University of Dayton Law Review

Volume 3 | Number 1 Article 13

1-1-1978

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PREEMPTION DOCTRINE: STATE PROHIBITION AGAINST THE EMPLOYMENT OF ILLEGAL ALIENS—*De Canas v. Bica*, 424 U.S. 351 (1976).

I. INTRODUCTION

A surge of illegal aliens in California has created significant crowding in the state's job market for lawfully resident workers. Some employers have been willing to draw from the illegal labor pool and have hindered the working situation of legally admitted laborers. California enacted section 2805 of the California Labor Code[1] to sever the illegal supply. The legislation prohibits knowing employment of illegal aliens when such employment would adversely affect the job security of lawfully resident workers. In 1976, the statute was challenged in the United States Supreme Court on the ground that it was preempted by the Federal Immigration and Nationality Act.[2] The Supreme Court, in *De Canas v. Bica*,[3] upheld the constitutionality of section 2805 finding that the California legislation was not preempted by that federal statute. The decision encourages further state regulation of illegal aliens and should stimulate further economic improvement for lawfully resident workers. The decision also indicates a continued effort by the Burger Court to strike a balance in favor of the state when there is a preemption question. This case note will examine *De Canas* and the general elements of the preemption doctrine, its recent application by the Supreme Court, and its economic impact upon the lawfully resident worker.

II. A BRIEF STATEMENT OF THE FACTS

Leonor De Canas and Miguel De Canas, migrant farmworkers, instituted an action against Anthony Bica and Juan Silva, certain farm labor contractors, alleging that the defendants had refused continued employment to the plaintiffs because of a surplus in the work force resulting from the defendants' violation of section

1. CAL. LAB. CODE § 2805 (West Supp. 1976) reads in full text 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 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. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1970).

3. 424 U.S. 351 (1976).

2805(a) of the California Labor Code. The California Superior Court, in an unreported opinion, dismissed the complaint, holding that the statute is an unconstitutional encroachment upon the comprehensive scheme of the Immigration and Nationality Act (I.N.A.). The Court of Appeals of California, Second Appellate District, affirmed that decision.[4]

III. Decision of the United States Supreme Court

On *certiorari*, the United States Supreme Court reversed the judgment of the California Court of Appeals and the case was remanded for further proceedings.[5] In an opinion by Justice Brennan, expressing the unanimous view of the eight participating members of the Court,[6] it was held that (1) the California statute is not an unconstitutional attempt to regulate immigration, even if the statute has some purely speculative and indirect impact upon immigration, and (2) examining the I.N.A. in view of the preemption doctrine, the California statute is not unconstitutional because it is within the state's police power to regulate employment, and the I.N.A. was not intended to completely oust state authority to regulate the employment relationship in a manner inconsistent with pertinent federal laws.

IV. The Trend in This Area of the Law—A Discussion

Generally, aliens are entitled to the constitutional guarantees of equal protection.[7] Thus the validity of state statutes[8] denying aliens certain rights enjoyed by citizens has frequently been challenged on equal protection grounds. In addition, the Supreme Court has expressly held[9] that state statutes denying aliens certain rights enjoyed by citizens are invalid under the supremacy clause of the federal Constitution[10] where such statutes are preempted by, or are in conflict with, any federal laws.

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4. 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974), *rev'd*, 424 U.S. 351 (1976).

5. On remand the California Court of Appeals, Second Appellate District, ordered that petitioners should recover $504.

6. Mr. Justice Stevens took no part in the consideration of this case.

7. 3 Am. Jur. 2d., *Aliens and Citizens*, § 9 (1962).

8. As used in this note, the term "state statutes" includes not only state legislation, but also state administrative regulations and court rules, territorial legislation, and municipal ordinances.

9. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) and Truax v. Raich, 239 U.S. 33 (1915).

10. U.S. Const. art. VI, cl. 2, provides that "[t]his 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."

A. *Equal Protection Challenges to State Statutes Denying Aliens Certain Rights Enjoyed by Citizens*

It has been expressly held or recognized by the Supreme Court that state laws denying aliens certain rights enjoyed by citizens are not valid under the equal protection clause of the Fourteenth Amendment[11] unless the state can prove that its purpose or interest in enacting the laws is both constitutionally permissible and substantial, and that the discrimination against aliens embodied in such laws is necessary for the accomplishment of its purpose or the safeguarding of its interest.[12]

De Canas, however, does not follow an equal protection analysis, but rather makes a supremacy clause inquiry. The equal protection analysis applied in previous cases[13] was necessary because the Court's primary concern was with the rights of those aliens lawfully in residence. The equal protection considerations which invalidate certain discriminatory classifications of the lawfully resident aliens should not operate to invalidate similar statutory treatment of illegal aliens.[14] It should be noted that the Supreme Court would have had to consider whether an equal protection problem existed in *De Canas* only if the definition of an "illegal alien" in the California law did not conform to the federal standard of an "illegal alien."[15]

