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I. Introduction

Undocumented aliens 1 illegally within the United States allegedly drain societal resources 2 and deprive citizens of employment opportunities. 3 Despite efforts by the Immigration and Naturalization Service (INS) to control the influx of aliens, 4 a serious problem continues to plague the nation. 5 Federal reluctance to extend social welfare bene-

1. The term "undocumented alien" is used in this Note to mean all aliens within the United States for whom there are grounds for deportation due to illegal entry or an overstayed visa. The Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1976), provides for the deportation of aliens falling into any one of a number of specific categories. 8 U.S.C. § 1251 (1976). Gordon & Rosenfield have reclassified these categories into three broad groups: "[A]liens who enter unlawfully, nonimmigrants who have overstayed their allotted time, and aliens who have been guilty of certain misconduct in the United States, such as criminals, subversives, narcotics violators, prostitutes, and violators of registration and reporting requirements." Gordon & Rosenfield, 1 IMMIGRATION LAW AND PROCEDURE § 1.3b (1981). Because different considerations would apply to the criminal alien, the rights of a criminal alien within the United States are beyond the scope of this Note.


4. Immigration Policy, supra note 3, at 36. Based on 1978 census estimates, the Congressional Select Committee approximated that there are 3.5 to 6 million aliens, half of whom are Mexican nationals, living in the United States without documentation. Id.

5. See, e.g., Staff of the Subcomm. on Immigration, Refugees, and International Law, Immigration and Refugee Issues in Southern California: An Investigative Trip, 97th Cong., 1st Sess., 2 (Comm. Print 1981). This report noted that in 1980 the Immigration and Naturalization Service apprehended approximately 759,000 aliens attempting entry into the United States in violation of the I.N.A. and stated that "[n]o one knows how many individuals are involved in these apprehensions: whether there are 800,000 individual aliens caught, or 100,000 aliens caught eight separate times. Neither does anyone know how many aliens evade the Border Patrol and enter the country illegally." Id. It has been suggested that the Bracero program which allowed some 5 million Mexican workers to enter this country to relieve manpower shortages between 1942 and 1964, undermined respect for the border in the minds of
fits to undocumented aliens\textsuperscript{6} leaves the burden of providing for illegal immigrants, who are often economically disadvantaged and exploited at the workplace,\textsuperscript{7} on state and local governments. Rather than address these problems directly, states and municipalities often attempt to eliminate employment incentives for illegal immigrants by imposing statutory fines on employers who knowingly hire undocumented workers.\textsuperscript{8} In keeping with this effort to exclude undocumented work-

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\textsuperscript{7} As one survey suggests, “the socioeconomic status at entry of EH [Eastern Hemisphere] respondents was close to the U.S. Norm; WH [Western Hemisphere] respondents clustered well below that norm; while the Mexican respondents fell below the norm of this nation’s most disadvantaged peoples, its blacks and chicanos.” North and Houstoun, \textit{The Characteristics and Role of Illegal Aliens in the U.S. Labor Market: An Exploratory Study} (1976), reprinted in Congressional Research Service, \textit{Selected Readings on U.S. Immigration Policy and Law} 77, 92, 96th Cong., 1st Sess. (Comm. Print 1980) [hereinafter cited as North & Houstoun]. North & Houstoun found that once inside this country, undocumented aliens tend to successfully compete with American disadvantaged workers for employment. \textit{Id.} at 94. The success of the undocumented alien is partly due to a willingness to work under “exploitative” conditions, for which North & Houstoun cite four indicia. These are: employment at less than the minimum wage; a perception of unsatisfactory working conditions; the presence of other undocumented workers at the worksite; and payment of wages in cash. \textit{Id.} at 89.

