilfully or knowingly," makes conviction unlikely, if only because of the technical

MONT. CODE ANN. tit. 39, § 2-305 (1979); N.H. REV. STAT. ANN. ch. 275-A, § 4-a (Supp. 1979); N.J. STAT. ANN. 34:9-1 (West 1965); VT. STAT. ANN. tit. 21, § 444a (1978); VA. CODE § 40.1-11.1 (Supp. 1980).

Though state authority to enact such laws has been upheld as legitimate state labor market protective action not preempted by federal plenary power over immigration, *De Canas v. Bica*, 424 U.S. 351 (1976), enforcement is dormant. This is partly because the offense is viewed as insignificant in the range of prosecutorial priorities and partly because proof of intent, ("knowing" employment of an undocumented alien is the usual standard which can be met by a showing of "pattern and practice"), is very difficult as few employers are expert pathfinders in the labyrinth of the INA.

¹²⁸ An employer who refuses to hire a noncitizen, regardless of the alien's immigration status, does not risk liability under Title VII of the Civil Rights Act of 1964 so long as his discrimination ground is alienage and not "national origin." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973).

¹²⁹ 8 U.S.C. § 1324(a)(3) (1976).

nature of an alien's due admission into or lawful entitlement to "enter or reside" in the United States. The practical barriers to enforcing not only the harboring provisions of section 274 but also the concealing and shielding provisions, for which direct eyewitness evidence seems necessary, give the "Texas proviso" the appearance of surplus legislative language. Yet, though removal of the proviso likely would not change the effect of the present law, it is the implication of the "Texas proviso" that is particularly troubling; employers may use cheap, exploitable labor without serious risk.

There are energetic advocates of employer sanctions as the ultimate solution to the illegal alien problem,¹³⁰ viewing it less as a method to prevent alien abuse than as a way to control illegal immigration and to protect against impacts on the labor market. During the past decade, employer sanctions legislation has been actively pursued by Congress with support from the Nixon, Ford, and Carter administrations. The major proposals are synopsized in Table 1.

The argument put forth by employer sanction advocates is rarely cluttered by complex questions of assumptions, means, or ends. For instance, in 1975, the House Judiciary Committee reported:

The committee believes that the primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which the aliens come, coupled with the chance of employment in the United States. Consequently, it is apparent that this problem cannot be solved as long as jobs can be obtained by those who enter legally as non-immigrants for the sole purpose of obtaining employment.

The Committee, therefore, is of the opinion that the most reasonable approach to this problem is to make unlawful the "knowing" employment of illegal aliens, thereby removing the economic incentive which draws aliens to the United States as well as the incentive for employers to exploit this source of labor.¹³¹

The simplicity of the statement in part accounts for its attractiveness. Despite the impressionistic nature and the attendant dangers of misusing the data on undocumented alien presence in the United States, studies "generally agree that there is a significant undocumented worker population in the United States The unresolved question is what degree of economic impact undocumented workers have on American

¹³⁰ Among these advocates are the Federation for American Immigration Reform which successfully lobbied Senator Walter Huddleston to introduce an employer sanctions amendment to the 1980 INS "efficiency package." The package and the amendment never reached a floor vote. David North, a researcher-activist from the New TransCentury Foundation in Washington, D.C., has been a principal advisor on employer sanctions to the Select Commission on Immigration and Refugee Policy. The *Washington Post* columnist William Raspberry has written favorably about employer sanctions from a position of special concern over minority unemployment. Raspberry, *Another Side to "Hiring American,"* Wash. Post, Sept. 15, 1980, § A, at 21, col. 2; *Hiring American*, Wash. Post, Sept. 8, 1980, § A, at 21, col. 6; *Should It Be Legal to Hire Illegals?*, Wash. Post, Aug. 8, 1980, § A, at 13, col. 1.

¹³¹ H.R. REP. NO. 506, 94th Cong., 1st Sess. 6 (1975).

Table 1
Employment Eligibility and Employer Responsibility Bills

	H.R. 16188 Rodino Bill (1972)	H.R. 8713 Rodino Bill (1975)	S. 561 Kennedy Bill (1975)	S. 3074 Eastland Bill (1976)	S. 2252 Carter Package (1977)
Explicit language prohibiting "knowing" employment of unauthorized aliens	x	x	-	x	-
Employer defense based on a bona fide inquiry re employment eligibility	x	-	x	x	x
Sanctions for hiring limited to civil penalties	-	-	x	x	-
Sanctions for hiring including criminal penalties	x	x	-	-	-
Initial civil penalty followed by combination with injunctive remedy for "pattern or practice" of employing illegal aliens	-	-	-	-	x
Attorney General authority to seek injunctive remedy	-	x	-	x	x
Felony to assist "knowingly and for gain" an undocumented alien in obtaining employment	-	-	-	-	x
Adjustment to permanent resident status for some illegal aliens	-	x	x	-	x
Adjustment to new temporary residence status for some undocumented aliens	-	-	-	-	x
Provision to assure labor supply to employers	-	-	-	x	-
Attorney General authority to initiate actions for national origin discrimination	-	x	-	-	-
Extension of Civil Rights Act employment discrimination protection to aliens authorized to work	-	-	x	-	-
Explicit preemption clause	-	-	-	-	x

Select Commission on Immigration and Refugee Policy, Working Paper, Inhibiting Illegal Migration: Employment Eligibility and Employer Responsibility app. 16 (March 27, 1980).

workers."¹³² On the one side are employer sanction proponents, among

¹³² U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION* 57 (1980).

whom an influential voice is David S. North, an economist specializing in migration issues at the TransCentury Corporation, Washington, D.C. In testimony on February 25, 1980 in Denver, before the Select Commission on Immigration and Refugee Policy, he asked:

Why an employer sanctions program? It is clear that . . . most illegal migrants come to the U.S. to work, and one may assume, quite safely, that there are millions of them in the U.S. labor market. An employer sanctions program would discourage such employment, open up a number of jobs (not one-for-one, of course) for U.S. residents, and serve as a healthy tonic to the U.S. labor market

Elsewhere, North has written:

A number of benefits, both direct ones and indirect ones, would flow out of an effective employer sanctions program.

