THE UNDOCUMENTED ALIEN LABORER AND DE CANAS V. BICA: THE SUPREME COURT CAPITULATES TO PUBLIC PRESSURE

INTRODUCTION

In a decision rendered this term, the United States Supreme Court in the case of *DeCanas v. Bica*[1] has held Section 2805 of the California Labor Code[2] constitutional, reversing a California Appellate Court decision to the contrary.[3] Section 2805(a) prohibits employers of that State from knowingly employing an alien who is not entitled to lawful residence if such employment would have an adverse effect on lawful resident workers.[4] The grounds for the Court's decision included: (1) the regulation was not an unconstitutional regulation of immigration;[5] and (2) the provision was not invalid for the reason advanced by the lower court,[6] i.e., the regulation had been preempted under the supremacy clause of the Federal Constitution by the Immigration and Nationality Act.[7] (Hereinafter cited INA).

The total impact of this decision is uncertain. What is certain, however, is that the decision will likely add more to the

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1. — U.S. —, 96 S. Ct. 933 (1976).

2. CAL. LABOR CODE, §§ 2805(a) (West 1971). The full text of § 2805 reads 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 violation of subdivision (a) is punishable by a fine of not less than two hundred ($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 on a violation of subdivision (a).

3. 40 Cal. App. 3d 976; 115 Cal. Rptr. 444 (1974).

4. CAL. LABOR CODE § 2805 (West 1971).

5. 96 S. Ct. at 936. The pertinent section of the Constitution concerned here was article 1, § 8. Article 1, § 8 states:

> The Congress shall have power . . . To establish an uniform Rule of Naturalization . . . And, to make all laws which shall be necessary and proper for carrying into execution the foregoing power. . . .

6. The California Court of Appeals argued that § 2805(a) violated article VI of the Federal Constitution. Article VI reads in part:

> . . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

7. 8 U.S.C. § 1101 *et seq.*

controversy already surrounding the issue involving the presence of illegal aliens in this country.[8]

The purpose of this article is to explore the opinion of the Court and suggest some conclusions regarding the soundness of the Court's reasoning.

A. Background of the Case

The petitioners in *DeCanas* were migrant farmworkers who sued respondent farm labor contractors under Section 2805(c)[9] in California Superior Court for the County of Santa Barbara. The complaint alleged that petitioners had performed employment in a satisfactory manner for respondents as farmworkers from June 5, 1972, through September 28, 1972; that petitioners were lawful residents and lawful workers at all times; that on or about September 28, 1972, and at all times thereafter, respondents refused employment to petitioners on the ground that respondents had a surplus of labor; that part of said labor supply consisted of aliens illegally present in the United States; that respondents are open and notorious employers of illegal aliens and encouraged illegal aliens to compete with local workers for jobs to depress local wages and working conditions; and that respondents' practices constituted the knowing employment of aliens not legally admitted to lawful residence in the United States which has an adverse effect on lawful resident workers in violation of California Labor Code Section 2805(a) and (c). Petitioners sought their reinstatement to employment by respondents and a permanent injunction against respondents' willful employment of illegal aliens.[10]

Respondents answered petitioners' complaint by filing a demurrer which challenged the constitutionality of Section 2805 on the ground that the statute is preempted by federal immigration law. The Superior Court, in an unreported opinion, declared California Labor Code Section 2805 unconstitutional on preemption grounds.[11] Petitioners appealed the trial court's decision.

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8. For a full discussion of the possible impact of this decision *see* Note, *The Undocumented Worker: The Controversy Takes A New Turn*, 3 Chicano L. Rev. 164 (1976).

9. *See* note 2 *supra*.

10. Brief of Petitioners at 3. The Court said:

> We assume arguendo in this opinion, in referring to "illegal aliens," that the prohibition of § 2805(a) only applies to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations. Whether that is the correct construction of the statute is an issue that will remain open for determination by the state courts on remand. . . .

11. Specifically, the Superior Court stated "that Labor Code § 2805 is unconstitutional . . . [because] [i]t encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive

The California Court of Appeals affirmed,[12] indicating that state regulatory power regarding this matter was foreclosed when Congress, as an incident of national sovereignty, enacted the INA as a comprehensive scheme governing all aspects of immigration and naturalization, including the employment of aliens, and "specifically and intentionally declined to add sanctions on employers to its control mechanism."[13] The Supreme Court of California denied petitioner's request for a hearing, and the United States Supreme Court granted certiorari.[14]

B. Treatment of the "Exclusiveness" Issue by the Court

The Court first agreed with respondents that Congress has exclusive power to regulate immigration,[15] but went on to observe that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised,"[16] and cited *Takahaski v. Fish & Games Comm'n.*,[17]

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power over immigration. . . ." As quoted by the Supreme Court, 96 S. Ct. at 935.