\textsuperscript{8} \textit{CAL. LAB. CODE} \textsection 2805 (West Supp. 1982); \textit{DEL. CODE ANN.} tit. 19, \textsection 705 (1979); 1979 Fla. \textit{Laws} Ch. 448-09; \textit{KAN. STAT. ANN.} \textsection 21-4409 (1974); \textit{MASS. ANN. LAWS} ch. 149, \textsection 19-C (Michie/law. Co-op 1981 Supp.); 1977 Mont. \textit{Laws} ch. 56 (1977); 1976 N.H. \textit{Laws} ch. 31; 1977 \textit{Va. Acts} No. 99; 1977 \textit{Va. Code} \textsection 40.1-11.1 (1981). The Connecticut provision, \textit{CONN. GEN. STAT. ANN.} \textsection 31-51k (West Supp. 1981), was declared unconstitutional because of overbreadth in Nozewski Polish Style Meat Prod. v. Meskill, 376 F. \textit{Supp.} 610 (D. Conn. 1974). Such objections against these statutes are raised frequently because it is feared employers will be reluctant to hire legal aliens because of potential liability where, for example, documents are later proved to be forged.
ers, states also erect legal obstacles to the eligibility of such illegal aliens for public resources and social welfare benefits such as medical benefits and unemployment insurance. In addition, an undocumented worker’s efforts to enforce his rights against his employer in state courts are often thwarted by his deportation. While these state measures are apparently consistent with federal immigration policies, a blanket disqualification leaves the undocumented alien vulnerable to discriminatory treatment and abusive employment practices.

This vulnerability actually may provide an added incentive to employers to hire undocumented aliens.

This Note examines the legal issues relating to the employment of undocumented aliens. Congressional power over immigration and the doctrine of federal pre-emption are examined in order to determine the extent to which state legislation is valid. The rights guaranteed undocumented aliens under the United States Constitution also are discussed as an additional limitation on state action. This Note argues that legal obstacles to both state social welfare benefits and the courts should not be imposed on the undocumented alien because this would reward employers who hire these workers to take advantage of lower labor costs.


10. The term social welfare benefits will be used in this Note to mean all enactments safeguarding the worker from catastrophic events beyond his control, such as sudden illness, injury or unemployment.

11. See note 7 supra. In addition, United States employers often are responsible for the illegal alien’s presence within the United States. See Immigration Policy, supra note 3. The Select Committee found that, “many undocumented/illegal migrants were induced to come to the United States by offers of work from U.S. employers who recruited and hired them under protection of present U.S. law.” Id. at 12. See also note 12 infra and accompanying text; United States v. Bunker, 532 F.2d 1262, 1263 (9th Cir. 1976) (defendant employer transported aliens from Mexico to work on his ranch); United States v. Castillo-Felix, 539 F.2d 9, 11 (9th Cir. 1976) (defendant furnished a Mexican citizen with a false registration card in order to enable the alien to enter the United States and work in his cafe).

12. United States employers benefit from hiring illegal aliens, instead of domestic labor. For example, in a survey conducted by North and Houstoun more than a fifth
considerations should not control the disposition of other types of court actions initiated by undocumented aliens.

II. Federal Power over Immigration

A. The Role of Congress

The United States Constitution empowers Congress "to establish a uniform rule of [n]aturalization." The power to admit aliens into the country, however, necessarily includes the power to exclude or deport them. Congressional authority in this area is of an extraordinary nature—"the power to expel or exclude aliens is a fundamental sovereign attribute." The United States Supreme Court has held that the power over immigration belongs exclusively to Congress. Moreover, the importance of this power as a means of preserving national integrity led the Court to state that there is no subject over which the legislative power of Congress is more complete than it is in the area of immigration. Congress, therefore, is permitted to exercise this power "largely immune from judicial control."

of the respondent undocumented workers were paid less than the minimum wage. North & Houstoun, supra note 7, at 89. The Congressional Select Committee on United States Immigration Law and Policy found that:

Undocumented/illegal migrants, at the mercy of unscrupulous employers and 'coyotes' who smuggle them across the border, cannot or will not avail themselves of the protection of U.S. laws. The presence of a substantial number of undocumented/illegal aliens in the United States has resulted not only in a disregard for immigration law but in the breaking of minimum wage and occupational safety laws. The inability/unwillingness of the alien to seek the protection of United States laws occasionally tempts employers who withhold wages rightfully due the alien. See Nizamuddowlah v. Bengal Cabaret, Inc., 92 Misc. 2d 220, 399 N.Y.S.2d 854 (Queens County 1977); Gates v. Rivers Constr. Co., 515 P.2d 1020 (Alaska 1973). Finally, to the extent that the employer is required to contribute toward state legislative benefits to which his employees are entitled, he realizes savings when an ineligible alien is hired instead of domestic labor. For example, under the Federal Unemployment Tax Act all employers are required to pay a tax of 3.4% on the first $4,200.00 each worker earns. 26 U.S.C. §§ 3301-3311 (1976). Moreover, state unemployment insurance schemes frequently require additional financing by the employer. See, e.g., CAL. UNEMP. CODE §§ 976, 976.5 (West Supp. 1982).

