The Demise of the Implied Federal Preemption Doctrine

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Introduction

Perhaps the most troublesome aspect of the doctrine of federal preemption has been its historically inconsistent application. Until recently the approaches to questions of preemption have been myriad and the results diverse. The Burger Court, however, has been carefully formulating a uniform approach to preemption questions. Several of its recent decisions have marked a change in the doctrine. This process has culminated in a recent unanimous Supreme Court decision that establishes a viable and uniform standard by which to decide future preemption questions. On February 25, 1976, the United States Supreme Court upheld a California statute[1] that prohibits employers from knowingly employing aliens not entitled to legal residence in the United States.[2] The Court held that the subject of California

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1. CAL. LAB. CODE § 2805 (West Supp. 1976). The statute reads in full as follows:

> "(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.
>
> "(b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.
>
> "(c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a)."

2. De Canas v. Bica, 424 U.S. 351 (1976).

Labor Code section 2805 was not preempted either by the United States Constitution[3] or federal immigration law.[4] That decision, *De Canas v. Bica*,[5] has opened the door for enactment of state statutes imposing sanctions on employers of aliens not authorized to work in the United States. In upholding the statute, the Court recognized that in the absence of federal legislation, states possess broad authority under their police powers to regulate employment to protect the domestic labor force.[6]

This article will focus on the relationship between immigration law and section 2805 of the California Labor Code in light of the preemption doctrine articulated in *De Canas*. A discussion of the impact of illegal aliens, both nationally and in California, will establish the background for examination of section 2805. Consideration of recent preemption cases and their effect on the two traditional aspects of the preemption doctrine, occupation and conflict, will reveal that *De Canas* is a continuation of the Supreme Court's current inclination to reconcile concurrent federal and state legislative schemes. This examination will show that the Supreme Court is manifesting its responsiveness to urgent state needs. The principal contention is that the Court properly construed the power of the states to impose criminal and civil sanctions on employers who knowingly employ illegal aliens as a legitimate state prerogative to protect the welfare of the domestic labor force. The appropriate resolution of the conflict question on remand will be considered along with the implications *De Canas* presents for California's neighboring states and for Congress.

I. Background of Section 2805

A. The Nationwide Impact of Illegal Aliens

The United States Department of Labor, summarizing the impact of persons illegally present in this country, has observed that illegal aliens: (1) obtain jobs that otherwise would be performed by American citizens; (2) depress the wages and impair the working conditions of American citizens; (3) increase the burden of American taxpayers through added welfare costs; (4) reduce the effectiveness of employee organizations;[7] (5) secure jobs,

3. "The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . ." U.S. CONST. art. 1, § 8, cl. 4. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

4. Immigration and Nationality Act §§ 101-407, 8 U.S.C. §§ 1101-1503 (1970).

5. 424 U.S. 351 (1976).

6. *Id.* at 356.

7. Illegal Mexican aliens have been used as strikebreakers and in that capacity have made it more difficult for farm laborers to unionize. Washington Post, Sept. 23, 1974,

services, and resources directly and indirectly from many federal and state programs, thus diverting scarce resources from American citizens; and as aggressive, enterprising workers with low wage demands,[8] constitute an unskilled group ripe for exploitation by employers.[9]

§ C, at 3, col. 6. Farmworker organizer Cesar Chavez has stated: "The illegal workers from Mexico are a severe problem. It is a problem that is out of control. . . . We say, let them come in with their families, if the country needs them. Let them be legal. Then they'll stand up for their rights." Severo, *The Flight of the Wetbacks*, N.Y. Times, Mar. 10, 1974, § 6 (Magazine), at 81. The Supreme Court's recognition that illegal aliens frustrate legal resident alien workers, especially in such occupations as farm work, is expressed in United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). *See also* Greene, *Immigration Law and Rural Poverty—The Problems of the Illegal Entrant*, 1969 DUKE L.J. 475, 488-89.

8. *See Illegal Aliens: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 1356 (1972) (statement of Robert Brown, Associate Manpower Administrator, United States Training and Employment Services, Dep't of Labor) [hereinafter cited as *1972 Hearings*]. *See also Illegal Aliens: Hearings on H.R. 982 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 26 (1975) [hereinafter cited as *1975 Hearings*].

Other adverse effects of the presence of illegal aliens include the overburdening of federal and state public assistance programs as well as other benefit and service programs, including the public schools. In California the total additional expense for educating 659 illegal alien students in Orange County was $2.6 million; San Diego County said its medical cost for the care of illegal aliens was $578,307 in 1974 and was expected to rise to over $600,000 in 1975; and two San Diego hospitals reported spending a total of $1.9 million last year on treatment of illegal aliens. Medical costs in Los Angeles County exceeded $8 million in 1974. *1975 Hearings*, *supra* at 158; Address by Leonard F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, before the Los Angeles World Affairs Council, in Los Angeles (Apr. 10, 1975) [hereinafter cited as Chapman Address]. In his address, Commissioner Chapman pointed out that certain California members of Congress had introduced a bill to require the federal government to absorb such medical costs. Chapman stated that the California sponsors claim that California spends more than $20 million annually in medical care for illegal aliens.

Additionally, an adverse social and political impact is reportedly attributable to the presence of illegal Mexican aliens in the Southwest. For example, it has made acculturation difficult for the Chicano community. *See* Salinas & Torres, *The Undocumented Mexican Alien: A Legal, Social, and Economic Analysis*, 13 HOUS. L. REV. 863, 881-84 (1976) [hereinafter cited as Salinas & Torres].

9. A congressional committee has made this observation as well: "Because the illegal aliens are themselves in violation of the law and risk deportation, or, in the case of illegal entry, criminal penalties, unscrupulous employers are able to exploit them without fear of being reported. According to the testimony, this exploitation takes a number of forms, including substandard wages and the denial of health protection, insurance, overtime, and other fringe benefits. The net effect is not only the displacement of American labor because of unfair competition, but, in the long run, a depression of wages and a lower standard of living where a supply of cheap alien labor is readily and dependably available." SUBCOMM. NO. 1 OF THE HOUSE COMM. ON THE JUDICIARY, 92D CONG., 1ST SESS., ILLEGAL ALIENS, A REVIEW OF HEARINGS CONDUCTED DURING

The use of illegal alien labor is often accompanied by abusive and unfair labor practices. For example, illegal aliens who are apprehended by immigration officials usually leave the country under the "voluntary departure" procedure.[10] The illegal entrant is advised of his right to a deportation hearing, and if he waives the right he is quickly processed and returned to his country of origin. Employers who make a practice of hiring illegal aliens are aware of this procedure and rely on it to reduce payroll expenditures. When the alien is apprehended, the employer frequently denies that he owes the worker back wages, knowing that the worker will leave the country within hours of apprehension and will be unable to pursue a wage claim.[11]

While it is difficult to obtain accurate data on illegal aliens, the scope of their impact can be described.[12] The Immigration and Naturalization Service (INS) apprehended 788,145 illegal aliens in the United States during fiscal year 1974[13] and 766,600 in 1975.[14] The former Commissioner of the INS, Leonard F. Chapman, Jr., however, estimates the total number of illegal aliens in the United States at between four and five million and possibly as many as ten or twelve million.[15] While it has been suggested that illegal

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THE 92D CONGRESS 12 (Comm. Print 1973) [hereinafter cited as REVIEW OF HEARINGS].