The most obvious direct benefit would be the opening of a number of jobs now held by undocumented workers ineligible for amnesty (or likely to be filled by such workers in the future), most of which would be filled by legal U.S. workers, thus decreasing U.S. unemployment.

The movement of, say, one million undocumented workers out of such jobs would have a healthy effect on the secondary labor market, lifting wages and perhaps improving working conditions for the largely disadvantaged resident workers holding secondary labor market jobs (Blacks, Chicanos, Puerto Ricans, women, teenagers, the aging, and the handicapped). The lowered unemployment rate, in turn, would ease the pressure on the hard-pressed unemployment compensation trust funds, as well as reducing the numbers of persons on food stamps, and perhaps removing some from the AFDC [Aid to Families with Dependent Children] rolls.¹³³

On the other side are employer sanctions skeptics and opponents who challenge the assumptions. Attorneys at Georgetown University Law Center's Institute for Public Representation write:

To conclude that employer sanctions would significantly ameliorate these problems [*e.g.*, displacement or disadvantaging of American workers, especially in light of high national unemployment rates; employer exploitation of undocumented alien workers for economic advantage; a marginal job sector outside the attractive mainstream economy; and overuse of entitlement assistance programs] requires that one make two essential assumptions. The first is that the marginal (sometimes called "secondary") economy is what it is because it employs vulnerable undocumented workers. The other is that the inhibition of the "pull" factor of job opportunity will have a significant effect upon migration patterns which by common agreement are the result of complex "push-pull" phenomenon, including conditions in the source countries, physical proximity, ease of access (particularly through the services of alien-smugglers or "coyotes") and cultural and family ties.

We do not argue that these assumptions are categorically wrong. We do believe, however, that there is sufficient doubt about their validity to suggest caution in proposing ways to deal with the problem of unauthorized immigration

¹³³ D. North, *Keeping Undocumented Workers Out of the Workforce: Evaluation of Alternative Strategies*, at 3-4 (May 1978) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.).

. . . .

We note also that job opportunity is but one of the many factors which contribute to the flow of migrants, authorized or not, to the U.S.A. If employer sanctions are effective in inhibiting particular job opportunities, they may nevertheless only marginally inhibit the migrant flow itself. This outcome would threaten to create a large undocumented population, lacking economic self-sufficiency, which would either impose other social costs, on public order or medical services for instance, or would increase the labor force available to an underground economy.¹³⁴

This focus on assumptions is especially important, for the assumptions define the problems which employer sanctions are the proposed means to eliminate. The principal problem that undocumented alien workers are said to cause is American unemployment. Because this premise has not been proven, there is more than an incidental element of scapegoating when such authorities as former Secretary of Labor Ray Marshall claim that excising undocumented workers from the labor force would bring unemployment below the four percent level.¹³⁵ Others have asserted the contrary, that the United States "should not attribute to international migration an exaggerated effect on U.S. employment. The unemployment rates in the United States are not primarily the result of illegal migration."¹³⁶ There is therefore much controversy over whether any of the benefits of employer sanctions that are assumed by its advocates would really occur.

A superficial advantage of employer sanctions to those whose principal concern is the domestic scene is that it assumes complex motivational "push" factors to be essentially irrelevant. The mere assertion that there is employment opportunity in the United States says nothing about why a Mexican may be more likely than a Canadian to migrate illegally. Nor does it address myriad other aspects, ranging from the political and religious freedoms Americans enjoy, to the backlog effect of annual national quotas and the racial bias in the INA due to historic exclusions and colonial limitations which today leave areas of the world with little or no

¹³⁴ E. Glitzenstein, A. Pandya, and D. Parker, Discriminatory Effects of Employer Sanctions Programs Under Consideration By the Select Commission on Immigration and Refugee Policy, at 56-57 (November 1980) (prepared for the Alien Rights Law Project) (copy on file at the Institute for Public Representation, Georgetown University Law Center).

¹³⁵ See R. Waldinger, *The Case Against Employer's Sanctions* (May 1980) (Joint Center for Urban Studies of MIT and Harvard University) (copy on file at the *North Carolina Journal of International Law and Commercial Regulation*). For Secretary Marshall's statement, see *N.Y. Times*, Dec. 3, 1979, § A, at 22, col. 2. For elaboration of his views, see Marshall, *Economic Factors Influencing the International Migration of Workers*, in *VIEWS ACROSS THE BORDER: THE UNITED STATES AND MEXICO* (S. Ross ed. 1980).