18. Id.
Among the categories of aliens which Congress deems to be excludable are those whose admission would have an adverse effect on the nation's economy. Thus, the Immigration and Nationality Act of 1952 (INA) provides for the exclusion of immigrants who fail to obtain a labor certification. The labor certification acknowledges that there are not sufficient workers in the United States to fill the job which the alien seeks and that employment of the alien will not adversely effect the wages and working conditions of United States workers similarly employed. If an alien has not obtained labor certification, and is employed in the United States, he may be deported under the INA. Labor certification considerations, however, have been applied beyond the context of exclusion and deportation cases to other types of claims brought in federal courts by undocumented aliens.

The INA also provides that an otherwise deportable alien may obtain a stay of deportation. The United States Attorney General has discretionary power to issue a stay if the alien meets the following three requirements: physical presence within the United States for seven continuous years; proof of good moral character; and indications that extreme hardship would befall the alien, or his citizen or resident spouse, child or parent if the alien is deported. In an attempt to limit the opportunities for aliens denied a stay of deportation to pursue dilatory tactics in the courts, the INA further provides for direct review of the deportation order by the United States Courts of Appeals. This review is available only after the alien has exhausted his administrative remedies. The courts of appeals generally limit the review to the question of whether the INS committed an

19. 8 U.S.C. § 1182(a)(14) (1976). In reporting this provision of the INA the House Committee on the Judiciary expressed its belief that:
[T]his provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.
20. See note 85 infra and accompanying text.
22. Id.
abuse of discretion in making its determination.\textsuperscript{25} Even in deportation proceedings, where Congress has the power to arbitrarily discriminate among aliens, the alien is entitled to the procedural due process protections of notice and opportunity to be heard.\textsuperscript{26}

B. Federal Pre-Emption

The Constitution, United States treaties, and federal statutes comprise the "supreme [l]aw of the [l]and."\textsuperscript{27} Courts reviewing the validity of a particular state statute, therefore, consider the doctrine of federal pre-emption and must distinguish among: areas of exclusive congressional authority;\textsuperscript{28} areas in which state and federal power may be exercised concurrently but where federal legislation either expressly or impliedly pre-empts state enactments;\textsuperscript{29} and areas where further state legislation has been contemplated by Congress.\textsuperscript{30}

In the context of immigration law, state statutes which undermine the authority of Congress to determine the categories of admissible aliens are invalidated as state legislation in an area reserved for Con-
In *Truax v. Raich* and *Takahashi v. Fish & Game Commission*, for example, the Supreme Court found that state attempts to restrict aliens from the "common occupations of the community" were tantamount to excluding such aliens. The power to exclude, the Court held, is reserved exclusively to Congress. State legislation which attempts to regulate the conduct of admissible aliens but does not amount to an exclusionary measure also must be examined in order to determine if Congress intended to pre-empt the states or if the state enactment would undermine congressional immigration policies.

The Supreme Court in *Hines v. Davidowitz*, concluded that a Pennsylvania statute requiring state registration of aliens was invalid because the Federal Alien Registration Act of 1940 pre-empted the states from acting in this regard. The Court found that registration impinged upon the personal freedom of the aliens and that the treatment of aliens influenced relations between the United States and the nations from which the aliens originated. States, therefore, may not impose on aliens a greater burden than that determined by Congress.

A leading case dealing with the issue of pre-emption was *DeCanas v. Bica*, where migrant farmworkers claimed that they had been displaced from jobs by undocumented workers who were employed in violation of a California statute which penalizes employers who

31. See note 28 *supra* and accompanying text.
32. 239 U.S. 33 (1915).
33. 334 U.S. 410 (1948).
34. 239 U.S. at 41.
35. *Id.* at 42. In *Takahashi*, the court stated, "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization... The states are granted no such power."
36. See note 30 *supra* and accompanying text.
37. 312 U.S. 52 (1941).
38. *Id.* at 68.
39. *Id.* at 64.
40. *Id.* at 73-74.
42. CAL. LAB. CODE § 2805 (West Supp. 1982). One of the recommendations of the Congressional Select Committee on United States Immigration Policy is for Congress to adopt a provision similar to the California Statute. *Immigration Policy, supra* note 3, at 61. Such a provision will meet with many constitutional challenges not discussed in the *DeCanas* decision because of the difficulties likely to be encountered by employers in attempting to discern the legal status of job applicants. See
knowingly hire illegal aliens. The question before the Court was whether the California statute was pre-empted by the INA. Congress, the Court concluded, did not intend the INA to preclude "harmonious state regulation" of illegal immigration. Thus it was held that a state may take measures to protect domestic workers even if the measures have an "indirect impact on immigration."44