The Domestic Council Committee on Illegal Aliens reports: "For obvious reasons illegals are vulnerable to exploitation by unscrupulous employers. They can hardly afford to report substandard work-related housing or dangerous working conditions to OSHA [Occupational Safety & Health Administration] nor can they report minimum wage violations even though they are theoretically protected. Numerous horror stories circulate regarding employers who report illegal aliens to INS [Immigration & Naturalization Service] in order to avoid paying wages. . . ." DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT 148 (1976) [hereinafter cited as DOMESTIC COUNCIL]. *See also* H.R. REP. NO. 108, 93d Cong., 1st Sess. 7 (1973); Briggs, *Mexican Migration and the U.S. Labor Market: A Mounting Issue for the Seventies*, 3 STUD. HUMAN RESOURCE DEV. 26 (1975) (citing J. SAMORA, LOS MOJADOS: THE WETBACK STORY (1971) [hereinafter cited as Briggs].

10. Immigration and Nationality Act § 244(e), 8 U.S.C. § 1254(e) (1970). *See also* 8 C.F.R. § 242 (1976). The voluntary departure procedure is by far the most common sanction. In 1974, 718,740 aliens were required to depart without issuance of a formal order and only 18,824 were formally deported. [1974] INS ANN. REP. 15 [hereinafter cited as [1974] INS REP].

11. *See* Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251, 252 (1972); note 8 *supra*.

12. *See, e.g.*, Vernon M. Briggs, Jr., Illegal Immigration and the American Labor Force: The Use of "Soft" Data for Analysis, Conference of Measurement of Social and Economic Data and Public Policy, University of Texas, Austin, Texas, (Apr. 10-11, 1975). *See generally* DOMESTIC COUNCIL, *supra* note 9.

13. [1974] INS REP., *supra* note 10, at 9.

14. *See* [1975] INS ANN. REP. [hereinafter cited as [1975] INS REPORT].

15. *1975 Hearings*, *supra* note 8, at 36 (statement of Leonard Chapman, Jr.). Former Attorney General William B. Saxbe stated that approximately seven to thirteen

aliens earn $10 billion a year,[16] Representative Peter Rodino, chairman of the House Subcommittee on Immigration, states that illegal aliens send an estimated $10 billion in earnings out of the country[17] and evade at least $100 million in income taxes.[18]

The influx of illegal aliens is particularly acute in those states bordering Mexico. One commentator has asserted that "the primary characteristic of the migration of Mexicans . . . is not legal migration, but rather it is illegal migration."[19] Thus, Mexicans accounted for 709,959, or 90 percent, of the illegal aliens arrested in 1974[20] and 680,392, or 89 percent, of those arrested in 1975.[21] Commissioner Chapman suggests that Mexican nationals comprise half of his estimate of the number of illegal aliens presently in the country.[22] The INS, the agency in charge of enforcing federal regulation of aliens, has referred to the illegal entries across the southern border as a "continuing surge"[23] and admits its inability to handle the situation: "Persons are illegally entering the country across our borders and through the ports of entry by the millions, far outstripping INS capability to enforce adequately the laws pertaining to entry and residence."[24] The service is simply too understaffed and ill-equipped to control effectively a problem of this magnitude.[25]

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million illegal aliens are in the country. *Illegal Aliens Cost One Million Jobs*, Orlando Sentinel Star, Oct. 31, 1974, at 6-A, col. 1 [hereinafter cited as *Illegal Aliens*]. *The Christian Science Monitor* reports estimates ranging from three to twelve million. Christian Science Monitor, Mar. 20, 1975, at 12, col. 1.

16. McLellan & Boggs, *Illegal Aliens: A Story of Human Misery*, AM. FEDERATIONIST 23 (Aug. 1974); *see Illegal Immigration: A Global Problem*, Washington Post, Nov. 13, 1974, *reprinted in 1975 Hearings*, *supra* note 8, at 74.

17. N.Y. Times, Dec. 30, 1974, *reprinted in 1975 Hearings*, *supra* note 8, at 92. Estimates put the number of illegal aliens holding jobs at approximately one million. *See*, *e.g.*, *Illegal Aliens*, *supra* note 15; TIME, May 19, 1975, at 14-15; Christian Science Monitor, Mar. 20, 1975, at 12, col. 1.

18. In 1974 the IRS conducted a study of the potential tax liabilities of 1,699 aliens detained at INS detention facilities. From 1,090 returns secured, the INS assessed the tax due at $247,696, and collected $168,469. DOMESTIC COUNCIL, *supra* note 9, at 103.

19. Briggs, *supra* note 9, at 3. Since the mid-1930's, illegal Mexican immigration has exceeded legal immigration. *See* J. SAMORA, LOS MOJADOS: THE WETBACK STORY 197 (1971).

20. [1974] INS REP., *supra* note 10, at 9.

21. [1975] INS ANN. REP., *supra* note 14, at 13.

22. Chapman Address, *supra* note 9; *1975 Hearings*, *supra* note 8, at 73.

23. [1974] INS REP., *supra* note 10, at iii.

24. *Id.*

25. The director of the Houston district office of the INS reported to one commentator that on pursuing telephone complaints concerning undocumented aliens his office discovered that the two agents who cover the Houston area were still investigating leads received two months earlier. Salinas & Torres, *supra* note 8, at 915.

Justice White of the United States Supreme Court has noted the failure of the border checkpoint system to detect illegal entries: "The entire system . . . has been notably unsuccessful in deterring or stemming this heavy flow . . . . Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness . . . ."[26] Thus, even though the federal legislative scheme governing aliens is comprehensive and provides both criminal[27] and civil[28] sanctions against illegal aliens and criminal sanctions against those who harbor them,[29] the federal government has been unable to abate the influx of illegal aliens. The most serious factor hindering effective control of illegal aliens is the absence from the legislative scheme of a proscription on their employment.[30] The Domestic Council Committee on Illegal Aliens has noted that the "availability of work and *the lack of sanctions for hiring illegal aliens* is the single most important incentive to [their] migration . . . ."[31]

It was in the foregoing setting of federal ineffectiveness that California confronted its illegal alien problem. All available evidence indicates that illegal aliens from Mexico come to the United States primarily to obtain employment.[32] California has a particular attraction for illegal aliens because of its common border with Mexico[33] and its extensive agricultural economy, which includes 81,000 square miles of farms in the San Joaquin Valley alone.[34] In fact, Commissioner Chapman estimates that at least 1.5

26. United States v. Brignoni-Ponce, 422 U.S. 873, 915 (1975) (White, J., concurring).

27. 8 U.S.C. § 1325 (1970).

28. *See, e.g.*, 8 U.S.C. § 1251(a)(2) (1970).

29. 8 U.S.C. § 1324 (1970). In Lopez v. Arrowhead Ranches, 523 F.2d 924, 926 (9th Cir. 1975), the court held that section 274 of the INA (8 U.S.C. § 1324 (1970)) is solely penal in nature and that no private right of action is implied thereunder. *See also* Flores v. George Braun Packing Co., 482 F.2d 279 (5th Cir. 1973); Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972).

30. There is no federal prohibition of employment of illegal aliens even though a recent Gallup poll revealed that 80% of those surveyed favored such a law. Houston Chronicle, July 28, 1976, at 14, col. 1. Such legislation has been debated in Congress since 1951, when the Truman Commission first recommended it. For a discussion of federal legislation currently pending, see notes 174-76 and accompanying text *infra*.

31. DOMESTIC COUNCIL, *supra* note 9, at 42 (emphasis added).

32. *See, e.g., 1972 Hearings*, *supra* note 8, at 1119; REVIEW OF HEARINGS, *supra* note 9, at 5. In fact, Congressman Leo J. Ryan observed that "the agricultural economy is based on the use of illegal aliens at a fairly low wage." N.Y. Times, Dec. 11, 1974, at 32, col. 2.

33. For example, California's San Ysidro crossing is the busiest land crossing in the United States, with 38 million people crossing annually. The border patrol has assigned 200 officers to cover this 3% of the 2000 mile border. One-third of the illegal aliens caught are arrested there. Miami Herald, Jan. 31, 1977, § b, at 3, col. 3.