¹³⁶ C. Keely, *U.S. Immigration: A Policy Analysis*, at 59 (1979) (a Public Issues paper of The Population Council, New York). This viewpoint, however, internationalizes and raises what may be a more fundamental if less politically resonant concern, population growth and stabilization. See, e.g., L. Bouvier, *The Impact of Immigration on U.S. Population Size*, at 1-3 (January 1981) (Population Reference Bureau, Inc., Washington, D.C.). As a method of stabilizing population growth, too, employer sanctions have attracted some commentators. See generally Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, *FOREIGN AFFAIRS*, Fall 1980, at 21.

access to family reunification.¹³⁷ Any palliative that responds to a partial diagnosis of a complex situation will inevitably be no more than symbolic and thus basically inadequate.

Furthermore, inherent in the assumptions about cause and effect are untested assumptions about deterrence. Employer sanctions is a significant proposal that has been in the public eye for at least a decade, yet the literature on it remains relatively small and unsophisticated in light of the extensively applied experiences of social scientists, psychologists, and planners working in law enforcement.¹³⁸ A review of all the employer sanctions literature reveals no significant use of the extensive theoretical and case study work on deterrence done by criminal justice researchers.¹³⁹ At the very least, proponents of employer sanctions should feel a scholarly obligation to examine the utility of deterrence knowledge as developed in the criminal justice area in relation to their deterrence claims for employer sanctions as they affect both undocumented immigrants and U.S. employers. The fact that employer sanctions advocates have not faced this responsibility leads one to ask whether the omissions are purposeful or negligent; neither justification is acceptable.¹⁴⁰

Hand in hand with a deterrence theory is a second question law enforcement planners must ask: what incidence of illegality is acceptable? This question is posed to determine resource needs and allocations. It presumes that "[s]ome law is always or almost always enforced, some is never or almost never enforced, and some is sometimes enforced and sometimes not."¹⁴¹ Yet this question, too, is barely touched upon by employer sanctions advocates. David North, for example, refers only to comparative "degrees of effectiveness"¹⁴² of four types of employer sanc-

¹³⁷ See generally Waller, *Unequal Protection: Public Benefits, Public Policy, and Aliens*, this issue.

¹³⁸ Insights from anthropology and mental health, too, are poignantly neglected by employer sanctions advocates, perhaps because they ineluctably would be forced to deal with "pull" factors other than paychecks and the host of "push" factors that they simply ignore.

¹³⁹ The Law Enforcement Assistance Administration has supported a wide range of scholarship and experimental programs since its founding in 1968. Its National Institute of Justice publishes an annual bibliography. The subject index of a recent bibliography identifies 27 of the 656 entries as specifically about deterrence. NATIONAL INSTITUTE OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, SNI DOCUMENTS 1979: A COMPREHENSIVE BIBLIOGRAPHY (June 1980).

¹⁴⁰ Although we are critical about leaps to policy recommendations—in particular those supporting employer sanctions—that we believe will make major changes in the relationships among people in the United States, we join David North in warning of the pitfalls in this relatively uncharted area. He writes:

The reader should be warned that despite widespread interest in illegal migration and bursts of ethnographic studies regarding the migrants themselves (an undeniably appealing group of subjects), there has been virtually no work done by scholars on alternative approaches to the enforcement of the immigration and related laws. This report, then, is an exploration of a new field, written under deadline pressures, and subject to the inherent disadvantages of those conditions.

D. North and J. Wagner, *Enforcing The Immigration Law: A Review of the Options*, at ix (Draft, June 1980) (Center for Labor and Migration Studies, New TransCentury Foundation Washington, D.C.) (prepared for the Select Commission on Immigration and Refugee Policy).

¹⁴¹ K. DAVIS, *POLICE DISCRETION* 1 (1975).

¹⁴² D. North, *supra* note 133, at 3. See Table 2 *infra*.

tions legislation. If there are between 3.5 and 5 million unlawful residents in the United States,¹⁴³ it is necessary to ask what number or, since the numbers are so speculative, what fractional reductions in the presence and flow of illegal immigrants would be acceptable. Naturally this inquiry raises further problems such as distribution and local impact. Yet these are precisely the types of questions that must be posed, with full acknowledgement of the operative assumptions, before Congress designs a series of responsive law enforcement options with attendant costs. Acceptability is not simply a statement of what is wished. Rather, it is a rational calculation that takes into account a host of surrounding factors such as human and civil rights, foreign policy consequences, and verifiable impacts on the U.S. economy and unemployment.¹⁴⁴

Another alluring argument for employer sanctions is that experience shows that the workplace is an efficient place to focus interior immigration law enforcement and that having employers screen workers for legality maintains this workplace locale and multiplies enforcement capacity at minimal public cost. Much INS interior enforcement has concentrated on places of employment because it is not unusual for a given employer to have more than one undocumented alien on his rolls. In addition, fourth amendment issues appear to be less complex and volatile when, for instance, a factory rather than an apartment, picnic, or street gathering is raided without the owner's objection, with questioning being based upon informant or observational information.¹⁴⁵ Finally, because working without authorization is one of the common deportable offenses for nonimmigrant visitors,¹⁴⁶ a workplace seizure provides direct evidence, which would not be available from a street arrest, of that out-of-status activity for aliens who were admitted with inspection.¹⁴⁷

The notion, however, of enlisting employers in the fight against illegal aliens as a means of enforcing the law ignores fundamental aspects of American society. While there are myriad health, safety, and employment standards that employers must adhere to, the government requires

¹⁴³ Department of Commerce, Bureau of the Census, Working Document, Review of Existing Studies of the Number of Illegal Residents in the United States, at 19 (January 1980) (prepared for the Select Commission on Immigration and Refugee Policy). This estimate is not an official estimate of the Census Bureau. The report states, "This review of the existing studies on illegal residents in the United States finds that there are currently no reliable estimates of the number of illegal residents in the country or of the net volume of illegal immigration to the United States in any recent past period." *Id.* at 18.