Although DeCanas held that not all state action is pre-empted by Congress, the Court declined to rule on the constitutionality of state measures which effect federal immigration policy under which no similar sanctions exist against employing undocumented aliens.46 DeCanas upheld state power to legislate disincentives to illegal immigration by penalizing the employers of undocumented aliens.47 The question of whether state social welfare benefits and services may be extended to undocumented aliens, however, remains unresolved. States may be barred from extending benefits such as medical care and unemployment insurance because they frequently are viewed as an inducement to illegal immigration.48

Nozewski Polish Style Meat Prods. v. Meskill, 376 F. Supp. 610 (D. Conn. 1974) (statute held unconstitutional due to overbreadth). National identity cards might resolve the employers' dilemma, but they also would be susceptible to forgeries as "green cards." See also Comment, Criminalizing Employment of Illegal Aliens: Work Authorization Cards May Invade Privacy, 72 J. CRIM. L. & CRIMINOLOGY 637 (1981); Note, A Critique of Proposed Amendments to the Immigration and Nationality Act, 5 FORDHAM INT'L L.J. 213, 233-35 (1981). Current legislation only prohibits the "harboring" of undocumented aliens under 8 U.S.C. § 1324 (1976). "Harboring" is defined as actively concealing the undocumented alien of his status as such, with knowledge that his entry into this country was unlawful, and is punishable by a fine of up to $2000.00 or a maximum of 5 years imprisonment, or both, per harbored alien. Id. See United States v. Hanna, 639 F.2d 194 (5th Cir. 1981); United States v. Anaya, 509 F. Supp. 289 (D.Fla. 1980).

44. Id. at 355-56.
45. Id. at 363-65.
46. See note 42 supra.
47. See Immigration Policy, supra note 3, at 36. The Congressional Select Committee on United States Immigration Law and Policy found that: "All studies indicate that undocumented/illega laliens are attracted to this country by U.S. employment opportunities. Most come from countries that have high rates of under- and unemployment." Id. See also Comment, Illegal Immigration: Short-Range Solution of Employer Sanctions, 49 Miss. L. J. 659 (1978), where it is argued that undocumented aliens are induced to illegally migrate to the United States by the "push" factors of a stagnant native economy as much as by the "pull" factors of United States employers willing to hire them. Id. at 663-65.
48. A discussion of the effect of 8 U.S.C. § 1251(a)(3)(8) (1976), is beyond the scope of this Note. Section 1251(a)(3)(8) classifies as deportable those aliens determined by the Attorney General to be likely to become public charges within five years of entry into the United States.
III. State Benefits and the Undocumented Alien

The court in *Perez v. Health and Social Services Department*,\(^49\) considered a claim for benefits brought by an undocumented Mexican alien under New Mexico's Special Medical Needs Act,\(^50\) which extends medical assistance to all residents of New Mexico.\(^51\) In permitting a grant of benefits, the court held that the intent of the legislation was to protect undocumented aliens because the statute applies to all residents,\(^52\) not to a restrictive category of beneficiaries. Moreover, the statute was funded only by state monies. Federal restrictions which might have otherwise rendered undocumented aliens ineligible for benefits were found to be inapplicable.\(^53\) The court rejected the argument that the alien's claim was a matter of immigration control in which Congress pre-empted the states.\(^54\) Whereas the *Perez* court considered a statute which applied to all state residents including undocumented aliens, most state statutes do not indicate whether undocumented aliens are eligible to receive their benefits.

Unemployment insurance is intended to be a temporary measure that eases the individual's transition to new employment, and not a form of welfare payments.\(^55\) Many state unemployment insurance laws impose the requirement that recipients be "available for work,"\(^56\)


\(^{50}\) N.M. STAT. ANN. §§ 27-4-1 to 27-4-5 (Supp. 1981).

\(^{51}\) 91 N.M. at 337, 573 P.2d at 692.