34. Washington Star-News, Nov. 16, 1974, at A-8, *reprinted in 1975 Hearings*,

million illegal aliens are now residing in California.[35]

California's recent economic history is replete with the influx of illegal aliens and their impact on the economy. In 1971, when 595,000 citizens were unemployed in California, illegal aliens were earning approximately $100 million in wages.[36] A 1970 United States Department of Labor study estimated the sum attributable annually to wages of illegal aliens in California agriculture at more than $180 million.[37] The study reported that approximately 67,437 illegal entrants were apprehended in California in fiscal 1970,[38] while a 1973 report stated that the United States border patrol in California averaged over 11,000 arrests of illegal aliens each month.[39] A more recent report stated that the border patrol had been apprehending 200 illegal aliens per day in Los Angeles and Orange counties before funds were cut, so that only 75 to 100 could be apprehended each day. In addition, approximately 200,000 illegal aliens were caught in Southern California in 1974, about 180,000 of them in the Los Angeles area. About 32,000 illegal aliens are employed in San Francisco, and 120,000 are believed to be doing agricultural work in California's central valley.[40] Moreover, INS reports that Los Angeles alone has approximately 135,000 illegally employed aliens.[41] These figures indicate the conditions giving rise to the enactment of section 2805 of the California Labor Code.

B. Section 2805 and Its Raison d'Etre

One of the early efforts in California to diminish the impact of illegal aliens was initiated by a group of Mexican-American farmworkers.[42] In 1968 they filed a lawsuit[43] seeking to enforce in the illegal alien context a state statute proscribing unlawful or unfair business practices.[44] They contended that it was unfair competition for an employer knowingly to employ illegal aliens in preference to domestic labor. After comprehensively reviewing the extent and impact of illegal aliens on the employment opportunities

supra note 8, at 73.

35. Chapman Address, *supra* note 8.

36. *1972 Hearings*, *supra* note 8, at 208.

37. *Id.* at 100.

38. *Id.*

39. Washington Star-News, Nov. 18, 1974, *reprinted in 1975 Hearings*, *supra* note 8, at 68.

40. U.S. NEWS & WORLD REPORT, Feb. 3, 1975, at 29.

41. *Present Scope of the Illegal Alien Problem*, CONG. DIG. (Jan. 8, 1975).

42. *See generally* Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 86-89 (1975); Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 S. CAL. L. REV. 565 (1973).

43. Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 88 Cal. Rptr. 443 (1970).

44. CAL. CIV. CODE § 3369(2) (West Supp. 1977) provides: "Any person per-

of domestic labor, the court concluded that "[T]he domestic farmworkers' need for protection against the job competition of illegal entrants is undeniable, the public benefits palpable."[45]

In particularly strong language, the court described the condition of domestic farmworkers:

> Ever since the depression era of the thirties, the dismal plight of the American farmworker has been heavily annotated in an interminable flow of congressional hearings and reports, public surveys and social commentaries. . . . Despite decades of protest and officially expressed concern, there has been no solution to the dilemma posed by agriculture's heavy, short-term need for manpower and society's inability to absorb that manpower when agriculture's need is past. From Steinbeck's *Grapes of Wrath* to the present, the thin gruel of public welfare handouts has been farm labor's principal progress to the remote goal of social justice.[46]

The court then noted that the general plight of domestic farmworkers is compounded by the influx of illegal aliens:

> Capture of a sizeable share of the farm employment market by invading illegal entrants is a superimposed source of deprivation. The Immigration and Nationality Act . . . expresses a national policy to preserve the available employment market for domestic workers. Partial expropriation of the farm job market by illegal entrants represents an abject failure of national policy. . . . [Such failure] must be ascribed to the self-imposed impotence of our national government.[47]

In spite of the court's appreciation of the problem, relief was denied.[48] Shortly thereafter, two similar attempts were also unsuccessful.[49]

Failing in the judicial forum, California's farmworkers went into the legislature and there succeeded. Recognizing the limitations of the federal system and the acute problems created by the presence of illegal aliens in California, the state legislature in 1971 attempted to alleviate the problem by enacting section 2805 of the Labor Code, which prohibits any employer from knowingly employing aliens not entitled to legal residence in the United States. The statute is not confined to the farm labor context inasmuch

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forming or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction."

45. 9 Cal. App. 3d at 596, 88 Cal. Rptr. at 448.

46. *Id.* at 596-97, 88 Cal. Rptr. at 448-49.

47. *Id.* at 597, 88 Cal. Rptr. at 449.

48. *Id.* at 599-600, 88 Cal. Rptr. at 450-51. The court denied equitable relief, favoring the comparative efficacy of eventual federal legislation over the burden an injunction would place on employers.

49. Larez v. Oberti, 23 Cal. App. 3d 217, 100 Cal. Rptr. 57 (1972); Cobos v. Mello-dy Ranch, 20 Cal. App. 3d 947, 98 Cal. Rptr. 131 (1971). Both cases followed *Diaz* and denied monetary recovery on the ground that the federal statute creates no private right of action.

as substantial numbers of illegal aliens live in urban areas as well,[50] thus depressing the urban labor market in a variety of industries.

Section 2805 is a limited labor statute that proscribes a specific employment activity in order to implement a state labor policy designed to protect California wage earners. It seeks to curtail the influx of illegal entrants and their partial expropriation of California's labor market, to protect domestic laborers, and to relieve California citizens of the substantial tax burdens caused by the severe impact of illegal aliens upon the labor force. With this legislation California created both criminal and civil sanctions against employers who hire illegal aliens. The statute protects the state's vital fiscal interests and domestic labor market by forbidding employers to use workers who, as Congress and others have recognized, depress wages and the economy. Section 2805 focuses its regulatory prohibition directly on the source of the problem, the hiring practices of employers. California's proximity to the Mexican border gives it an unusually strong interest in this area, and the federal government's ineffective control of illegal entry by aliens makes the employment of illegal aliens a legitimate concern of the state.[51]

II. The Preemption Doctrine and the *De Canas* Decision

While the validation of section 2805 in *De Canas* is notable for its directly beneficial effect on the California economy in general and on poor legal immigrants in particular, its greatest significance is that it marks a major step in a series of cases upholding state laws in areas of concurrent federal and state legislation.

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50. *See, e.g.*, Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

51. Other states have expressed similar concerns by enacting comparable legislation. *See* CONN. GEN. STAT. ANN. § 31-51k (Supp. 1977); KAN. STAT. § 21-4409 (1974). The Connecticut statute, however, appears to have been declared unconstitutional as a denial of equal protection to illegal aliens in Marin v. Smith, 376 F. Supp. 608, 609 n.2 (D. Conn. 1974). *See also* Nowzewski Polish Style Meat Products v. Meskill, 376 F. Supp. 610 (D. Conn. 1974). In *Marin*, plaintiffs sought a decree requiring that the INS decide in a reasonable time whether to grant employment authorization to plaintiffs, who were aliens temporarily admitted to the United States, so that they would not be in violation of section 31-51k. 376 F. Supp. at 608. Although it refused to issue the decree, the district court indicated in dictum its belief that the statute was patently invalid, relying on *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); and Truax v. Raich, 239 U.S. 33 (1915). 376 F. Supp. at 609 n.2. The decisions relied on by the court hold only that statutes singling out *lawfully* admitted aliens are inherently suspect, subjecting them to strict scrutiny. The statutes considered here, on the other hand, distinguish between classes of aliens on an obviously rational basis—the legality of their entry into the country. Furthermore,