¹⁴⁴ Claims for employer sanctions, such as David North's hypothesis that a million jobs will open to American workers or Labor Secretary Ray Marshall's claim that removal of undocumented workers would drop the unemployment rate below four percent, require greater analytical support to be persuasive. *See* notes 133 & 135 *supra*.

¹⁴⁵ *See, e.g.*, *Payton v. New York*, 445 U.S. 573 (1980).

¹⁴⁶ 8 U.S.C. § 1251(a)(9) (1976); *see* *Pinella v. Board of Review*, 155 N.J. Super. 307, 382 A.2d 924 (App. Div. 1978).

¹⁴⁷ Aliens who enter without inspection are deportable for that act, 8 U.S.C. § 1251(a)(2) (1976), and the burden is on the alien to show "time, place and manner of entry," *id.* § 1361.

all employers to actively participate in enforcement of the law with respect to their employees in only one area, taxation. Employer sanctions would thus become only the second such general requirement. This obviously would be a major change in the relationship between government and the people. The other obvious change caused by employer sanctions would be that private persons will be asked to discriminate according to a legal category, such as citizen or unlawful entrant. To date, the federal government has been chary of establishing such intrusive labeling that would erect barriers to labor market access. To the contrary, federal intervention in the labor market has generally followed the view that the government has an obligation to protect access and ensure fairness, particularly when employment is at stake.¹⁴⁸ Justice Douglas stated: "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property."¹⁴⁹

Employer sanctions inevitably would lodge government between the individual and most employment in a fashion much different from regulation according to civil rights standards which ensures the free play of skill, opportunity, and fair market forces; employer sanctions are unrelated to a person's actual or potential economic contribution. The most dramatic conclusion one reaches about employer sanctions is that they are appropriate to nations with centrally-controlled economies. Economically, they are a national socialist measure; politically, they are totalitarian.

To illustrate what an extraordinary proposal employer sanctions are, consider parallel sanctions which could be imposed on other entities also in regular contact with a wide variety of people. Landlord sanctions, for example, would punish any landlord who rented housing to an undocumented alien. The conservative rationale would be that undocumented aliens squeeze tight rental markets, particularly in cities where they cluster, reducing the opportunity for citizens and other lawful residents to find good housing and resulting in higher rental fees. The liberal rationale would be that rapacious landlords are exploiting undocumented aliens by threatening to report them to the INS unless they pay inflated prices, live in overcrowded conditions, and do not report health and safety violations. Finally, the enforcement efficiency argument would be that, because everyone needs a place to live, shutting off the possibility of shelter would deter most aliens who wish to come to the United States without inspection or who plan to violate nonimmigrant visa terms. The same arguments could be raised for many other entities sharing broad public contact: dentist sanctions, grocer sanctions,

¹⁴⁸ See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427-55, 948-53 (1978).

¹⁴⁹ *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

mechanic sanctions, and teacher sanctions.¹⁵⁰ The police state consequences of such "scorched earth" proposals are clear.

Aside from tenuous assumptions and the danger of unthinkingly accepting colorable proposals, employer sanctions present the fundamental question of how one identifies oneself. The key to employer sanctions is creating a barrier to U.S. jobs that can be overcome only by those persons permitted to work. Though the barrier will be manned by employers, it must be constructed by the federal government in order to be uniform nationwide. The federal government therefore would have to provide an identity system that would enable employers to screen people in or out of the labor market without error or discrimination.

This task is as complex as the United States itself. The United States is a heterogeneous society and there are no obvious ways to distinguish a citizen from an immigrant or a nonimmigrant from an undocumented alien. No certainty about a person's nationality or immigration status can be had from the physical appearance, dress, age, accent, English language skill, companions, or demeanor. Also, for the most part, the INA does not govern a person's ordinary behavior. Most violations, including working without INS or visa authority, are status offenses. They turn on a person's legal status derived from the label of being "alien." An individual whose nonimmigrant visa has expired is no different personally the day after it expired than he was the day before.

In addition, most INA violations are victimless. An alien who enters illegally or who enters legally but works without authorization does not harm anyone directly or suffer harm himself, except to the extent that he is exploited within legal definition, suffers peonage, or feels anxiety that his employer will report him to the INS and retain his backwages. It is possible, of course, that society in general or aggregate groups of workers may be harmed, though as noted earlier this harm is highly speculative and rarely can be demonstrated as specific injury to a lawful worker or job seeker. Because labor is legal, an undocumented alien who works alongside a citizen commits through his labor no more of a labor offense, as contrasted to an immigration offense, than does the citizen.

Consider the example of employer sanctions being applied to identical twins working side by side, one a U.S. citizen and the other an undocumented alien. Nothing in appearance or activity distinguishes one from the other; yet, one is deportable and, under employer sanctions, his employment could lead to punishing the employer. Therefore, to implement employer sanctions the government must develop a mechanism to separate and distinguish the legal from the illegal worker. Without such a mechanism, an employer inevitably will discriminate against citizens or immigrants whom he believes to be illegal or alternatively will hire undocumented aliens who appear to be citizens. Without help, the em-

¹⁵⁰ The Texas "school cases," *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978), have scorched earth sanctions rationales attached to the government's arguments.

employer's decisions thus will be either overinclusive or underinclusive as he walks the line between employer sanctions and civil rights concerns.