12. 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974).

The Court of Appeals held that § 2805(a) is an attempt to regulate the conditions for admission of foreign nationals; and therefore unconstitutional because, ". . . in the area of immigration and naturalization, congressional power is exclusive." 115 Cal. Rptr. at 446. The Supreme Court questioned the Court of Appeals' determination of § 2805's objective as a matter of state law, noting that another division of the Court of Appeals had interpreted the section not as being aimed at immigration control or regulation, but as seeking to help California residents to obtain employment. 96 S. Ct. at 935 note 3, citing Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 686, 115 Cal. Rptr. 435, 442 (1974), which also invalidated § 2805(a) on the ground that it ". . . does or could affect immigration in several ways." 115 Cal. Rptr. at 442-43. The Supreme Court further observed that:

> It is also uncertain that the Court of Appeals viewed § 2805 as a constitutionally proscribed state regulation of immigration that would be invalid even absent federal legislation; the court's discussion of the INA seems to imply that the court assumed that Congress could clearly authorize state legislation such as § 2805, even if it had not yet done so. 96 S. Ct. at 935 note 3.

13. 96 S. Ct. at 935-36, citing 115 Cal. Rptr. at 446.

14. 442 U.S. 1040, 95 S. Ct. 2654, 45 L.Ed. 2d 692 (1975). While the California courts treated only the preemption question, the Supreme Court dealt with both the exclusiveness and preemption issues. *Cf.* Hines v. Davidowitz, 312 U.S. 52 (1941), where the Court ignored the exclusiveness issue and went off on preemption grounds to invalidate Pennsylvania's alien registration law despite the fact that federal legislation on the subject was not enacted until *after* the initiation of the action.

15. 96 S. Ct. at 936, citing Passenger Cases, 7 How. 283 (1849); Henderson v. Mayor of New York, 92 U.S. 289 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876); and Fong Yue Ting v. United States, 149 U.S. 698 (1893). *Fong Yue Ting* turned on the "naturalization" clause of article I, § 8; the other cases involved violations of the commerce clause, article I, § 8, insofar as it empowers the Congress "to regulate commerce with foreign nations."

16. 96 S. Ct. at 936. *See* discussion at note 20 *infra* and text accompanying.

17. 334 U.S. 410 (1948).

and *Graham v. Richardson*,[18] for their treatment of a line of cases that "upheld certain discriminatory state treatment of aliens lawfully within the United States.[19]

The Court then noted that the "doctrinal foundations" of these cases that upheld discrimination against legally present aliens, arising generally under the equal protection clause, "were undermined in *Takahashi*," *Graham*, and *In re Griffiths*[20] all of which extended fourteenth amendment protection to legally admitted aliens. However, despite this "undermining of doctrinal foundations," the Court concluded that cases discriminating against legally present aliens:[21]

> . . . remain authority that, standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain . . . .[22]

It is submitted that the Court's analysis to this point is not entirely sound for two reasons. First, all of the cases cited by the Court concern only the rights of aliens lawfully present in the United States or attempting to enter the country in a lawful manner. To this extent, the federal interest in the regulation of

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18. 403 U.S. 365 (1971).

19. 96 S. Ct. at 936. This "line of cases" includes Crane v. New York, 239 U.S. 195 (1915) (upholding a New York statute prohibiting the employment of legally present aliens in public works projects on the ground that such discrimination is not arbitrary but based on considerations of protecting the interest of the state's own citizens in resources spent to combat poverty); Heim v. McCall, 239 U.S. 175 (1915) (upholding a New York labor statute prescribing that only citizens of the United States shall be employed in public works and that New York citizens will get first preference as not violative of the constitutional rights of legally admitted aliens who sought employment in a New York public works project); Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927) (holding that "a city ordinance prohibiting the issuance to aliens of licenses to conduct pool and billiard rooms does not violate the" fourteenth amendment equal protection rights of aliens, in light of the nature of the business and no evidence that no rational basis for the distinction exists).

20. 413 U.S. 717 (1973). In *Takahashi*, a California statute barred issuance of commercial fishing licenses to persons "ineligible for citizenship." This classification included resident alien Japanese nationals and precluded such persons from earning their living as commercial fishermen in the ocean waters off the coast of the state. The Court held that even though the object of the statute may have been to conserve fish in the coastal waters of the state or to protect citizens of the state engaged in commercial fishing from the competition of Japanese aliens, or both, it was unconstitutional under the fourteenth amendment. *Graham* involved the Arizona and Pennsylvania statutes denying welfare benefits to resident aliens or to aliens not having resided in the United States for a specified number of years. The Court held that such state regulations violated the equal protection clause, because classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny, and the state failed to meet its burden of showing the classification to have been necessary to vindicate the state's undoubted interest in maintaining high professional standards.