A. The Parameters of the Preemption Doctrine

When federal and state laws regulate the same subject matter, the Supreme Court uses two basic approaches to determine the validity of the specific state law in question. The first approach, often called "occupation," renders invalid a state attempt to regulate a field "occupied" by federal law, even if the state scheme does not impair, but rather enhances the achievement of federal goals.[52] The second approach, often called "conflict," renders the state attempt invalid only if it conflicts with and impairs the federal scheme.[53]

Because a preemption decision based on the fact that Congress has occupied the field may strike down state laws that aid the federal scheme, such decisions are not rendered lightly. Unless the court discerns that "the clear and manifest purpose of Congress"[54] is to occupy the field, it "*will not be presumed* that a federal statute was intended to supersede the exercise of the power of the state . . . . *The exercise of federal supremacy is not lightly to be presumed.*"[55] In other words, before an intent to occupy preemptively will be found, the text or the legislative history of an act of Congress must demonstrate that "Congress has unmistakably so ordained."[56] Without a very firm foundation based upon an explicit congressional declaration or readily apparent legislative history, talismanic invocation of phrases such as "comprehensive federal scheme" would mean "setting aside great numbers of state statutes to satisfy a congressional purpose which would be only the product of [a court's] imagination."[57]

Preemption by a finding of occupation is often disparaged:

> Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.[58]

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the state interest furthered by these statutes would seem sufficiently compelling to overcome even the exacting strict scrutiny test. See notes 32-50 and accompanying text *supra*.

52. *See generally* Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 625, 642-46 (1975) [hereinafter cited as *Preemption Doctrine*].

53. *Id.* at 626, 646-49.

54. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

55. New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)) (emphasis added).

56. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

57. California v. Zook, 336 U.S. 725, 732-33 (1949).

58. Hines v. Davidowitz, 312 U.S. 52, 78-79 (1941).

Even when Congress acts pursuant to one of the specific powers expressed in the Constitution, such as the power to regulate copyrights, such exercise will be held to preempt state copyright law by occupation only if the state law would be "absolutely and totally *contradictory* and *repugnant*."[59] In *Goldstein v. California*,[60] the Court articulated a simple test for repugnancy: federal power is exclusive over "matters which are *necessarily* national in import."[61] But even when the matters regulated are necessarily national, preemption of state regulation is not absolutely mandated unless a conflict between the state and federal regulations will inevitably occur.[62]

Historically, when Congress has not clearly manifested an intent to occupy a particular subject of regulation, a state could legislate pursuant to its police powers as long as such legislation did not conflict with and frustrate federal law.[63] A determination of preemption on the basis of conflict "turns on the peculiarities and special features of the federal regulatory scheme in question."[64] For this reason, "prior cases on preemption 'are not precise guidelines . . . .' "[65] But some guidelines can be derived from the conflict cases. First, "to merit judicial rather than cooperative federal-state resolution [conflicts] should be of substance and not merely trivial or insubstantial."[66] Second, when potential conflict appears, a detailed examination must be undertaken of the respective *purposes* of the federal law and the potentially conflicting state law. Such an inquiry is necessary because this aspect of the doctrine requires preemption of state law "only to the extent necessary to protect the achievement of the aims" of the federal law.[67]

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59. Goldstein v. California, 412 U.S. 546, 553 (1973) (quoting THE FEDERALIST No. 32 (A. Hamilton) 241 (B. Wright ed. 1961)).

60. *Id.*

61. *Id.* at 554 (emphasis in original).

62. *Id.*

63. Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963) (state labor legislation not preempted); Maurer v. Hamilton, 309 U.S. 598 (1940) (state highway regulation not preempted); Mintz v. Baldwin, 289 U.S. 346 (1933) (inspection of cattle for infectious diseases not preempted); Carey v. South Dakota, 250 U.S. 118 (1919) (upholding state prohibition of shipment of wild ducks by common carrier); Savage v. Jones, 225 U.S. 501 (1912) (upholding state requirement that certain labels reveal package contents); Reid v. Colorado, 187 U.S. 137 (1902) (upholding state prohibition on importation of diseased cattle).

64. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973).

65. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 139 (1973) (quoting City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973)).

66. New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 423 n.29 (1973).

67. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963)).

Several commentators have suggested that the only proper method of preemption analysis lies in the conflict approach because of the inherent pitfalls of discerning legislative intent in the occupation branch of the doctrine.[68] One commentator observed:

> By framing the preemption question in terms of specific congressional intent the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining which Congress' and which congressman's intent is relevant this manner of stating the issue suggests that the preemption question was consciously resolved and that only diligent effort is needed to reveal the intended solution.[69]

Analysis by several other commentators suggests that "the proper approach is to determine whether the continued existence of the state law is consistent with the general purpose of the federal statute by seeking to define the evil Congress sought to remedy and the method chosen to effectuate its cure."[70] Thus, the key is a finding of state impairment of the federal purpose: conflict exists only when "the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[71]

Currently, the Court's preference is to sustain the state law, to the extent that it does not violate the supremacy clause,[72] by constraining the pertinent federal purpose and scheme; this is perhaps the very essence of federalism. This preference, however, has not always existed. It is true that during the 1930's the Court favored state interests and required a showing of a clear congressional intent to occupy the subject area or an actual conflict in order to preempt the challenged state law.[73] But *Hines v. Davidowitz*[74] began a period of expansive federal preemption. *Hines* involved a constitutional challenge to the Pennsylvania Alien Registration Act[75] on the ground that Congress, by enacting the 1940 Alien Registration Act,[76] had precluded the states from requiring the registration of aliens. The Supreme Court for the most part abandoned the clear intent and actual conflict standards and

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68. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 97-102 (tent. ed. 1958); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-20 (1959) [hereinafter cited as *Pre-emption as a Preferential Ground*].

69. *Pre-emption as a Preferential Ground*, *supra* note 68, at 209 (citations omitted).

70. *Id.* at 210.

71. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

72. U.S. CONST. art. VI.

73. *Pre-emption Doctrine*, *supra* note 52, at 627.

74. 312 U.S. 52 (1941).

75. 35 PA. CONS. STAT. ANN. §§ 1801-1806 (Purdon Supp. 1940).

76. Act of June 28, 1940, ch. 439, 54 Stat. 670.

defined the primary question as whether, under the factual circumstances of this particular case, Pennsylvania's law stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[77] The Court nullified the Pennsylvania act, declaring:

> [W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.[78]

Justice Stone perceived the doctrinal change and cautioned in his dissent:

> *At a time when the exercise of the federal power is being rapidly expanded through Congressional action*, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.[79]

With few exceptions,[80] the doctrinal evolution continued, in effect creating a presumption of federal preemption.[81] Recent decisions of the Supreme Court, however, suggest a change in the progression.

B. Recent Preemption Decisions of the Supreme Court

Recent decisions of the Supreme Court regarding problems of federal preemption have sought to balance state and federal interests.[82] In *Goldstein v. California*,[83] the Court protected the state's right to prohibit the unauthorized reproduction of phonograph records by narrowly construing the preemptive scope of the copyright clause.[84] In affirming a conviction under a California statute making record piracy a criminal offense, the Court considered but rejected the constitutional claim that the copyright power, by its own force and in the absence of any federal regulation of the particular matter, precluded state legislation. After close examination of the federal

77. 312 U.S. at 67.

78. *Id.* at 66-67.

79. *Id.* at 75 (emphasis added).

80. *See, e.g.*, Kessler v. Department of Pub. Safety, 369 U.S. 153 (1962). In Perez v. Campbell, 402 U.S. 637 (1971), the Court overruled *Kessler*.

81. Townsend v. Swank, 404 U.S. 282 (1971); Association of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Free v. Bland, 369 U.S. 663 (1962).

82. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Goldstein v. California, 412 U.S. 546 (1973). *See generally Preemption Doctrine*, *supra* note 52.

83. 412 U.S. 546 (1973).