Because the essence of a fair system is simple, unbiased identification, the government must face the task of inventing an identity system in order for employer sanctions to work. For an employer to be punished fairly for hiring someone illegally, he must commit an act he could have avoided without breaching other laws that ensure fair hiring practices. If an employer is held to a knowledge standard he must have means to obtain that knowledge at minimal cost to his operations, including his relationships with employees, applicants, and the community at large. To avoid legitimizing employer discrimination against people who appear foreign, employer sanctions need either a strict knowledge standard or a supportive identity mechanism that simultaneously prevents employers from engaging in and employees from experiencing illegal discrimination. If employers themselves are required, with penalties for refusal, to enforce the law privately by rejecting applicants who are not permitted to work, the federal government may need to establish an objective, fraud-proof identity system. To permit an employer to reject an applicant on suspicion rather than certainty of illegal presence would not only cause serious and legitimate social outcry, but would also subject the employer to discrimination lawsuits.

Because the basic immigration interior enforcement questions are identity and status, advocates of employer sanctions have devised a continuum of methods for identification.¹⁵¹ The identity continuum moves from the most effective to the most porous. The identity systems proposed include a national work identity card, a centralized data bank, a simple affidavit, and a multiplicity of identifiers. The most curious aspect of these methods is that the more effective they are, the more dangerous they become to the U.S. tradition of civil rights. Justice William O. Douglas has observed:

Free movement by the citizen is of course as dangerous to a tyrant as free expression of ideas or the right of assembly and it is therefore controlled in most countries in the interest of security. That is why riding boxcars carries extreme penalties in Communist lands. That is why the ticketing of people and the use of identification papers are routine matters under totalitarian regimes, yet abhorrent in the United States.¹⁵²

Concurrently, the less effective methods, with less of a threat to civil rights, are minimally useful to punish employers because they shift the punitive action back to the alien. Under the "new hire reporting" propo-

¹⁵¹ The North comparison chart, *see* Table 2 *infra*, lays out the most talked about continuum. Behind this search for the solution is a sense that employer sanctions proponents believe that designing a mechanistic system is the same as designing a law enforcement program. The LEAA experience shows clearly that mechanical sophistication helps ease the job of policing but does not replace the human judgment of officers and other analysts. Enforcement proposals, like employer sanctions, must take into account the complex human factor in society to be successful.

¹⁵² *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

sal, for instance, the employer would become little more than an information-gathering arm of the government, and the punitive/deterrent notions behind employer sanctions would disappear. Thus, as a proposal becomes less effective, it no longer is one of "employer sanctions." Each proposal, nevertheless, deserves individual scrutiny.

Table 2
Comparison of Four Alternative Systems to Discourage the
Employment of Undocumented Workers
 (assumes passage of employer sanctions legislation)

Impacts \ Systems	Work Permit	Call-In Data Bank	New Hire Reporting	Multi-Document Screening by Employers
Impact on Legal Workers	newly hired workers must show card	minimal on most; a minority, notably the young, would have to file applications	new employees must fill out half-page form	all new employees must show some documents to employer
Impact on Employers	all employers must screen new workers for this card	all must make phone calls about new employees	employer must forward copies of form to government	substantial decision-making responsibility
Differential Impact, If Any, on "Foreign Looking" Workers	none	none	such workers more likely to be excluded or screened more thoroughly	such workers more likely to be excluded or screened more thoroughly
Decision-Maker (re worker's legitimacy)	Government	Government	Employer, as audited off-site by INS	Employer
Need for New Document	yes	no	yes	no
Degree of Effectiveness	very effective	effective	effective to the extent that reports are monitored, followed up	least effective
Degree of Opposition Expected	very substantial	substantial	substantial	substantial
Cost to Government	most expensive	moderate cost	low cost	low cost

D. North, *Keeping Undocumented Workers Out Of The Work Force: Evaluation Of Alternative Strategies*, Exhibit A (May 1978) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.).

A. The ID Card

The work identity card is the simplest, most efficient method for

employers to screen workers. The government would issue a card to any person wishing to enter the job market or change jobs if that person could prove he is a citizen or an alien permitted to work. Any card would have to allow for some variation of work right to reflect the law; foreign students, for instance, are permitted to work no more than 20 hours per week with permission during the school year. If the Social Security card were used, it would also have to be coded to allow for separate, non-employment purposes, such as a foreign visitor without work permission opening a bank account. Once a worker had a card, he simply would present it to the employer who would verify that the applicant was the cardholder. Employers might verify the applicant's status visually, by questioning, or by a machine that could, for example, check the person's fingerprints against prints on the card. The employer would then record this information and retain records for government checks. An employer who did not ask for a card or who did not keep records would be liable for employer sanctions.

This method would be the purest employer sanctions system because it focuses upon the employer's screening responsibilities. An employer who did not take the steps of verification and record keeping would be punished. Secondly, the system would provide cause for INS employees to question workers. Because workers would not be required to carry their cards with them daily, presumably they would have to be asked to bring them for INS checks, or INS investigators would undertake questioning without the benefit of cards.¹⁵³ Employer sanctions would be only a supportive mechanism for the principal concern, discouraging employment of illegal aliens.