\(^{52}\) The statute spoke in terms of "residents" rather than "citizens," as does New Mexico's Workmen's Compensation and Wrongful Death laws. A workmen's compensation claim awarded to a non-citizen alien was upheld in *Gallup Am. Coal Co. v. Lira*, 39 N.M. 496, 50 P.2d 430 (1935). A wrongful death claim by an undocumented alien was upheld in *Torres v. Sierra*, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976).

\(^{53}\) 26 U.S.C. § 3304(a)(14)(A) (1976), provides that unemployment insurance programs funded in part by the federal government shall not provide benefits on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law.


\(^{55}\) *See Staff of the House Comm. on Ways and Means, Information Relating To Federal-State Unemployment Compensation Insurance Laws*, 93d Cong., 2d Sess. (Comm. Print 1974), which states "Unemployment insurance is a Federal-State system designed to provide temporary wage loss compensation to workers as protection against the economic hazards of unemployment." *Id.* at 1, discussing the Federal Unemployment Tax Act, *supra* note 12.

\(^{56}\) For example, N.J. STAT. ANN. SOC. SEC. § 43:21-4 (West 1962), states: "An unemployed individual shall be eligible to receive benefits with respect to any week only if it appears that: . . . (c) He is able to work, is available for work, and has demonstrated that he is actively seeking work . . . ." *See also* notes 64, 67 infra.
which means that the workers must be ready, willing and able to work. 57

The court in Pinilla v. Board of Review, 58 considered the unemployment insurance claim of a Colombian citizen who had overstayed her visa. 59 Taken into custody by the INS and subsequently released, the petitioner was told that she could not continue her employment without a work permit while her deportation hearing was pending. 60

In denying the unemployment insurance claim, the court stated that “legal inability to work is as disqualifying as physical inability to work.” 61 Consequently, the court found that the petitioner was unavailable for work and thus ineligible for unemployment insurance under the New Jersey statute. 62

In Alonso v. State, 63 an illegal alien was disqualified from eligibility under the California unemployment insurance availability requirement. 64 The court concluded that the denial of benefits was consistent with the federal policy of excluding uncertified aliens because the state was, in effect, refusing to subsidize the alien's continued illegal presence within the United States. 65


[limiting the beneficiaries of the State's unemployment compensation program to those genuinely attached to the labor market and setting monetary eligibility requirements for recipients in order to preserve fiscal integrity are clearly permissible and rational governmental interests. . . .

Id. at 1151.


59. Id. at 308, 382 A.2d at 921.

60. Id. at 308-09, 382 A.2d at 921.

61. Id. at 311, 382 A.2d at 923.

62. Id.


64. CAL. UNEMP. INS. CODE § 1253 (West 1972), states that “[a]n unemployed individual is eligible to receive unemployment compensation benefits with respect to any week only if the director finds that: . . . (c) He was able to work and available for work that week.”

65. 123 Cal. Rptr. at 543, 50 Cal. App. 3d at 252. The court also stated that the undocumented alien's employment within the United States amounted to a “fraud.” Cf. note 8 supra and accompanying text. In California, under CAL. LAB. CODE § 2805 (West Supp. 1981), an employer who knowingly hires an undocumented alien is subject to penalties. It is unclear under California law whether, and to what extent, the employer is obligated to inquire into the job applicant's legal status. Where an employer is completely derelict in this regard, he can not only circumvent § 2805, but by claiming to be “defrauded” by the undocumented alien he can also escape liability under the unemployment insurance law.
A contrary result was reached, however, in *Ayala v. California Unemployment Insurance Appeals Board.* The court upheld state disability payments to an undocumented worker under an availability requirement in the California disability insurance law almost identical to that contained in the unemployment insurance statute considered in *Alonso.* It rejected the reasoning of *Alonso,* stating that it cannot be conclusively presumed that an otherwise eligible alien cannot collect disability payments simply because he is an illegal alien. Thus, the *Ayala* court agreed with the dissent in *Alonso* which opined that "[i]t is not appropriate that . . . this court rewrite those provisions to impose a requirement for benefits that the legislature did not erect." A preferred method of determining alien eligibility which would resolve potential conflicts with federal immigration policy is provided by the standards established by the court in *Montoya v. Gateway Insurance Company.* In *Montoya,* an illegal alien sued to enforce the personal protection provisions in his no-fault insurance policy. In the event of personal injury, the policy provided for income-continuance benefits. The defendant argued that the alien should not be entitled to such benefits because any employment secured by him would be in violation of United States immigration laws. Acknowledging the plaintiff's right to sue, the court upheld the income-continuation benefits as an element of the plaintiff's damages, reasoning that anyone illegally entering the United States would not do so for the purpose of initiating litigation. Moreover, the court noted that the payment of benefits does not require the alien's continued presence in the United States.