84. U.S. CONST. art. 1, § 8, cl. 8.

copyright statute, the Court held that no conflict existed because Congress had "left the area unattended."[85] Chief Justice Burger declared that a distinction is to be made both as to those matters "which are *necessarily* national in import," and as to "those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise."[86] He further noted: " 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of state sovereignty.' "[87]

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,[88] which followed *Goldstein*, involved a New York Stock Exchange rule enacted pursuant to the Securities Exchange Act.[89] The rule required arbitration of claims involving employment termination and the employee's forfeiture of certain benefits,[90] in conflict with two California laws that precluded aribitration of wage disputes[91] and invalidated forfeiture clauses.[92] In resolving the conflict, the Supreme Court studied the relationship between the purpose of the exchange rules and the purpose of the California laws. State law conflicting with the federal law was to be preempted "only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act."[93] The employee arbitration rule was held to be ancillary to the purpose of the federal law to insure fair dealing and to protect investors, and it thus did not preempt state law.[94] The Court noted that its "analysis is to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.' "[95] The Court further noted that its approach was "supported by decisions extending back to the turn of the century."[96]

85. 412 U.S. at 570.

86. *Id.* at 554 (emphasis in original).

87. *Id.* at 555 (quoting THE FEDERALIST No. 32 (A. Hamilton) 243 (B. Wright ed. 1961)).

88. 414 U.S. 117 (1973).

89. 15 U.S.C. § 78(f) (1970).

90. New York Stock Exchange Rule 347(b).

91. CAL. LAB. CODE § 229 (West 1971).

92. CAL. BUS. & PROF. CODE § 16600 (West 1964).

93. 414 U.S. at 127 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963)).

94. *Id.* at 130, 134-36.

95. *Id.* at 127 (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)).

96. *Id.* at 127 n.8 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944); Savage v. Jones, 225 U.S. 501 (1912)).

Finally, in *Kewanee Oil Co. v. Bicron Corp.*,[97] the Supreme Court considered whether a conflict existed between the patent clause of the United States Constitution[98] and a state trade secret statute[99] that applied to patentable inventions and would provide a monopoly in perpetuity rather than for seventeen years, as under the federal patent law. To be void, the state trade secret law would have to stand "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[100] Clearly the statute was not presumptively void: "Trade secret law and patent law have co-existed in this country for over one hundred years. *Each has its particular role to play, and the operation of one does not take away from the need for the other.*"[101] Relying on *Goldstein*, the Court in *Kewanee* upheld the state trade secret statute after examining its purpose, scope of application, and effect on various products, and finding no significant conflict between state law and federal patent policy. The federal purpose of encouraging development and public disclosure was not frustrated by the enforcement of the state law.

The recent preemption trilogy of *Goldstein*, *Merrill Lynch*, and *Kewanee* has thus validated state laws in instances when provisions of state and federal law differed, but the purposes of the two schemes did not conflict. Moreover, the state laws involved in these cases were upheld even when the subject matter regulated had implications beyond the state's boundaries. These cases thus laid the foundation for the Court's recent decision in *De Canas v. Bica*.[102]

III. *De Canas v. Bica* and Its Implications

The *De Canas* decision marks the latest and most significant step in the Court's treatment of the preemption doctrine. It is distinguishable from the preceding trilogy on several grounds. First, *De Canas* involved a preemption challenge under the immigration clause.[103] The strong preference for federal laws in this area dates back to *Hines v. Davidowitz*,[104] when the Court observed that "the interest of the cities, counties and states, no less than the interest of people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from

97. 416 U.S. 470 (1974).
98. U.S. CONST. art. 1, § 8, cl. 8.
99. OHIO REV. CODE ANN. § 1333.51(c) (Page Supp. 1976).
100. 416 U.S. at 493 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
101. *Id.* (emphasis added).
102. 424 U.S. 351 (1976).
103. *Id.* at 354-56.
104. 312 U.S. 52 (1941).

local interference.''[105] Second, the statute[106] in *De Canas* not only affects foreign relations and immigration, albeit indirectly, but also has far-reaching implications for California's neighboring states. Finally, in *De Canas*, the Court not only refrained from analyzing the statute for possible clashes between the state and federal laws, but even remanded for possible reconciliation of a clear conflict.[107] In this, *De Canas* goes further than all its predecessors.

A. The Factual Setting

The petitioners in *De Canas*, a husband and wife who were legal resident aliens, sued the respondents, a farm labor contractor and his foreman, in the superior court of Santa Barbara pursuant to section 2805(c) of the California Labor Code,[108] which permits civil suits against employers who violate section 2805(a) by employing illegal aliens. The petitioners alleged that they were legally admitted to the United States from Honduras in the mid-1960's and had for the past five years been employed as agricultural field workers. They asserted that on June 5, 1972, they gave up previous farm labor employment to accept the respondents' offer of steady jobs as farm laborers, but that on September 28, 1972, although their performance was satisfactory, they were discharged on the ground that the respondents had a sufficient supply of labor. Both before and after the petitioners were discharged, the respondents' work crews were raided by the United States border patrol, which apprehended forty illegal aliens in a six-month period. Either immediately before or soon after raids, the petitioners requested jobs from the respondents but were refused on the ground that none were available. Finally, the petitioners alleged that the respondents were wilfully inducing aliens to enter the United States illegally and protecting them from the authorities.[109] The petitioners sought reinstatement of their employment, an injunction against the respondents' wilful employment of illegal aliens, and both punitive and compensatory damages.[110]

The trial court ''reluctantly'' dismissed the complaint on the ground

105. *Id.* at 63.

106. CAL. LAB. CODE § 2805 (West Supp. 1976). See note 1 *supra*.

107. 424 U.S. at 363-65.

108. CAL. LAB. CODE § 2805(c) (West Supp. 1976).

109. The case was determined on a demurrer; the trial court specifically found that ''after hearing the evidence on the preliminary injunction, it is reasonably certain that plaintiffs could not sustain the factual allegations of their complaint.'' Appendix to Brief for Petitioner at 21a, De Canas v. Bica, 424 U.S. 351 (1976).

110. *Id.* at 12a-14a. In count two of their complaint the petitioners asserted a claim of unfair competition pursuant to Cal. Civ. Code § 3369 (West Supp. 1976). Appendix to Brief for Petitioner at 10a-12a, De Canas v. Bica, 424 U.S. 351 (1976).

that section 2805 was an unconstitutional interference with "a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration."[111] Furthermore, the court found that the prohibition against the hiring of aliens who were not "entitled to lawful residence in the United States,"[112] was in direct conflict with federal law, which permits the employment of such aliens in certain circumstances.[113] The California Court of Appeals affirmed the dismissal, holding that congressional power was exclusive in the area of immigration,[114] and denied damages in reliance on *San Diego Unions v. Garmon*.[115] The California Supreme Court declined to review *De Canas*,[116] but the United States Supreme Court granted certiorari[117] to determine "[w]hether section 2805(a) is unconstitutional either because it is an attempt to regulate immigration and naturalization or because it is pre-empted under the Supremacy Clause . . . of the Constitution, by the Immigration and Nationality Act . . . ."[118]

B. The Decision

The Court's two-part opinion dealt first with the issue of regulation of immigration and second with the issue of preemption. The opinion began with the undisputed assertion that the power to regulate immigration is exclusively federal. The Court made an important distinction, however, between the field of immigration, preempted by the federal government, and the subject of aliens, which is open to valid regulation by the states. The Court emphasized that state statutes regulating the activities of aliens are not always to be equated with prohibited state regulation of immigration,[119] and further noted that if the Constitution of its own force precluded all state regulation of aliens, there would have been no need in previous cases to

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111. *Id.* at 17a.