The card raises several problems. First, once it became adequately universal, perhaps within twenty years, its attractiveness for other control purposes would be so strong that it would quickly become a national identity card.¹⁵⁴ Second, though its proponents claim it would be hard to counterfeit or tamper with, as a passport to the U.S. labor market in a world increasingly strapped for relatively well paying jobs, it would become so valuable that organized crime surely would find it a lucrative field. The Federal Advisory Committee on False Identification noted precisely this possibility of attendant corruption and recommended against a national identification document.¹⁵⁵

Third, for a number of years, some citizens would find it difficult to

¹⁵³ One should keep in mind that only persons hired after the system went into effect would have cards.

¹⁵⁴ See U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 65-70* (1980). With two dissents, the U.S. Commission on Civil Rights strongly opposed such a card. "Congress should *not* enact legislation for the development and implementation of a compulsory national identity card or work permit system." *Id.* at 74 (emphasis in original). See generally J. RULE, D. MCADAM, L. STEARNS & D. UGLOW, *THE POLITICS OF PRIVACY* (1980) [hereinafter cited as J. RULE & D. MCADAM].

¹⁵⁵ FEDERAL ADVISORY COMMITTEE ON FALSE IDENTIFICATION, *THE CRIMINAL USE OF FALSE IDENTIFICATION* (Nov. 1979).

get a card because they are not part of the record system in this country. Also, citizens who are already marginal to the economy may be forced fully underground both from lack of knowledge and fear of government.

Fourth, it is probable that the only prosecutions will be brought against those employers who actually have hired undocumented aliens. Prosecutors are unlikely to charge employers who do not ask for cards, do not keep records, but only hire citizens knowing the charges would be subject to extensive litigation and ultimately to jury nullification.

Finally, to the extent that prosecutions are selective and directed not to the employer but rather to the employee, hiring discrimination will develop. Only persons who appear to be foreign will be checked by employers and if any doubts emerge they will be turned away. For example, an Anglo who forgets his card might be hired and told to bring it tomorrow, whereas an Hispanic who forgets it will not be hired even tentatively.

B. The Data Bank

To avoid the traditional American fear of internal passports associated with an ID card, a centralized data bank has been proposed.¹⁵⁶ This computer bank would store information on every person who might be in the workforce or who wishes to enter it. Some proposals call for the merger of existing data systems such as military records, social security records, and even Internal Revenue Service personal identifying data. Other proposals call for establishing a new system that would record the essential data on a person who comes to the government for labor clearance. Such data may include name, birthplace, birth date, mother's maiden name, and elementary school. It might also include fingerprints if technology permitted. The system would not include address because it quickly might become obsolete.

Although the political perceptions may be somewhat different from those associated with ID cards, similar arguments to those concerning ID cards apply to data banks, particularly as police cars increasingly become equipped with computer terminals. A card system, too, may be linked to a computer if the ID card has to be checked out, which would make the data bank more than a passive repository of information. In some ways, a data bank is more ominous than a card system for it can be used to obtain information on a person without the person's knowledge. Thus, the privacy concerns of the data bank proposal are large.

¹⁵⁶ The idea of a universal identifier social security card has been active since the Social Security Board was established in 1935. *See* J. RULE & D. MCADAM, *supra* note 154, at 99-100, 142-45.

Every official who has overseen the system, including Patricia Roberts Harris, Secretary of Health and Human Services in the Carter Administration and, by virtue of her position, one of the sixteen Commissioners of the Select Commission on Immigration and Refugee Policy, has sought to protect the Social Security System from such proposals. Success has been mixed.

C. New Hire Reporting

Here, the employee would sign an affidavit, such as the one in Form 1, saying he is a citizen or a legal alien and, if the latter, would provide his documentation. Some proposals call for all employees to present documentation.¹⁵⁷ The weakness of this system is obvious. It is open to abuse by employees using false documents and by employers making judgments about people and documents that they are not equipped or trained to make. The enforcement focus shifts from the employer to the employee. The government provides virtually no screening assistance to the employer, making it unlikely that prosecutions will be brought against anyone other than the flagrant violator who has determinedly hired undocumented aliens. "Employer sanctions" might essentially be replaced in nomenclature by "employer license to discriminate."

D. Multiple Documents

In this proposed system, a range of documents would be authorized for employer scrutiny, and no centralized government reporting would be required, though records must be kept for INS on-site inspection. These records might include passports, other government-issued ID cards, and birth certificates. This system, of course, easily could be penetrated if only because the United States has no uniform, secure birth record system. Cheating would be fairly widespread, although less sophisticated foreigners might be deterred from entering the country. Again, the concept is based on employee screening rather than employer sanctions.

The proposal includes telling employees that the form will be sent to the INS for verification.¹⁵⁸ The assumption is that many undocumented aliens will be frightened away; but there is real reason to believe that legal aliens might be equally concerned. Employer returns of employee records would be checked in two ways: (1) data on employee forms would be randomly verified, for example by cross-checking with military records, and (2) the records of a particular employer or type of business might be verified first through existing data banks and then through visits to the employer where personnel records would be checked against the filed employee identity forms and discrepancies checked further by means of questioning employees.

¹⁵⁷ See D. North & J. Wagner, *Enforcing The Immigration Law: A Review Of The Options*, at 59-71 (Draft, June 1980) (Center for Labor and Migration Studies, New TransCentury Foundation, Washington, D.C.) (prepared for Select Commission on Immigration and Refugee Policy).

¹⁵⁸ The authors wonder whether the INS is capable of verifying any documents given its record of losing files which the authors and others have experienced.