67. CAL. UNEMP. INS. CODE § 140.5 (West 1972), authorizes disability payments to "an eligible unemployed individual with respect to his wage losses due to unemployment as a result of illness or other disability resulting in such individual being unavailable or unable to work due to such illness or disability." Under the reasoning of *Alonso* and *Pinilla* legal disability would have to be the cause of the undocumented alien's unavailability for work and subsequent physical infirmities may be viewed as superfluous.
71. *Id.* at 103, 401 A.2d at 1104.
72. *Id.* at 104, 401 A.2d at 1104.
73. *Id.* at 108, 401 A.2d at 1106.
74. *Id.* at 104, 401 A.2d at 1104.
75. *Id.* at 108, 401 A.2d at 1106.
The Montoya court considered whether an undocumented alien was motivated to immigrate by the possibility of commencing an insurance claim. The motivations of employers who hire undocumented aliens also should be weighed, however, in determining an alien's eligibility for state benefits. This is consistent with the goals of United States immigration policy, state social welfare programs, and state statutes which fine the employers of undocumented aliens. Pursuant to Montoya, the only benefits which should be provided are those for which eligibility does not require the presence of the undocumented alien. Where the presence of the undocumented alien is not required, state legislative goals can be effectuated without undermining the goals of federal immigration law. To the extent that undocumented aliens are denied coverage, these goals — particularly the last — are undermined. An employee's inability to recover for injuries sustained in the course of employment presents the employer with an

76. Id. at 104, 401 A.2d at 1104.
77. See note 8 supra and accompanying text.
78. The goals of workmen's compensation, for example, are to alleviate the economic distress to families when the head of the household is disabled; to equalize the disparity in legal resources between the employer and employee; and to shift the risk of engaging in hazardous occupations from the employee to the employer and ultimately to the consumers of the finished product. See Prosser, The Law of Torts 530-31 (4th ed. 1971). See also Arizona Employer's Liability Cases, 250 U.S. 400 (1919); Mountain Timber Co. v. Washington, 243 U.S. 219 (1919); Hawkins v. Bleakly, 243 U.S. 210 (1919); New York Cent. R.R. Co. v. White, 243 U.S. 188 (1919) (upholding various workmen's compensation statutes which were constitutionally challenged). To the extent that undocumented aliens are denied coverage, these goals—particularly the last—are undermined. An employee's inability to recover for injuries sustained in the course of employment presents the employer with an economic incentive to hire an illegal alien worker. This situation was presented in cases considering whether undocumented aliens are "employees" within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(3) (1976). The courts in NLRB v. Sure-Tan, Inc., 583 F.2d 355 (7th Cir. 1978); and NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180 (9th Cir. 1979), answered this question in the affirmative. The Apollo Tire court stated:

Were we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor laws. . . . Our holding merely insures that an employer is not permitted to commit unfair labor practices in the knowledge the Board is powerless to remedy them.

Apollo Tire, 604 F.2d at 1183. The court also noted that coverage by the NLRA would have no effect on the question of the deportability of the alien. Id. at 1183. This decision invites the frequent criticism of alien labor that it causes depression of wages and a deterioration of working conditions affecting American labor. It is argued that it permits workers, both domestic and aliens to organize to upgrade standards at the work site. See note 3 supra and Immigration Policy, supra note 3, at 74. See also Comment, Illegal Aliens Are Employees Under 29 U.S.C. § 152(3) and May Vote in Union Certification Elections, 10 Rut.-Cam. L.J. 747 (1979).
economic incentive to hire an illegal alien worker. An application of *Montoya* to the unemployment insurance situation presents a different result. While relief from the burden of such statutes might motivate the employer to hire undocumented aliens not entitled to receive benefits, the goal of unemployment insurance is to alleviate the disruption caused by temporary dislocation in a job market which is theoretically forbidden to the undocumented alien. Contemplating return of the recipient to gainful employment assumes his continued presence within the United States. Therefore, under *Montoya*, the alien would not be eligible for unemployment benefits.