112. CAL. LAB. CODE § 2805(a) (West Supp. 1976).

113. Appendix to Brief for Petitioner at 18a, Decanas v. Bica, 424 U.S. 351 (1976).

114. De Canas v. Bica, 40 Cal. App. 3d 976, 980-81, 115 Cal. Rptr. 444, 447 (1974). As the Supreme Court pointed out in its opinion in *De Canas*, it is unclear whether the court of appeals held that section 2805 was constitutionally proscribed because the lower court hinted that Congress could authorize the states to enact such laws. 424 U.S. at 354 n.3.

115. 359 U.S. 236 (1959). In *Garmon*, the Supreme Court had invalidated California's efforts to provide injunctive relief and damages to an employer who was found to have suffered from an unfair labor practice over which the National Labor Relations Board had refused to assert jurisdiction.

116. 40 Cal. App. 3d 981, 115 Cal. Rptr. 444 (1974).

117. 422 U.S. 1040 (1975).

118. 424 U.S. at 352-53.

119. *Id.* at 355.

discuss the relevant congressional enactments.[120] Speaking for a unanimous Court, Justice Brennan defined regulation of immigration as "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[121] Using that definition he found that section 2805(a) was not "a constitutionally proscribed regulation of immigration,"[122] and he characterized the statute as local regulation with only a "speculative and indirect impact on immigration."[123] Justice Brennan concluded that "absent congressional action, section 2805 would not be an invalid state incursion on federal power," because the Constitution itself does not require preemption of state regulation of aliens.[124]

The Court used the preemption standard it had set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*:[125] federal regulation of a particular subject will not preempt state regulation unless "either the nature of the regulated subject matter permits no other conclusion or . . . Congress has unmistakably so ordained."[126] Having previously concluded that the subject matter being regulated by the state was aliens and not immigration, the Court noted that regulation of employment was clearly within the state's police power. Citing examples of other state regulations on employment, such as child labor, health, and safety laws, the Court held that Section 2805 was within "the mainstream of such police power regulation."[127] Reflecting the public debate over the problem of illegal immigration, Justice Brennan stressed several arguments used by proponents of stringent measures to curb illegal immigration. Specifically, he pointed out that illegal aliens take jobs away from United States citizens, depress wage scales and working conditions, and weaken labor unions.[128] The Court took judicial notice of the particular severity of those problems in California due to illegal immigration from Mexico. The Court then decided that these problems were local in nature and that section 2805(a) was, therefore, not preempted on a subject matter basis.[129]

Turning to the question of preemption by mandate of Congress, Justice Brennan focused on the scope, detail, wording, and legislative history of the

120. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
121. 424 U.S. at 355.
122. *Id.* at 356.
123. *Id.* at 355.
124. *Id.* at 356.
125. 373 U.S. 132 (1963).
126. *Id.* at 142.
127. 424 U.S. at 356.
128. *Id.* at 356-57.
129. *Id.*

Immigration and Nationality Act (INA).[130] In his view, the respondents had failed to demonstrate a "clear and manifest purpose of Congress" to preempt state regulation of undocumented workers, and an independent review by the Court had also failed to reveal an indication of such congressional intent.[131] The Supreme Court labelled as "misplaced"[132] the reliance of the California Court of Appeal on *San Diego Unions v. Garmon*.[133] In *Garmon* the Supreme Court invalidated California's attempt to provide relief in an area committed by Congress to the National Labor Relations Board (NLRB), but over which the NLRB had declined jurisdiction.[134] The Court in *Garmon* recognized that "in areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude *any* state regulation, even if harmonious."[135] Furthermore, nothing in the INA resembled the NLRB scheme.

The Court in *De Canas* also rejected the respondents' contention that section 274 of the INA, which makes it a felony to harbor illegal aliens but provides that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring,"[136] was evidence of preemptive intent. At best, this is merely "evidence of a

130. *Id.* at 357-63 (discussing the INA, 8 U.S.C. §§ 1101-1503 (1970)). The Act was enacted over President Truman's veto on January 27, 1952. [1952] U.S. CODE CONG. & AD. NEWS 276. The Court's analysis of the INA is further evidence of the changing preemption doctrine. The Court rejected the assertion that by sheer comprehensiveness the INA preempted the state law: "Given the complexity of the matter addressed by Congress in [the INA], a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." 424 U.S. at 359-60 (citation omitted). Thus the Court has finally laid to rest a notion that originated in Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). There, the Court declared that the "scheme of federal legislation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement." *Id.* at 230.

131. 424 U.S. at 357-58.

132. 424 U.S. at 359 n.7.

133. 359 U.S. 236 (1959). See note 115 and accompanying text *supra*.

134. *Id.* NLRB v. Boeing Co., 412 U.S. 67 (1973), may also indicate why this reliance was misplaced. There, the Court held that the NLRB, in its determination of whether a disciplinary fine by a union on a member constitutes an unfair labor practice, is not authorized to inquire into the reasonableness of the amount of the fine imposed; this is a matter left for state courts. *Garmon*'s broad rule may thus be in the process of contraction. *See* Farmer v. United Bhd. of Carpenters & Joiners, Local 25, 45 U.S.L.W. 4263 (U.S. Mar. 7, 1977); Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 96 S. Ct. 2548 (1976). Perhaps another distinguishing feature of *Garmon* is the efficacy with which the NLRB scheme operates. In light of the federal ability in this sphere, the need for valid state legislation is not as pressing as in other fields. In contrast, the ineffectiveness of the INS in dealing with the illegal alien problem makes California's need for section 2805 all the more vital.

135. 424 U.S. at 359 (emphasis in original).

136. 8 U.S.C. § 1324(a)(4) (1970).

peripheral concern with employment of illegal entrants.''[137] Not only did the Court find no congressional preemptive intent, but it found that certain 1974 amendments to the Farm Labor Contractor Registration Act (FLCRA)[138] indicated a congressional intent ''that states may, to the extent consistent with federal law, regulate the employment of illegal aliens.''[139] That Act provides for licensing certification of farm labor contractors and restrains them from knowingly recruiting or employing ''any person who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment.''[140] The 1974 amendments afforded civil relief under the FLCRA, which until then had been held to be strictly penal in nature.[141] Most important, section 2051 of the Act provides that ''this chapter and the provisions contained herein are *intended to supplement State action* and compliance with this chapter shall not excuse anyone from compliance with *appropriate State law and regulation*.''[142] With this, the Court rejected the respondents' contention that by restricting to farm labor contractors the prohibition of employing aliens not entitled to lawful residence, Congress was affirming its position that no other employers were to be punished for the employment of such aliens.[143]

The Court then distinguished the cases of *Hines v. Davidowitz*[144] and *Pennsylvania v. Nelson*,[145] relied on by the respondents. In *Hines*, the Court

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137. 424 U.S. at 360 (footnote omitted). Similarly, the Court declined to accept the petitioner's assertion that this proviso, while exempting employment per se from the crime of harboring, does not purport to immunize an employer who knowingly employs illegal aliens. *Id.* at 360 n.9. Petitioners stated: ''While there has been no specific judicial interpretation of the word 'harbor' in § 274(a)(3), an examination of the legislative history demonstrates that the congressional intent was to protect the *innocent* employer from prosecution.'' Petitioner's Reply Brief at 8, De Canas v. Bica, 424 U.S. 351 (1970). They quoted Senator Kilgore, the author of § 274(a)(3), who has stated: ''So am I [trying to strengthen the immigration bill], but at the same time I am trying to do it, not at the expense of some man who unwittingly or unknowingly . . . hires a man he does not know to be a wetback, who may be pretty well in the interior of the country, and who is seeking employment. The man to whom I am referring may need an employee, and hires the alien. That of itself should not subject him to a penalty. *Once he finds out the real situation, he is knowingly and willfully harboring the man*, and the authorities can go after him.'' 98 CONG. REC. 794 (1952) (emphasis added).