21. See cases discussed in note 19, *supra*.

22. 96 S. Ct. at 936.

immigration was not in question in these cases; rather, the states were asserting their interests in ensuring the safety or welfare of their own citizens. In short, the states involved in these cases were asserting what they conceived to be a legitimate police power concern in relation to aliens already processed by the Immigration and Naturalization Service (INS) and found to be eligible to legally remain in the United States. Secondly, the Court was not entirely correct in concluding that the earlier cases, upholding discrimination against aliens on police power grounds, "remain authority" for the proposition that although aliens are the subject of a state statute, this standing alone "does not render the statute a regulation of immigration."[23] The Court's conclusion here is incorrect to the extent that *Graham v. Richardson*[24] found the state regulation of aliens involved there to be unconstitutional[25] on other than fourteenth amendment grounds. As the Court in *Graham* explained:

> . . . The National Government has broad constitutional powers in determining what aliens will 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 . . . [W]here the federal government; in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with; curtail or complement, the federal law; or enforce additional or auxiliary regulation . . . .[26]

In other words, assuming the existence of a comprehensive scheme of federal legislation, the subsequent enactment of state regulations that proceed to produce any of the above proscribed results, (curtail, conflict with federal regulation) is "standing alone" invalid.

The Court's treatment of the issue of exclusivity of federal regulation of aliens is troubling for another reason. Having concluded that authority exists for holding that the states may regulate the conduct of aliens without infringing on the federal government's grant of power over immigration in article I, section 8, the Court says:

> . . . Indeed, there would have been no need, in cases as *Graham*, *Takahashi*, or *Hines v. Davidowitz*, 312 U.S. 52 (1941), even to discuss the relevant congressional enactments in finding preemption of state regulation if all state regulation of aliens was *ipso facto* regulation of immigration, for the

23. *Id.*
24. 403 U.S. 365 (1970).
25. See discussion in note 20, *supra*.
26. 403 U.S. at 376-78. *Cf.* discussion of preemption in this note, *infra*.

> existence *vel non* of federal regulation is wholly irrelevant if the Constitution of its own force requires preemption of such state regulation . . . .[27]

It is possible to argue that the Court has only ostensibly decided such cases as *Hines*, *Takahashi*, and *Graham* on preemption grounds, and has in reality been concerned primarily about a policy for uniformity in the immigration context emanating from the Constitutional provision in article I, section 8 granting Congress the power to formulate and prescribe "a uniform rule of naturalization," and from the foreign relations power, rather than from the text or background of the federal statute.[28] Moreover, a strong argument can be made that the true motivation of the Court in upholding the California statute in *DeCanas* was not so untainted by questionable considerations as its opinion might suggest. In particular, it is possible that the Court was simply responding to a popular racist sentiment that aliens, legal or not legal, are not good for the American economy.[29] Considering the inhumane tactics of the Immigration and Naturalization Service (INS) in dealing with aliens,[30] it is likely that the current uproar over the impact of illegals on the American job market[31] had created such great pressure on the Court to act despite the predictable increase in harassment and aggression of aliens and citizens who re-

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27. 96 S. Ct. at 936.

28. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 218 (1959). As this excellent note points out, lower courts have been apt to strike down alien registration laws "on the ground that they invade a field exclusively reserved to the federal government by the Constitution." *Id.* at 218, citing Davidowitz v. Hines, 30 F. Supp. 470 (M.D. Pa. 1939), *aff'd* 312 U.S. 52 (1941) (lower court decision in *Hines*); Arrowsmith v. Voorhies, 55 F.2d 310 (E.D. Mich. 1931); *Ex Parte* Ah Cue, 101 Cal. 197, 35 Pac. 556 (1894). The lower court decision in *Hines* is particularly revealing in this regard, since the federal act was passed while the case was pending in the Supreme Court. Hines v. Davidowitz, 312 U.S. 52, 60 (1941). *Arrowsmith* is also instructive in connection with the exclusiveness consideration; there a Michigan statute requiring unnaturalized foreign-born persons to obtain a certificate of residence, prohibiting certain aliens from acquiring legal residence in the state, and prohibiting their employment was held unconstitutional by a federal district court on exclusiveness ground, citing Henderson v. Mayor of New York, 92 U.S. 259 (1876) (also cited by the Court in *De Canas*. 96 S. Ct. at 936); Chy Lung v. Freeman, 92 U.S. 275 (1876) (*Id.*); and *Ex Parte* Ah Cue, 101 Cal. 197, 35 Pac. 556 (1894). In *Ex Parte Ah Cue*, the Supreme Court of California invalidated a California statute entitled the "State Chinese Exclusion Act." The Act was intended to prohibit Chinese persons from coming into the state, and to prescribe the terms in which those residing in the state might remain or travel between different points in the state. The court held the Act unconstitutional because in conflict with the Federal Constitution's general grant to the federal government of authority to regulate commerce with foreign nations in article I, § 8.