IV. The Constitutional Rights of Undocumented Aliens

The United States Supreme Court has held that undocumented aliens are entitled to fourteenth amendment protections including the due process requirement of access to both state and federal. In *Johnson v. Eisentrager*, 399 U.S. 763 (1950), the court held that, "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. *Id.*at 771. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-20 (1948) (equal protection); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (equal protection); *Yick Wo v. Hopkins*, 118 U.S. 356, 359 (1896) (due process and equal protection). Under the equal protection analysis established by the U.S. Supreme Court, resident aliens are deemed a "discrete and insular minority" against whom the states may discriminate only upon a showing of a compelling state interest. For example, a series of decisions has defined the categories of employment from which a resident alien may be excluded due to a compelling state interest. Cabell v. Chavez-Salido, 50 U.S.L.W. 4095 (Jan. 12, 1982) (permitting the exclusion of lawfully-admitted aliens from positions as probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (where it was held that an alien may be excluded from teaching in a public school); *Foley v. Connellie*, 435 U.S. 291 (1978) (upholding the exclusion of a resident alien from the New York City police force); *In re Griffiths*, 413 U.S. 717 (1973) (holding that an alien could not be restricted from the Connecticut bar on the basis of his alienage); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (upheld the restriction of an alien from the New York State Civil Service). In contrast, the issue of whether state discrimination regarding undocumented aliens also is subject to a strict judicial scrutiny test currently is pending before the Supreme Court. See note 9 supra.

Due process requires at a minimum that aliens, both legal and undocumented, have access to a judicial forum for the litigation of grievances. *See*, *e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *The Japanese Immigrant Case*, 189 U.S. 86 (1903); *Wong Wing v. United States*, 163 U.S. 228 (1896) (all upholding the undocumented alien's right to a fair hearing before deportation). *See also* *Comment, The Right of An Illegal Alien To Maintain A Civil Action*, 63 CALIF. L. REV. 762 (1975) (where it is argued that the Constitution makes no specific reference to a right to use, most likely because the right was considered fundamental and necessary to the Constitution's successful implementation)[hereinafter cited as *The Right of An Illegal Alien*]; *Menz v. Coyle*, 117 N.W.2d 290, 299 (N.D. 1962). The *Menz* court, in
Courts, therefore, have allowed illegal aliens to litigate grievances. For instance, a New York court allowed an undocumented alien to recover unpaid wages even though the alien had not obtained labor certification.  

Although due process requirements guarantee access to the courts in order to pursue legal remedies, questions arise concerning the undocumented alien's ability to obtain an injunction or stay of deportation pending the resolution of his unrelated claim. The INA provision for appeal of an INS deportation order directly to the United States Courts of Appeal was intended to limit the opportunities for a deportable alien to engage in dilatory tactics. Aware of this consideration, courts are justifiably skeptical of claims asserted by deportable aliens. Given the fact that no provision exists in the INA to guarantee re-entry to an alien in order to litigate a claim, and the practical considerations involved in returning to the United States if the alien is deported, it is consistent with due process that deportation be postponed until all legal remedies have been exhausted.

Relation to a $2.50 filing fee for bringing an action, held that the "imposition of a reasonable tax on litigation has been upheld . . . with free justice and not in violation of the 'due process' clause." Id. at 299.


85. In Nizamuddowlah v. Bengal Cabaret, Inc., 92 Misc. 2d 220, 399 N.Y.S.2d 854 (Queens County 1977), the court stated, "[p]ermitting employers knowingly to employ excludable aliens and then with impunity refuse to pay them for their services does not safeguard American labor from unwanted competition." Id. at 222, 399 N.Y.S.2d at 857, quoting Gates v. Rivers Constr. Co., 515 P.2d 1020, 1023 (Ala. 1973). In Gates, a Canadian citizen working in Alaska without a labor certification recovered unpaid wages. Dismissing the employer’s argument that the plaintiff illegally was earning his wages, the Gates court noted that the labor certification requirement simply created a category of excludable aliens, and was not intended to render unenforceable employment contracts entered into in its violation. 515 P.2d 1020, 1022 (Alaska 1973). This holding recognizes that the due process rights of aliens include access to a judicial forum in order to pursue legal remedies.