138. 7 U.S.C.A. §§ 2041 to -55 (West Supp. 1977).

139. 424 U.S. at 361.

140. 7 U.S.C.A. § 2045(f) (West Supp. 1976).

141. Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972). Thus, in the absence of federal prosecution, the FLCRA was useless to the petitioners.

142. 424 U.S. 362 (construing 7 U.S.C.A. § 2051 (West Supp. 1976)) (emphasis in original).

143. Respondent's Brief at 20, De Canas v. Bica, 424 U.S. 351 (1976).

144. 312 U.S. 52 (1941).

145. 350 U.S. 497 (1956).

had reviewed the validity of the Pennsylvania Alien Registration Act,[146] whose provisions conflicted in several particulars with the federal Alien Registration Act.[147] The Court invalidated Pennsylvania's legislation because it conflicted with supervening federal law, but expressly left open the question whether federal power in this area is exclusive.[148] In *Nelson*, the Court determined that the Smith Act,[149] which proscribes advocacy of the overthrow of any government, superseded all state sedition acts, including Pennsylvania's.[150] The first distinction drawn in *De Canas* was that *Hines* and *Nelson* involved federal statutes dealing with the exact topic sought to be regulated by Pennsylvania.[151] Furthermore, in neither case was there "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law,"[152] whereas the FLCRA constituted affirmative evidence of congressional sanction of section 2805 and similar state legislation. Another difference cited was that section 2805 regulates local problems, whereas *Hines* and *Nelson* dealt with immigration and foreign affairs, fields in which the federal interest is predominant.[153] Thus, in *De Canas*, the governmental interest advanced is a state, rather than a federal interest. One last distinction was that section 2805 deals with illegal alien workers, persons whom the federal government has already declared cannot legally work; *Hines* and *Nelson* involved state regulation of aliens who were lawfully in the United States and thus created conflicts with existing federal laws.[154]

Although the Court in *De Canas* concluded that the California Court of Appeal was in error in declaring section 2805 unconstitutional as a statute regulating immigration, there remained unanswered the question whether the statute was nevertheless unconstitutional because it stood as an obstacle to the accomplishment and execution of the full purposes and objectives of

146. 35 PA. CONS. STAT. ANN. §§ 1801-1806 (Purdon Supp. 1940).
147. Act of June 28, 1940, ch. 439, 54 Stat. 670.
148. 312 U.S. at 62.
149. 18 U.S.C. § 2385 (1970).
150. 350 U.S. at 504.
151. 424 U.S. at 362.
152. *Id.* at 363.
153. *Id.* The petitioners argued: "The case at bar is distinguishable from *Nelson*. While *Nelson* involved a potential conflict between two systems aimed at regulating identical behavior (sedition), the instant case involves federal and state statutes in two (2) different fields—immigration and labor. Moreover, Congress does not condone the behavior which the California statute prohibits. Therefore, the two statutes do not compete or even potentially conflict. Rather, they operate in different domains. The federal statute is directed toward regulating immigration and the state statute toward regulating employers and employment." Petitioner's Reply Brief at 5-6, De Canas v. Bica, 424 U.S. 351 (1976).
154. 424 U.S. at 363.

Congress in enacting the INA. The Court concluded that it could not resolve that issue on the record before it because the court of appeal had not addressed that question nor settled certain questions of statutory construction. Declaring that it sufficed to decide that in enacting the INA Congress had not precluded state authority to regulate the employment of illegal aliens,[155] the Court reversed the judgment and remanded the case for a consideration of whether section 2805 conflicts with federal law.

A. On Remand

The asserted conflict is contained in subsection (a) of section 2805. This subsection prohibits the employment of an alien "not entitled to lawful residence in the United States."[156] Because there are aliens in the United States who are not entitled to lawful residence, but whose employment is nevertheless authorized by the attorney general,[157] the application of section 2805(a) to such aliens would unconstitutionally conflict with federal law. In reality, however, the conflict is nonexistent. Regulations promulgated under the California statute give the phrase an expansive definition: "An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form 1-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work."[158] Clearly then, anyone authorized by the federal government to work could legally be hired and employed in California.

Section 2805 prohibits the employment of illegal aliens only when such employment "would have an adverse effect on lawful resident workers."[159] Significantly, the Administrative Code adopts *federal* standards to interpret this phrase.[160] In sum, it is clear that section 2805 does not create a fatal conflict. The California regulations accept and incorporate federal law defining those aliens not entitled to lawful residence who are nonetheless entitled

155. *Id.* at 365.
156. CAL. LAB. CODE § 2805(a) (West Supp. 1976).
157. 8 U.S.C.A. § 1182(a)(14) (West Supp. 1976).
158. 8 CAL. AD. CODE § 16209 (1972).
159. CAL. LAB. CODE § 2805(a) (West Supp. 1976).
160. 8 CAL. AD. CODE § 16209.6 (1972) provides:

"Definition of Adverse Effect. Employment of an alien not entitled to lawful residence under any of the following circumstances shall be deemed to have an adverse effect on lawful resident workers:

(a) Employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 C.F.R. § 60.7. Schedule A may be obtained from the Manpower Administration, U.S. Department of Labor, Washington, D.C.

(b) Payment by an employer to such employee of less than the federal or state minimum wage, whichever is higher."

to work in the United States. Section 2805 extends federal law to remedy a local labor problem and to effectuate California's legitimate interest in protecting its labor force. By enacting section 2805, California was protecting this traditional state interest without directly affecting federal interests in light of congressional tolerance of state regulation.

Two recent California cases may have a bearing on the court's interpretation of this legislation on remand.[161] In *Dolores Canning Co. v. Howard*,[162] a different division of the California Court of Appeal also held section 2805 unconstitutional, relying in part on *San Diego Unions v. Garmon*.[163] At least to the extent that this reliance was "misplaced,"[164] this decision is doubtful authority. The *Dolores* court's second ground for invalidating section 2805, that it encroaches upon and interferes with a comprehensive scheme enacted by Congress pursuant to its exclusive power over immigration, was explicitly rejected in *De Canas*.[165]

The last ground on which the court in *Dolores* held section 2805 unconstitutional was that the statute's proscription was not limited to those persons not authorized to work and thus was "in conflict with the federal law in this area of immigration."[166] This conclusory statement is weak authority on which to base a decision on remand because, as the Supreme Court pointed out, the *Dolores* opinion only quotes the administrative definition in a footnote,[167] without elaborating upon "its significance in construing § 2805(a)."[168]

Moreover, the need to uphold section 2805 has been strengthened by the holding in *Alonso v. State Department of Human Resources*.[169] In sustaining the state's denial of employment compensation benefits to an illegal alien, the California Court of Appeal declared: "If an alien is here unlawfully, he has no rights under the Constitution of the United States to equal opportunity of employment as enjoyed by lawfully resident aliens . . . and has no right to work. . . . [A] fortiori an individually *illegally* in this country cannot legally be qualified to work here."[170] The Court also found

161. Alonso v. California, 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975); Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

162. 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

163. 353 U.S. 26 (1957). See note 133 and accompanying text *supra*.

164. See text accompanying note 133 *supra*.

165. 424 U.S. at 355-56. See text accompanying notes 119-24 *supra*.

166. 40 Cal. App. 3d at 688, 115 Cal. Rptr. at 444 (footnote omitted).

167. *Id.* at 677 n.3, 115 Cal. Rptr. at 436 n.3.

168. 424 U.S. at 364 n.12.

169. 50 Cal. App. 3d 242, 123 Cal. Rptr. 536 (1975), *cert. denied*, 96 S. Ct. 1492 (1976).