29. For a more expansive discussion of the U.S. immigration policy as influenced by economic conditions *see* Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROB. 213 (1956); Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66 (1975).

30. *See* United States v. Brignoni-Ponce, — U.S. —, 95 S. Ct. 2590 (1975).

31. See *"Human Tide Cuts Deeply in America,"* Washington Star-News, November 16, 1974, § A, at 8.

semble foreign nationals.[32] Despite the dearth of case law and writing on the subject, there is very cogent reasoning extant in the literature in support of the contention that such laws as the one upheld in *DeCanas* are oppressive and undesirable from a civil liberterian point of view.[33]

In concluding its treatment of the exclusiveness question in *DeCanas,* the Court made what can best be characterized as a disingenuous observation:

> . . . In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. . . .[34]

The Court's reasoning in this context must be characterized as insincere in that it purposely disregards the very real impact the

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32. This problem is particularly serious with respect to Chicanos and Mexican aliens, both of whom are harassed by the INS in those areas of the country to which aliens tend to go in search of work, especially the Southwestern and Midwestern United States. *See generally* United States v. Brignoni-Ponce, 95 S. Ct. 2590 (1975); United States v. Martinez-Fuerte *et al.* and Sifuentes v. United States, — U.S. —, 96 S. Ct. 3074 (1976).

Of particular application here is a statement made by Congressman Roybal of California during debates on enactment of H.R. 982, federal proposed legislation similar to California's § 2805. Made in reference to § 2805, Roybal stated:

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

Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, H.R., Cong., 1st Sess. on Illegal Aliens, pt. 5, at 84.

33. In a note entitled, Recent Anti-Alien Proposals, 39 COLUM. L. REV. 1207 (1939), the author treated the question of the extent to which a state may legislate affecting aliens unlawfully present in this country. (Notwithstanding the relative age of this article, the author's analysis and reasoning can be applied here).

> The power to regulate the terms and conditions under which aliens may live belongs to the federal government, and, since it has exercised it by making aliens unlawfully here deportable the state act imposing additional disabilities on the alien would seem to be an unlawful invasion of a paramount federal authority. Whether their term "knowingly" is construed to mean either possessing actual knowledge or possessing information which would make a reasonable man believe that an employee was an alien illegally here, the fear of prosecution under the statute will deter the employment of all aliens.

34. 96 S. Ct. at 936.

California statute will have on the entry of illegal aliens into the state.[35]

C. THE PREEMPTION ISSUE: THE COURT MAKES A PROCRUSTEAN BED

Having found that the power to regulate immigration is not exclusively federal in nature, the Court ventured onto an extended discussion of the issue of preemption, and concluded that the INA[36] does not preempt the state's power to regulate illegal aliens in the context of this case.[37]

The Court states a dual test of preemption:

> . . . federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakeably so ordained. . . .[38]

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35. As Professor Charles Gordon (Former Chief Counsel for the INS; co-author of *Immigration Law and Procedure*; Adjunct Professor, Georgetown University Law Center) put it at a recent conference of immigration law held at the Georgetown University Law Center:

> The hysteria regarding the tide of illegal aliens supposedly engulfing America is based purely on speculation. No one knows what the figures really are . . . *DeCanas* is not a sound opinion because there is no reasonable basis for the judgment of the Court. How can a state statute which in reality is designed to inhibit, and therefore control, the entry of illegal aliens not be in conflict with the exclusive power of the federal government as granted by article I, § 8 of the Federal Constitution? When one compares the earlier Supreme Court cases dealing with state laws restricting the entry of aliens, the Court consistently said "no!" . . . The only conclusion to be drawn from all of this is that in *DeCanas* the court chose to ignore its own prior opinions and allowed California to act in an area which is the exclusive province of the federal government. The Court has simply followed what it conceives to be the popular will in the case. . . . This is really a national problem and the decision in *DeCanas* will create terrible problems if all the states pass different laws . . . the framers of the Constitution intended to prevent such a situation from arising by forbidding the states to legislate in the areas of "commerce between nations" and of "naturalization." To call this a "labor law" is disingenuous at best. . . . One sad effect of all of this will be the inevitable and gravely detrimental effects it will have on minorities in the United States when such state laws are "observed" by employers—citizens will be hurt along with aliens. . . .