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11. The fourteenth amendment provides in pertinent part as follows: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

12. *See In re* Griffiths, 413 U.S. 717 (1973), where a Connecticut statute barring resident aliens from admission to the state bar was held unconstitutional under the equal protection clause; pointing out that the Supreme Court looks to the substantiality of the state's interest in enforcing the statute in question, the Supreme Court in Sugarman v. Dougall, 413 U.S. 634 (1973), held that a New York statute denying all aliens the right to hold positions in the state's competitive class of the civil service violated the equal protection clause; the Supreme Court in Examining Board of Engineers v. De Otero, 476 U.S. 572 (1976), held that a Puerto Rican statute which prohibited alien residents of Puerto Rico from engaging in the private practice of engineering violated either the equal protection clause or the due process clause of the fifth amendment; the Supreme Court in Graham v. Richardson, 403 U.S. 365 (1971), held that Arizona and Pennsylvania statutes which denied welfare benefits to resident aliens or to aliens who had not resided in the United States for a specified number of years were unconstitutional under the equal protection clause.

13. *See* note 12 and accompanying text *supra.*

14. *See* De Canas v. Bica, 424 U.S. 351 at 353 n.2. *See also, Hearings on H.R. 982 Before the Subcomm. on Immigration, Citizenship & International Law of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. 44 (1975):

> Once in this country, aliens who have entered illegally are entitled to a minimum of procedural due process, but we are not aware of any decision suggesting that it would be a denial of equal protection to deny them government benefits. Indeed, we have no doubt that a benefit statute distinguishing between . . . those who have entered illegally would be upheld as a valid legislative distinction.

15. An equal protection question did not arise in *De Canas* because the Supreme Court assumed that the reference to "an alien who is not entitled to lawful residence in the United

B. Supremacy Clause Challenges to State Statutes Denying Aliens Certain Rights Enjoyed by Citizens

The federal preemption doctrine is invoked under the supremacy clause, either to effectuate a congressional design to occupy a particular field, even where there are gaps in the federal regulatory scheme, or to nullify state regulation in conflict with federal legislation.[16] The doctrine thus serves to define spheres of governmental authority within the federal system. A state may not regulate in an area where its regulation would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[17] Where a state regulation has such an effect, federal supremacy mandates the state action be preempted.

Although the Supreme Court has never developed an uniform approach to preemption,[18] at least several formulas have emerged and retained their vitality. One test was developed in *Pennsylvania*

States" in § 2805(a) only applied to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations. The question of whether this was the correct construction of the statute was an issue to be possibly determined by the state court on remand. 424 U.S. at 353 n.2. However, the California Court of Appeals, Second Appellate District, simply ordered, on April 16, 1976, that petitioners should recover $504. Thus a question of construction was never dealt with.

16. *See* Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630, 638-39 (1972); *see also* C. MCGOWAN, THE ORGANIZATION OF THE JUDICIAL POWER IN THE UNITED STATES 48 (1969).

Constitutionally mandated preemption is compelled by article one, sections eight and ten of the Constitution. Congressionally mandated preemption, the power of Congress to make its legislation preemptive of state law, is based on the supremacy clause.

In *De Canas* the Court held that § 2805(a) of the California Labor Code was not constitutionally preempted by federal power over immigration nor was it congressionally preempted by the Immigration and Nationality Act. In both Truax v. Raich, 239 U.S. 33 (1915), and Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), the Supreme Court reasoned that certain state legislation interfered with federal power over immigration. In the latter two decisions the Court held that the prohibited restrictions actually denied to the alien entrance and abode, which violated the supremacy clause by encroaching upon the regulatory programs of federal immigration. The legal principles established in *Truax* and *Takahashi* were applied in Purdy & Fitzpatrick v. State, 71 CAL. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969), where a contractor brought suit to recover a fine assessed for violating California Labor Law § 1850 which made illegal the employment of aliens on a public works project. The California Supreme Court held § 1850 unconstitutional not only because it violated the supremacy clause but also because it offended the equal protection clause. The significant difference between *Truax, Takahashi, Purdy* and *De Canas* is that the first three decisions invalidated state statutes discriminating against legal and illegal aliens. *De Canas* dealt with state legislation directed only toward illegal aliens.

17. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In *Hines*, the Supreme Court considered the preemptive force of congressional legislation. The Court recognized that the enactment of a federal statute, without more, did not preclude all legislative efforts. Rather, some measure of intent was necessary for Congress to accomplish preemption.