170. *Id.* at 248, 255, 123 Cal. Rptr. at 540, 544 (citations omitted) (emphasis in original).

that it was the intent of Congress that citizens and lawful resident aliens be entitled to work in those jobs surreptitiously held by illegal aliens.[171]

The key factor in *De Canas* and *Alonso* is the ascertainment of the alien's legal status pursuant to a state law not otherwise involving classifications of aliens. The interest of the State of California is identical in both cases. Unless section 2805 is upheld, California will have articulated a dual legal standard, one for illegal aliens and another for their employers.[172]

D. The Aftermath of *De Canas*

De Canas has profound implications for illegal aliens, for California's neighboring states, and for the doctrines of federalism. The consequences will materialize and evolve in stages. Initially, other state legislatures will move to enact similar provisions. New Hampshire and Massachusetts have already done so.[173] By adopting the federal standards, these states will easily circumvent the problems presently besetting California's section 2805.

Once a provision such as section 2805 is enforced in any one state, an exodus of illegal aliens will follow. Neighboring states will absorb the population along with its burdens, thus requiring the enactment of its own section 2805. This potential domino effect demonstrates the urgent need for federal legislation.

Consequently, the secondary impact of *De Canas* will be its catalytic effect on federal legislation. The House of Representatives has twice approved legislation barring employment of illegal aliens,[174] but each time the bills died when the Senate did not act.[175] Approval of one of the currently pending bills is imminent.[176]

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171. *Id.* at 253, 123 Cal. Rptr. at 543.

172. *See id.* at 258-59, 123 Cal. Rptr. at 546-47 (Thomson, J., dissenting); *cf.* Ayala v. California Unemployment Bd., 54 Cal. App. 3d 676, 126 Cal. Rptr. 210 (1976) (disability benefits allowed for illegal aliens).

173. 1976 N.H. Laws, ch. 275-A:4 to A:5; MASS. GEN. LAWS ANN. ch. 149, § 19C (West 1977).

174. H.R. 16188, 92d Cong., 2d Sess. (1972); H.R. 982, 93d Cong., 1st Sess. (1973). H.R. 982 was re-introduced as H.R. 8713, 94th Cong., 1st Sess. (1975). *See* H.R. REP. NO. 506, 94th Cong., 1st Sess. 3 (1975).

175. The L.A. Times, Mar. 16, 1976, § II, at 1, col. 1, described Senator James Eastland (D-Miss.) as "a large plantation owner" who, by keeping the Immigration Committee inactive, was almost singlehandedly holding up the passage of a federal law penalizing employers of illegal aliens. Until *De Canas*, Senator Eastland, Chairman of the Senate Judiciary Committee and the Subcommittee on Immigration and Naturalization, opposed legislation similar to section 2805 that did not make provisions similar to the Bracero program, which made foreign labor available to American farmers during the 1950's. On March 4, 1976, two weeks after *De Canas* was decided, Senator Eastland introduced S. 3074, which bars employment of illegal aliens and provides for the limited importation of foreign labor. S. 3074, 94th Cong., 2d Sess. (1976).

176. Briefly, H.R. 8713, the Rodino Bill, eliminates the proviso in 8 U.S.C. §

Conclusion

De Canas v. Bica[177] is an important affirmation of state power. The Court tacitly balanced the pressing local need for state legislation against the necessity for federal predominance, and upheld state legislation that had an indirect impact on immigration despite the admittedly exclusive federal power to regulate immigration. Moreover, by granting relief to the petitioners, the Court recognized that as employers of illegal aliens, the respondents sought the protection of that which was the very impetus for section 2805, the federal inability to effectively control the massive problems caused by the presence of illegal aliens in this country.

Whether the California courts will uphold section 2805 is uncertain, and in the end, immaterial. Once the Supreme Court declared that the present exercise of federal power does not occupy the field, the enactment of a valid state law is a mere matter of drafting. Still, section 2805 should be upheld, for its asserted conflict is illusory at best. The administrative provisions evince an official state policy that accepts and adopts the federal standards for the employment of aliens. No federal "purposes or objectives" would be served by striking down the statute.

The validation of section 2805 was imperative in a period of severe economic recession. Its ultimate validation promises enomic relief for California's legal migrant workers in particular and for California's economy in general. The anticipated enactment of similar state statutes will require the passage of a uniform federal statutory scheme to regulate illegal alien employment. Congressional legislation will not only have the inherent benefits of a uniform national enforcement policy, but will also avoid the problem caused by the migration of job-seeking illegal aliens to those states lacking legislation regulating their employment.

1324(a)(4) (1970) that employment will not constitute harboring, and in effect makes unlawful the knowing employment of an "alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General." H.R. 8713, 94th Cong., 1st Sess. 3 (1970). Enforcement is a three-tiered process. The first step is the issuance of a citation; second, the imposition of a civil penalty up to $500 for each alien knowingly hired; and finally, the imposition of a criminal sanction. *Id.* at 3-5. The bill permits the Attorney General to initiate a civil action if an employer discriminates against an individual on the basis of national origin and provides for amnesty, allowing status adjustment under certain conditions for an alien continuously physically present in the United States since June 30, 1975. *Id.* at 5-7. The Eastland Bill, S. 3074, provides for the importation of an alien worker when not enough domestic workers are available. S. 3074, 94th Cong., 2d Sess. 2 (1976). Moreover, the bill imposes only civil sanctions against the knowing employment of undocumented aliens and bars liability if the employer makes a bona fide inquiry. *Id.* at 12. A signed statement from the prospective employee attesting that he is not an alien is also a bar. *Id.*

177. 424 U.S. 351 (1976).

More significantly, the *De Canas* case has extensive implications for a uniform state-oriented preemption doctrine. It is the first unanimous decision in which the Court has refused to presume preemptive intent in the mere enactment by Congress of a comprehensive statutory scheme and instead required some textual evidence of this intent, either in the legislation or its history. It is a case in which the Court chose to be guided by evidence of nonpreemption in rejecting judicial doctrine concerning federal legislative schemes.[178] Clearly, less exacting analysis by the Court could have resulted in the imposition of a categorical federal preemption.

Most importantly, *De Canas* is a promising milestone in the evolution of the preemption doctrine. It establishes a clear mode of analysis for future preemption questions. Once it determines that the Constitution does not proscribe state legislation, the Court will analyze the subject matter regulated. Only in those cases where no other conclusion is permissible will a state law be preempted on a subject matter basis. Federal legislation will preempt nonconflicting state law only where its scope, detail, wording, or history reveal that "Congress has unmistakably so ordained."[179] Finally, any state law conflicting with federal legislation will fail where it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[180]

The Court's desire to "reconcile the operation of both statutory schemes with one another"[181] portends a period wherein state legislation will be permitted to supplement federal legislative schemes. Such a period will provide a welcome opportunity for the resolution of the myriad social problems with which the federal government is presently unable to deal.

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178. The Domestic Council Committee on Illegal Aliens stated: "Our official commitment is to an exclusionary policy founded in history and domestic political considerations which allows approximately 400,000 foreign-born to take up permanent legal residence in this country per annum. The de facto situation is quite the opposite in that a combination of legal loopholes and incentives, enforcement inadequacies, and international push-pull forces have considerably eased limitations on immigration so that in practice we have a very open immigration system. Analysis of this combination of factors leads inevitably to the conclusion that a trend has been established which is likely to grow if present circumstances persist." DOMESTIC COUNCIL, *supra* note 9, at 237.

179. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). In the most recent preemption decision, the Supreme Court, relying on *De Canas*, held that a California consumer labeling statute was invalid because of the express preemptive provisions of the Federal Wholesale Meat Act, 21 U.S.C. § 678 (1970). Jones v. Rath Packing Co., 97 S. Ct. 1305 (1977).

180. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

181. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).