36. 8 U.S.C. § 1101 *et seq.*

37. 96 S. Ct. at 937-40.

38. 96 S. Ct. at 937, citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). In *Florida Lime* the appellants were engaged in the business of growing, packing, and marketing Florida avocados in interstate commerce. They had sued in federal district court to enjoin appellees, California state officials, from enforcing § 792 of the CAL. AGRIC. CODE, which prohibits the transportation or sale in California of avocados containing less than 8% of oil by weight, against Florida avocados certified as mature under federal regulations issued under the Federal Agricultural Marketing Agreement Act of 1937. They contended that § 792, as so applied, was unconstitutional because; first, under the supremacy clause the California law was preempted by the federal statute; second, its application to Florida avocados denied appellants equal protection under the fourteenth amendment; and third, its application to them unreasonably burdened or discriminated against interstate marketing of Florida avo-

and held that "[i]n this case we cannot conclude that preemption is required either because 'the nature of the subject matter . . . permits no other conclusion," or because 'Congress has unmistakeably so ordained' that result."[39]

In arriving at those conclusions, the Court first discussed the broad authority the State has under its police power to "regulate the employment relationship to protect workers within the state,"[40] citing child labor laws, occupational health and safety legislation, workmen's compensation laws, and minimum wage and other wage-related laws as examples.[41] The Court then said:

> . . . California's attempt in Section 2805(a) to prohibit the knowing employment by [its] employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation. Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working condition can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into that State of illegal aliens from neighboring Mexico.[42] In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, Section 2805(a) focuses directly upon

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cados in violation of the commerce clause. The Supreme Court held that § 792 is not preempted because "there is no such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor is there evidence of a congressional design to preempt the field." 373 U.S. at 141-52. The Court explained that on the record before it, it saw "no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards," 373 U.S. at 142-43, that the "subject matter of the California regulation, while not concerned with health or safety, is one traditionally within the scope of the power of the States to prevent deception of consumers in the retail marketing of foodstuffs," 373 U.S. at 143-46, and that "neither the terms nor the history of the federal act disclose a congressional intent to displace traditional state powers to regulate the retail distribution of agricultural commodities," 373 U.S. at 146-52. The Court remanded the case to the district court for a new trial of appellants' contentions that § 792 unreasonably burdened or discriminated against interstate commerce in Florida avocados. 373 U.S. at 152-56. Presumably, in the event the lower court found a commerce clause violation, the California statute would be held invalid. In this respect, *Florida Lime* is similar to *DeCanas*, as the Court in *DeCanas* also remanded for a determination of whether CAL. LABOR CODE § 2805, *as construed*, is unconstitutional as conflicting with the INA or other federal laws or regulations. 96 S. Ct. at 940-41.

39. 96 S. Ct. at 937.

40. *Id.*

41. *Id.*

42. *Quaere* whether the Court considered the problem that virtually all of the persons affected adversely by § 2805 are members of a minority racial group and hence belong to a suspect class for purposes of the fourteenth amendment?

> these essentially local problems and is tailored to combat effectively the perceived evils. . . .[43]

It is clear that the Court's conclusions in regard to the police power justification for upholding Section 2805 are as "purely speculative" as is the impact on immigration the respondents argued the act will have.[44] Moreover, it is not at all clear that Section 2805 is "certainly within the mainstream" of the same police power regulation that generated the kinds of protective laws the Court enumerates as examples. The thrust of the laws mentioned by the Court is aimed at the employer-employee relationship in a manner that is obviously intended to protect the worker from the employer in the context of working conditions that affect the worker adversely while on the job. Section 2805, on the other hand, is intended to stem the tide of illegals entering the state to obtain jobs otherwise available to legal workers. Whatever the ostensible purpose of this kind of law, the impact of such regulation is directly on the illegal alien and on those persons suspected by the employer of being illegals; it does not go directly to the working conditions, health or safety of legal workers already employed.[45] While there is no doubt that California has an interest in legislating to remedy the illegal alien "problem," the interest of the federal government in uniformity of regulation throughout the nation and in not jeopardizing its relations with foreign nations would appear to outweigh such local concerns.[46]

The Court did acknowledge that "even state regulation designed to protect vital state interests must give way to paramount federal legislation,"[47] but applied the test of *Florida Lime & Avocado Growers, Inc. v. Paul*,[48] regarding the ouster of state power to Section 2805, and concluded that Respondents failed to meet that test.[49] In addition to *Florida Lime*, the Court cited a

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43. 96 S. Ct. at 937. *Cf.* the Note, 39 COLUM. L. REV. at 1223, cited in note 33, *supra*.