18. *Id.* at 67.

v. Nelson.[19] The elements of the *Nelson* test, which, if satisfied, demonstrate preemption, are:

> "[T]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."
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> . . . .
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> . . . the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."
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> . . . .
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> . . . enforcement of [the state act] presents a serious danger of conflict with the administration of the federal program.[20]

Another standard normally used in resolving supremacy clause problems is that followed by the Supreme Court in *Florida Lime & Avocado Growers v. Paul*:[21]

> The principle to be derived from our decisions is that federal regulation of a field of commerce 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 the Congress has unmistakably so ordained.[22]

The Court in *Florida Lime* thus held that a state statute regulating avocado sales did not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23]

V. ANALYSIS

Opinions of the Burger Court which have come after *Florida Lime* support the foregoing analysis and establish a trend that *De Canas* follows. In a series of decisions—*Goldstein v. California,*[24] *Kewanee Oil Co. v. Bicron Corp.,*[25] *New York State Department of*

19. 350 U.S. 497 (1956). In *Nelson,* the Court was asked to determine whether the Smith Act, 18 U.S.C. § 2385 (1965), which prohibited knowingly advocating the overthrow of the government by force or violence, preempted the enforceability of a sedition act by Pennsylvania.

20. 350 U.S. at 502-05, *quoting* Rice v. Santa Fe Elevator Corp. 331 U.S. 218 (1947).

21. 373 U.S. 132 (1963). There, a California statute prohibited the transportation for sale in California of avocados containing less than 8% oil by weight. California's right to set an oil percentage limit was challenged as having been preempted by the Federal Agriculture Marketing Act of 1937, which gave no significance to oil weights.

22. *Id.* at 142.

23. *Id.* at 141, *quoting* Hines v. Davidowitz, 312 U.S. 52, 67 (1940).

24. 412 U.S. 546 (1973).

25. 416 U.S. 470 (1974).

Social Services v. Dublino,[26] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,[27] and *De Canas*—the Court has incorporated into its preemption inquiry a definite concern for state interests.

In *Goldstein v. California*[28] the Court protected the states' right to prohibit the reproduction of phonograph records from misappropriated copies by narrowly construing the preemptive scope of the copyright clause.[29] The Court considered but rejected the constitutional claim that the federal copyright power by its own force precluded concurrent state legislation.[30] The Court in *Goldstein* determined that since the state statute did not conflict with, and hence did not stand as an obstacle to, the accomplishment of the full objectives of Congress, it was not preempted by the federal copyright power.[31]

Kewanee Oil Co. v. Bicron Corp.[32] also involved the copyright clause. There the Court relied on *Goldstein* and pointed out that existing evidence of the intent of the copyright clause did not demonstrate congressional desire to exclude the states' participation in the area. The Court indicated that in the absence of such a preemptive Congressional intent the states are free to operate without Congressional preclusion.[33]

The favorable disposition toward state interests that supported both *Goldstein* and *Kewanee* was similarly found in *New York State Department of Social Services v. Dublino*.[34] In that case New York's Social Welfare Law[35] was challenged as having been preempted by the federal Work Incentive Program (WIN). The Court noted it had examined congressional committee reports as well as the history of WIN and found no express congressional desire to preclude state action in the area under consideration. There again the Court indicated that in the absence of an express congressional desire to preclude state action, the pertinent state legislation would be allowed to operate.[36]

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26. 413 U.S. 405 (1973).
27. 414 U.S. 117 (1973).
28. 412 U.S. 546 (1973).
29. U.S. CONST. art. I, § 8, cl. 8.
30. 412 U.S. at 548-60.
31. *Id.* at 561-70.
32. 416 U.S. 470 (1974).
33. *Id.* at 478-79.
34. 413 U.S. 405 (1973).
35. N.Y. SOC. SERV. LAW §§ 1-486 (McKinney Supp. 1977).
36. 413 U.S. at 414, 416-17.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware,*[37] a state law survived an admitted federal-state conflict. The Supreme Court sustained a state statute having the same objective as a federal regulation by reconciling "the operation of both statutory schemes with one another rather than holding one completely ousted."[38]

Goldstein, Kewanee, Dublino and *Ware* indicate a concerted effort by the Supreme Court to strike a balance in favor of the state when there is a preemption question involved. While no single preemption case is likely to provide enough illumination to forecast the course of decisions to come, several cases resting on diverse subject matter, and bearing the doctrine in a common direction, offer a more reliable gauge of the Court's sentiment. The Burger Court's most recent decisions (including *De Canas*) indicate that where Congress has not made clear its intention to preempt, or where a conflict is unripe or peripheral to the purpose of the federal statute, state legislation will be allowed to stand.