Form 1

New Hire Reporting Form

DATE OF HIRE _____	
NAME OF EMPLOYER _____	EMPLOYER NUMBER _____ ()
ADDRESS _____	TELEPHONE NUMBER _____ \$
TYPE OF BUSINESS _____	WAGE PER WK/HR _____

NAME OF WORKER _____	SOCIAL SECURITY NUMBER _____
ADDRESS _____ () / /	
TELEPHONE NUMBER _____	DATE OF BIRTH _____
DO YOU POSSESS ONE OF THE FOLLOWING? (if yes, note number)	
U.S. PASSPORT <u>yes</u> <u>no</u>	U.S. CITIZEN CARD <u>yes</u> <u>no</u> (form I-197)
DISCHARGE FROM U.S. ARMED FORCES <u>yes</u> <u>no</u>	
# _____	# _____

If one or more of the above are answered "yes" do not complete the following section.

COMPLETE BLOCK BELOW CORRESPONDING TO YOUR STATUS IN THE U.S.

☐ United States Citizen, Native Born or by Derivation

Place of Birth _____

Mother's Maiden Name _____

☐ Naturalized Citizen A-Number _____

☐ Permanent Resident Alien A-Number _____

☐ Other - Describe status below; if you have a nonimmigrant visa, indicate visa class (A-1, G-1, I-1, etc.) and date on which your authorized stay expires.

I, the employee, certify, under penalty of perjury, that I am entitled to work in the United States and that the information given is true and accurate.

Employee Signature _____ Date _____

D. North, Keeping Undocumented Workers Out Of The Workforce: Evaluation Of Alternative Strategies, Exhibit C (May 1978) (Center for Labor and Migration Studies, New Trans-Century Foundation, Washington, D.C.).

E. Analysis of Proposed Identification Systems

Although each system has its unique drawbacks, ranging from laying the groundwork for a totalitarian police state to obvious inefficacy, they all share in common little regard for civil rights. Discrimination

will be the hallmark of any employer sanctions scheme and that fact alone is sufficient reason to reject the proposals.¹⁵⁹

When people rather than documents are being hired, there is no such thing as an objective verification program. Documentation must be evaluated in light of the person who presents it, so employer or government screener subjectivity will never be eliminated. Not only will job applicants who look foreign be scrutinized more rigorously and possibly rejected if screening becomes too costly in terms of time spent by employers or government personnel, but workers who frequently change employers will experience many screenings and thus disproportionate risk of employer or government error. These workers are predominantly minorities and women.¹⁶⁰ In addition, workers from lower class minority groups who have been marginal to many of society's data systems, or at least to those identification systems acceptable to employer sanctions screeners, may have difficulty documenting their legality for employers and thus may experience more frequent referral for government review. Furthermore, any temporary permit system meant to offset bureaucratic confusion and delay would not only risk error and frustration and perhaps even deportation of citizens, but also would decrease employment prospects with employers who do not recognize or trust temporary documents or who refuse to risk hiring someone who may have difficulty being documented.¹⁶¹ Racial, ethnic, and alienage characteristics will be used to direct this group of persons to the government bureaucracies.

Employer perceptions toward both individuals and the program will be very important. To the extent program effectiveness depends upon vigilance and employer fear of punishment, and vigilance in turn means skepticism toward certain people, anyone who is either "foreign-looking" or unfamiliar will have a harder time than an "American-looking" person in removing the government constructed barriers to labor market access.¹⁶² The employer who wishes to "play it safe" inevitably will be overinclusive in his rejections and referrals for government screening.

¹⁵⁹ The authors are indebted to many observers of the processes of the Select Commission on Immigration and Refugee Policy, including Carolyn Waller of *Interpreter Releases*; David Carliner of Carliner and Gordon; John Shattuck, Legislative Director of the American Civil Liberties Union; and Carol Stepick and Dale Frederick Swartz of the Alien Rights Law Project, who have found the employer sanctions proposals to be without true merit, both broadly and in their specifics, and dangerous in their civil liberties consequences. We also appreciate the work of the Georgetown University Law Center's Institute of Public Representation, Amita Pandya, Douglas Parker, and Erick Glitzenstein, so thoughtfully presented in their paper on employer sanctions, *supra* note 134.

¹⁶⁰ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY REPORT—1973 PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY xvii (1975).

¹⁶¹ A person who might have difficulty being documented is not always equivalent to an undocumented alien. Some citizens may be difficult to document. For instance, a person born outside a hospital in a rural area might never have obtained a birth certificate or a Social Security card, so it would be very difficult for him to prove citizenship via documents.

¹⁶² Lawful immigrants often are generally classified as "illegals" by persons concerned about illegal immigration problems. U.S. DEP'T OF LABOR, ILLEGAL IMMIGRATION AND U.S. FOREIGN POLICY (October 1980).

Any administrative system like "New Hire Reporting" that leads to INS on-site inspection following paper review will simultaneously prompt employers to err on the side of caution so as to avoid INS interruptions and permit INS officers themselves to select persons for questioning, ostensibly from the "objectivity" of documents. In reality, however, the selection will be influenced by the person's appearance, thereby raising substantial questions under the fourth amendment standards of reasonable suspicion.¹⁶³ Under an identity card system, INS spot checks and raids will cause some employees to carry their cards to work and perhaps cause employers to demand that they do so. If this becomes the norm, state and local police officers may expect cards to be carried, especially by foreign-looking persons, and treat them as internal passports. Further, legislative and regulatory standards might soon be established permitting state and local officials to require all travelers during declared emergencies, ranging from riots to blackouts to high crime zones, to carry their ID cards, with arrest and other penalties for non-compliance.