44. See the discussion in notes 34 and 35 and text accompanying, *supra*. The attorney for petitioners, R.S. Catz, has suggested that the opinion in *DeCanas* has to be viewed in the context of farmworkers' rights. His argument is that:

> . . . the statute only regulates employers' conduct and does not empower state officials to apprehend illegal aliens . . . All appellants wanted here was injunctive relief for legal farmworkers, *not* sanctions on illegals. . . . Besides, the state law will prevent growers from screwing illegal aliens out of bonus pay by turning them in to the INS and having them deported before they qualify for the extra renumeration. . . .

R.S. Catz, attorney for petitioners; remarks made at immigration law conference held at the Georgetown University Law Center on March 26, 1976.

45. See note 32, *supra*.

46. *See* Hines v. Davidowitz, 312 U.S. 52 (1941).

47. 96 S. Ct. at 937.

48. 373 U.S. 132 (1963). *See* discussion of *Florida Lime* at note 38, *supra*.

49. The Court said that:

> . . . [Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative

number of decisions[50] in support of its conclusion that Congress intended preemption, but was careful to add that:

> . . . even absent such a manifestation of Congressional intent to 'occupy the field,' the Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any manner with any federal laws or treaties . . . . However, 'conflicting law absent repealing or exclusivity provisions, should be preempted . . . only to the extent necessary to protect the achievement of the aims of' the federal law since 'the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding (the state scheme) completely ousted'. . . .[51]

This line of analysis by the Court is inconsistent with the theory of preemption that views the preemption principle as operating not "in favor" of the federal interest and "against" the state's interest, but rather "in favor" of that interpretation of the federal statute that makes the most sense, whether the state's interest is precluded or not. To the extent that the Court has been careful to articulate a doctrine of preemption that is consciously protective of the state's interests at the expense of the principle of reaching the most rational conclusion, it is a product of the Court's inappropriate compromising posture in relation to the demands of the states for deference to their concerns.[52]

Having concluded that nothing in either the wording or the legislative history of the INA indicates that it was the intent of Congress to preclude even harmonious state regulation affecting aliens in general, or the employment of illegals in particular,[53] the Court applied a second test to the controversy before it to determine whether the INA was intended to preempt state law, and concluded:

> . . . Nor can such intent be derived from the scope and detail of the INA. The central concern of the INA is with the terms and conditions of admission to the country and the

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state regulation touching on aliens in general, or the employment of illegal aliens in particular . . . .

96 S. Ct. at 937-38. *And see* footnote 6 of the Court's opinion in *DeCanas*, where the Court admits that "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress . . ." 96 S. Ct. at 938 n.6. *Cf.* discussion in note 33, *supra*, and accompanying text. It is to the Court's credit that it remanded for a consideration of "whether § 2805(a) nevertheless *in fact* imposes burdens bringing it into conflict with the INA. . . ." 96 S. Ct. at 938 n.6. *And see* discussion of remand order, *infra*.

50. New York Department of Social Services v. Dublino, 413 U.S. 405 (1973); Schwartz v. Texas, 344 U.S. 199 (1952); California v. Zook, 336 U.S. 725 (1949).

51. 96 S. Ct. at 937, footnote 5, citing Merril, Lynch, Pierce, Fenner, & Smith v. Ware, 414 U.S. 117 (1973).

52. *See* note 35, *supra*.

53. 96 S. Ct. at 937-38.

> subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as 'plainly within . . . [that] central aim of federal regulation.' . . .[54]

Further, the Court reasoned, "[this] conclusion is buttressed by the fact that comprehensiveness of legislation governing entry and stay of aliens was to be expected in light of the nature and complexity of the subject."[55] It is submitted that the Court's analysis

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54. 96 S. Ct. at 938, citing San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959). The Court explained that reliance by the lower court on *Garmon* and Guss v. Utah Labor Board, 353 U.S. 1 (1957) as controlling authority in this context was misplaced, because those cases:

> . . . involved labor-management disputes over conduct expressly committed to the NLRB to regulate, but concerning which the Board had declined to assert jurisdiction; the Board had not ceded jurisdiction of such regulation to the states, as it was empowered to do. . . . This Court rejected the argument that the inaction of the NLRB left the states free to regulate the conduct. . . . [The NLRA] expressly excluded state regulation of the disputed conduct unless the Board entered into an agreement with the state ceding regulatory authority. . . . *Guss* and *Garmon* recognize, therefore, that in areas that Congress decides require national uniformity of regulation, Congress may exercise power to exclude *any* state regulation, even if harmonious. But nothing remotely resembling the NLRA scheme is to be found in the INA.