86. See notes 23, 24 supra and accompanying text.

87. See, e.g., Adame v. INS, 349 F. Supp. 313, 315 (N.D. Ill. 1972), where the court refused to enjoin the plaintiff’s deportation in order for him to pursue a divorce action through United States courts, in view of the plaintiff’s history of dilatory tactics. See also Prassinos v. INS, 193 F. Supp. 416 (N.D. Ohio 1960), aff’d, 289 F.2d 940 (6th Cir.), cert. denied, 366 U.S. 966 (1961). In Prassinos, the court refused to nullify a deportation order issued against the plaintiff, thus preventing him from pursuing a workmen’s compensation claim. The court stated that “the very fact of his injury can be traced directly to his own illegal action in willfully failing to leave the country on the date required.” Id. at 420.
In Bolanas v. Kiley, the plaintiff sought an injunction of his deportation because of an intended civil rights suit against the New York City police department. The court denied the injunction, stating that although the alien had access to United States courts under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, he should not be able to remain in the United States for whatever time period was required to resolve the litigation. The Bolanas court found that the authority to stay a deportation is in the same category of extraordinary occurrences as the presidential power to pardon and the judicial authority to suspend a criminal sentence. It might be argued that the grant of an injunction would have provided a temporary remedy and as such would not have unduly interfered with congressional power over immigration.

A different situation is presented where the undocumented alien has initiated litigation prior to the commencement of deportation proceedings. In such instances, litigation was begun without the motivation of delaying INS efforts to remove the alien from the country. For instance, in Hong v. Agency for International Development, the plaintiff commenced an action for breach of a contract for employment. Shortly thereafter, the INS initiated deportation proceedings against him. The court found that because the plaintiff had entered the courts with a contractual claim, and not an appeal from a deportation order, the INA was not dispositive. The INA was intended to

88. 509 F.2d 1023 (2d Cir. 1975).
89. 42 U.S.C. § 1983 (1976) (emphasis added) provides:
   Every person who, under color of any statute . . . of any state . . .
   subjects, or causes to be subjected, any Citizen of the United States or
   other person within the jurisdiction thereof to the deprivation of any
   rights, privileges, or immunities secured by the Constitution and laws,
   shall be liable to the party injured in an action at law, suit in equity, or
   other proper proceeding for redress.
Section 1983 gives the alien access to United States courts. See Inada v. Sullivan, 523 F.2d 485, 489 (7th Cir. 1975).
90. 28 U.S.C. § 1343 (1976), the procedural implementation of section 1983, provides federal district courts with original jurisdiction in order to "[r]edress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . (emphasis added).
91. 509 F.2d 1023, 1025-26 (2d Cir. 1975). The court however states: "despite all this we have been concerned lest immediate deportation might cause [the plaintiff] to be unduly hampered in prosecuting his claim. But the stays granted during the course of this litigation have largely taken care of this problem." Id. at 1026.
92. Id. at 1026, citing United States ex rel Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950).
93. 470 F.2d 507 (9th Cir. 1972) (per curiam).
94. Id. at 507.
95. Id. at 508.
limit judicial review until after administrative remedies are exhausted and it provides for direct review to the United States Circuit Courts in order to expedite deportations. Nonetheless, considerations of expediency were not intended to be controlling where the deportable alien already has commenced litigation unrelated to his deportable status within the United States and where, at the time he initiates his claim, the alien was under no threat of removal from this country. Furthermore, the INA was not intended to preclude all litigation brought by an excludable alien and, therefore, the Hong court correctly enjoined the deportation order pending resolution of the contractual claim.

V. Conclusion

The eligibility of undocumented aliens for social welfare benefits and the rights of these persons to gain access to the courts present difficult legal questions. An absolute denial of legal benefits penalizes illegal aliens for the hiring practices of their employers. More importantly, employers are given incentives to continue employing undocumented aliens because of low labor costs and the inability of aliens to initiate legal actions for wages and benefits. Courts should, therefore, seek to eliminate the economic incentives which encourage employers to hire illegal aliens.

Eligibility to receive social benefits and access to the courts should not be provided to the extent that they undermine federal immigration policy or induce aliens to immigrate to the United States. State benefit programs aimed at serving humanitarian purposes or at achieving other policy goals by providing assistance to the individual recipient, for which undocumented aliens should be eligible, must be distinguished from those programs which solely provide financial aid, for which undocumented aliens should not be eligible.

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96. *Id.* 8 U.S.C. § 1105(c) (1976), provides for judicial review of INS determinations only after all administrative remedies have been exhausted.

97. See note 19 *supra* and accompanying text.

98. See, e.g., New Mexico Special Needs Act, *supra* note 50.