Regardless of the employer sanctions system one chooses, violations of Title VII of the Civil Rights Act of 1964 and of the fifth and fourteenth amendments are possible. When subjective hiring results in discrimination against the disadvantaged and the minority¹⁶⁴ so that access is frustrated by reasons unrelated to job qualification,¹⁶⁵ Title VII may be violated. To the extent that persons are barred from competing equally due to suspicions raised about them by a government labeling program, they may have been deprived of liberty and property without due process¹⁶⁶ and may also belong to similarly situated groups being discriminated against in contravention of equal protection principles.¹⁶⁷

Finally, if discrimination is as deep as anticipated and strikes against "insular minorities,"¹⁶⁸ courts will apply a "strict scrutiny" test¹⁶⁹ to the cause of these problems. It is hoped that any employer sanctions scheme will fail to be implemented; a permanent injunction could be obtained against any expenditure of funds on the ground that proponents did not

¹⁶³ INA offenses often invoke criminal as well as civil penalties (deportation is a civil penalty, 8 U.S.C. § 1252 (1976); *Jolley v. Immigration & Naturalization Serv.*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971)), so the fourth amendment cannot be disregarded. *See Brown v. Texas*, 443 U.S. 41 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Robinson*, 414 U.S. 218 (1973).

¹⁶⁴ *See, e.g., Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972).

¹⁶⁵ *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁶⁶ *See Vitek v. Jones*, 445 U.S. 480 (1980); *Meachum v. Fano*, 427 U.S. 215 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

¹⁶⁷ *See text accompanying notes 24-28, 50-60 supra.*

¹⁶⁸ *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 153 & n.4 (1938) (dictum) (Stone, J.).

¹⁶⁹ *See, e.g., In re Griffiths*, 413 U.S. 713, 721-22 (1973); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

meet the "least restrictive alternative" test¹⁷⁰ and could not argue successfully that such an intrusion into the domestic labor market was immune to challenge as a congressional exercise of plenary power to regulate immigration.¹⁷¹ This is because, regardless of the identity modality suggested for employer sanctions, sanctions remain but one option model among a group focused on interior enforcement. Alternatives include enforcing a range of labor laws directed against worker exploitation and toward establishing a professional, legally-trained police force, perhaps within INS, solely responsible for enforcing the immigration laws with no involvement of other government service agencies. Moreover, even if not clearly unconstitutional, Congress should strongly consider the policies behind Title VII and the equal protection provisions of the U.S. Constitution when making any policy on employee sanctions proposals.

Thus, employer sanctions need scrutiny both as means and as ends. The ends concern advocate assumptions about the undocumented alien "problem" and its deterrence. The means concern law enforcement principles and identity schemes. Inherent in employer sanctions proposals is an unsettling disregard for American traditions respecting individual rights and effective and fair law enforcement. Claims made for this "scorched earth" idea are so unsubstantiated that the idea itself of employer sanctions is inherently unsound. Regardless, the means needed to implement employer sanctions so threaten U.S. traditions that the idea should be rejected on that basis alone.

VII. Conclusion

This article is as much about attitudes as it is about policies and proposals. Although immigration has been a central theme of the United States for over two centuries, immigration policy has been a backwater. The Immigration and Naturalization Service today, for example, is asked to do a monumental though ill defined job with antiquated tools and insufficient budget and staff. The Visa Office of the Department of State has only recently begun to use computers. During its twelve years of existence, the Law Enforcement Assistance Administration had no programs to undertake research or to develop technical competence in immigration law enforcement. The Immigration and Nationality Act is also likely to remain a confusing patchwork, built upon a law devised during the McCarthy era, because of the Select Commission's avoidance of fully meeting its mandated responsibility to "simplify and clarify" the Act.

Given this neglect, it is little wonder that the contemporary surfacing of international migration as an overriding global issue like popula-

¹⁷⁰ See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967).

¹⁷¹ *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

tion growth and resource depletion is met by panic. Like them, it is second only to nuclear war as a worldchanging force. International migration is also a symptom of population and resource pressures, of political instability, and of human rights violations as well as being a direct reflection of those affirmative desires for a better life that have brought most current U.S. citizens or their ancestors to this nation.

Americans are a "people of all people" and therefore sense the economic and cultural benefits of immigration. Few U.S. citizens would wish to close the doors of the United States, even if that could be done easily. Nevertheless, many current immigration policy proposals would require fundamental restructuring of traditional personal relationships in order to obtain control over undocumented foreign migration into the United States. Structuring employment and other relationships to solve the "illegal alien problem" is a tactic having not only questionable utility but also dangerous tendencies for fostering hostility, disloyalty, and distrust among U.S. residents. This is an enormous price to pay for an uncertain resolution to an as yet poorly understood global problem. The American people should find "scorched earth" proposals offensive and extremely dangerous to the country. There is a crisis, but it is one of confidence, of expertise, and of experience. Immigration policy from both domestic and international perspectives must be made a priority matter. If it is not, "scorched earth" policies may be the quickest answer to the enduring unsettlement of fundamental U.S. traditions of freedom such as privacy, travel, and association. Were the United States to permit such perversion of its beliefs and institutions, the country surely will reap in the next century what is sown today.