96 S. Ct. at 938 n.7. *Cf.* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 212 (1959) at note 23, observing that the result in *Guss* was abrogated by the Labor-Management Reporting and Disclosure Act of 1959 § 701(a), U.S. CODE CONG. & AD. NEWS 595 (1959). The same Note says:

> . . . It has been suggested . . . that the policy of preserving local control in the federal system should give rise to a presumption against preemption. Such a presumption may be relevant in determining the reach of the federal statute; however, *when Congress has exercised its power in an area admittedly subject to national authority, it would seem that the Court should approach the preemption issue without preconceptions as to the proper disposition of the case. Thus, neither the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a preemption question.* . . . (footnotes omitted)

12 STAN. L. REV. at 215 (emphasis added). If one accepts this argument, the treatment by the Court of the reliance by petitioners and the lower court in *DeCanas* on *Guss* is questionable.

55. 96 S. Ct. at 938. The Court reached this conclusion by applying the test of another of its cases involving the INA:

> . . . "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." *New York Dep't. of Soc. Serv. v. Dublino*, 413 U.S. 405, 415 (1973).

96 S. Ct. at 938. The Court's reliance on *Dublino* requires a strained application of the logic of that case to the facts in *DeCanas*. In *Dublino* the Court was dealing with social welfare legislation (the Work Incentive Program) and prefixed the sentence quoted in *DeCanas* by stating:

> . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, *Cf. Askew v. American Waterways*, 411 U.S. 328 (1973). . . .

413 U.S. at 415. It is therefore obvious that the concern of the Court in *Dublino* was with preemption in cases involving "modern social and regulatory legislation" and that the application of *Dublino* to *DeCanas* is inappropriate in that their underlying concerns are inapposite. In other words, it's one thing to consider the

in this regard is unsound. While it is true that the main concern of the INA is with the terms and conditions of admission to the United States and the subsequent treatment of aliens lawfully present therein, it does not follow that a state law purportedly regulating the relationship between illegal aliens and their employers does not directly affect those concerns of the federal legislation. While the ostensible purpose of the state act may be to regulate the employer-employee relationship, its real effect will be to deter aliens from seeking to enter the United States, and to discourage the employment of all aliens, legal or not.[56]

The Court's treatment of the preemption question in *DeCanas* next turns to a discussion of the Farm Labor Contractor

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question of preemption in a case involving a matter on which both the states and the Congress are likely to have legislated extensively and in great detail, and quite another to apply the same test to a case involving an area such as immigration, concededly of federal concern in all of its prominent features. Interestingly, the Court quoted Justice Stone's dissenting opinion in Hines v. Davidowitz, 312 U.S. 52 (1941), in support of its application of the *Dublino* standard. 96 S. Ct. at 938 note 8.

56. *Cf.* the discussion in note 34, *supra.* And see 8 U.S.C. § 1182(a)(14), which classifies as excludable:

> Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . .

And in 8 U.S.C. § 1251(a)(1) Congress has ordained that:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . .

These federal provisions, read together, would appear to regulate the sanctions to be imposed on aliens hired by employers in violation of the CAL. LABOR CODE section upheld as constitutional in *DeCanas*, and hence it is arguable that the state act imposes burdens on illegal aliens already subject to federal sanctions.

The Court made reference in *DeCanas* to the proviso in 8 U.S.C. § 1324 which makes it a felony to harbor illegal entrants, and provides that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." 8 U.S.C. § 1324(a). The Court reasoned that "this is at best evidence of a peripheral concern with employment of illegal entrants," 96 S. Ct. at 939, though its recognized that "[a] construction of the proviso as not immunizing an employer who knowingly employs illegal aliens may be possible, and we imply no view upon that quesiton." 96 S. Ct. at 939 n.9. The Court cited San Diego Unions v. Garmon, 359 U.S. at 243 for the proposition that:

> due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal regulation] . . . .

96 S. Ct. at 939. Interestingly enough, the Court substituted "federal regulation" for "Labor Management Relations Act," which appeared in *Garmon.* The Court cited a number of other labor cases in *Garmon* in support of its conclusions regarding preemption, and it is submitted that the same objections can be made to of *Garmon* that was made to the use of *Dublino* in note 55, *supra.*

Regulation Act (FLCRA)[57] as "evidence . . . that Congress intends that states may, to the extent consistent with federal law, regulate the employment of illegal aliens."[58] The Court makes much of the fact the FLCRA contains a section providing:

> 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. . . .[59]

and concludes that "[a]lthough concerned only with agricultural employment, the FLCRA is thus persuasive evidence that INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens and therefore barring state legislation such as Section 2805(a)" (footnote omitted).[60] In this regard, it is profitable to consider the observation made in a student note that:

> . . . The slight attention the courts have paid to savings clauses may be due to the problems they raise. It is difficult to give effect to the savings clause with respect to subsequent legislation because of the principle that one Congress cannot bind a later Congress. It is arguable that the savings clause does not attempt to bind subsequent Congresses, since they can avoid its effect by explicit repeal. But it would seem that the Congress which passed the savings clause should not be able to bind a subsequent Congress even to the extent of disabling the later Congress from impliedly repealing the savings clause with a substantive . . . law . . . . Because of these constitutional and interpretative difficulties broad savings clauses are probably used only as makeweight arguments. . . .[61]

The reasoning of these observations applies with full force

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57. 7 U.S.C. § 2041 *et seq.*

58. 96 S. Ct. at 939. 7 U.S.C. § 2044(b) provides:

> Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to review a certificate of registration to any farm labor contractor if he finds that such contractor . . . (6) has recruited, employed, or (utilized) with knowledge, the services of 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. . . .

7 U.S.C. § 2045 provides:

> Every farm labor contractor shall . . . (f) refrain from recruiting, employing, or utilizing, with knowledge, the services of 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. . . .

Violation of the Act is made criminal and aggrieved persons are accorded the right to civil relief in § 2048.

59. 7 U.S.C. § 2051.

60. 96 S. Ct. at 939-40.

61. Note, 12 STAN. L. REV. 208, 213-214 (1959).

to FLCRA provisions on which the Court relies to conclude that preemption is not a problem in *DeCanas* because Congress has heretofore allowed the INA to give way to state law. The Court's reasoning in this respect is dubious.

The Court concludes its discussion of preemption in *DeCanas* by finding both *Hines v. Davidowitz*[62] and *Pennsylvania v. Nelson*[63] to be fully consistent with the finding that the INA does not preempt state law, because:

> . . . [a]lthough both cases relied on the comprehensiveness of the federal regulatory schemes in finding preemptive intent, both federal statutes were in the specific field which the States were attempting to regulate, while there is no indication that Congress intended to preclude state law in the area of employment regulation. . . . Moreover, in neither *Hines* nor *Nelson* was there affirmative evidence, as here, that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law. Furthermore, to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, there could not appear to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country. . . .[64]

For reasons already given elsewhere in this article, these conclusions of the Court in distinguishing *Nelson* and *Hines* are questionable at best.

D. The Court Pulls A Punch

The Supreme Court found itself unable to decide in *DeCanas* "whether although the INA contemplates some room for state legislation, Section 2805(a) is nevertheless unconstitutional because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."[65] The Court concluded it could not look into that issue

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62. 312 U.S. 52 (1941).
63. 350 U.S. 497 (1956).
64. 96 S. Ct. at 940.
65. 96 S. Ct. at 940, citing *Hines*, 312 U.S. at 67, and *Florida Lime*, 373 U.S. at 141. In *Hines*, the court added:

> And in that determination [whether state law is preempted], it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings,

on the record before it and remanded it to the California Court of Appeals.[66]

CONCLUSION

The Supreme Court's holding with regard to the exclusiveness issue is troubling for reasons explored fully in this note. An easy reaction to its analysis of the preemption question is that it is superfluous if the exclusiveness issue was wrongly decided.[67]

Whatever conclusion might be formed as to the wisdom and tenability of the decision in *DeCanas*, the prospect of applying Section 2805 in a constitutional manner is problematical. Indeed, it is difficult to imagine a procedure whereby a California employer could effectively screen out undocumented job applicants without necessarily imposing an oppressive burden on all potential employees.

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and is an entirely different category from state tax statutes or state pure food laws regulating the labels on cans. . . .

312 U.S. at 67-68. As has been pointed out *supra* at p. 5, the state law in *DeCanas* also impacts on the "rights, liberties, and personal freedoms" of the aliens, legal and illegal, that will feel the thrust of the statute when employers stop hiring them. And of course Chicanos will also be harassed if they are required to produce identification documents to prove to their prospective employers that they are citizens despite their racial characteristics.

66. In this regard, compare the remarks of Professor T. Krattenmacher at the conference on immigration law held at the Georgetown University Law Center on March 26, 1976:

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

67. Normally, when the Court decides a case on preemption grounds that could have been decided on exclusiveness principles, its holding is that Congress preempted the field, arriving at its decision via statutory construction. But it has been suggested that:

> . . . the pre-emption decisions do not uniformly represent the product of sound statutory construction, much less a supportable finding of Congressional intent. . . . Pre-emption can never be the product of statutory construction alone, since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause.

Note, 12 STAN. L. REV. 208, 224 (1959).