De Canas would appear then to follow the *Goldstein-Kewanee-Dublino-Ware* direction. Drawing heavily from its decision in *Florida Lime,* the Court in *De Canas* held that the I.N.A. did not preempt, and was not inconsistent with, the effort of the California legislature to assist its resident farmworkers by passing a statute which restricted the rights of illegal aliens.[39] Justice Brennan found no congressional intent to preclude state action under these circumstances.[40] The Court stated that congressional intent, as manifested by the I.N.A.,[41] was "at best evidence of a peripheral concern with employment of illegal entrants,"[42] and thus afforded the states the opportunity to take individual action.

De Canas allows a state legislature to enact laws which may control the immigration of illegal aliens. The Court found that section 2051 of the Farm Labor Contractor Registration Act of 1963[43] was adequate evidence to show that Congress intended to allow the states to regulate employment of illegal aliens.[44] Further, the Court

37. 414 U.S. 117 (1973).

38. *Id.* at 127, *quoting* Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963) at 357.

39. 424 U.S. at 356-57.

40. *Id.* at 358.

41. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1970 & Supp. 1977).

42. 424 U.S. at 360.

43. 7 U.S.C. §§ 2041-2053 (1973 & Supp. 1977).

44. 424 U.S. at 361-62. The Court noted that § 2044(b) of the Act, 7 U.S.C. § 2044(b) (1973 & Supp. 1977), authorizes revocation of the registration certificate of any farm labor

felt that "Congress' failure to enact general laws criminalizing knowing employment of illegal aliens . . . reinforces the inference . . . that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter."[45]

VI. CONCLUSION

An influx of illegal aliens into the United States has created significant competition in this country's job market for lawfully resident workers. The extent of this problem is demonstrated by the following statistics. In 1971 more than 400,000 illegal Mexican immigrants were seized in the United States.[46] In 1973 this figure exceeded 575,000.[47] The Immigration and Naturalization Service (I.N.S.) currently calculates that there are between six and eight million illegal aliens in the country.[48] A conservative assessment of the wages paid to illegal aliens in 1970 alone exceeds $180 million, an amount which legally admitted immigrants and United States citizens could earn. It is well documented that illegal alien laborers reduce the overall pay scale of the region in which they are employed.[49]

One important step toward advancing the economic position of

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contractor found to have employed "an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment." Section 2051 states that "the provisions contained in the Act are *intended to supplement state action* and compliance with this chapter shall not excuse anyone from compliance with *appropriate state law and regulation.*" Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2051 (1973 & Supp. 1977) (emphasis added).

45. 424 U.S. at 360 n.9. Introduced but not passed in the 94th Congress, 1st and 2d sessions (1975-76), were bills which provided sanctions for employers who knowingly employed illegal aliens. H. 8713, 94th Cong., 1st Sess., 121 CONG. REC. 23,300 (1975); S. 561, 94th Cong., 1st Sess., 121 CONG. REC. 2454 (1975); S. 2531, 94th Cong., 1st Sess., 121 CONG. REC. S18,187 (1975); S. 3074, 94th Cong., 2d Sess., 122 CONG. REC. S2798 (1976). Similar legislation has been introduced in the 95th Congress, 1st session (1977). H. 6560, 95th Cong., 1st Sess., 123 CONG. REC. H3473 (1977); H. 6939, 95th Cong., 1st Sess., 123 CONG. REC. H4119 (1977); H. 7058, 95th Cong., 1st Sess., 123 CONG. REC. H4266 (1977); S. 1601, 95th Cong., 1st Sess., 123 CONG. REC. S8648 (1977). None have yet to be reported out of committee.

46. 117 CONG. REC. H 37,247 (1971) (remarks of Rep. Danielson).

47. U.S. DEP'T OF JUSTICE, ANN. REP. OF IMMIGRATION AND NATURALIZATION SERVICE 78 (1973).

48. *Hearings on S.B. 3074 Before the Subcomm. on Immigration and Naturalization of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) (statement of Leonard F. Chapman, Jr., Comm'r, Immigration and Naturalization Service) (hereinafter cited as Chapman statement).

49. One Immigration and Naturalization Service official has stated that "the employment of illegal aliens is a national problem resulting in the loss of billions of dollars to our economy annually." Chapman statement, *supra* note 48.

lawfully resident workers is to sever the illegal labor supply some employers take advantage of to hinder the bargaining position of the lawful laborers. The Supreme Court's holding in *De Canas* provides California (and potentially other states) with an opportunity to promote an improved standard of living for its lawfully resident work force. This holding could bring other state assemblages to draft statutes that initiate or further develop state regulation in areas previously thought to be exclusively within the control of the federal government. *De Canas* indicates that state statutes will be upheld against preemption challenges because it is possible to reconcile concurrent state and federal interests in the control of illegal aliens. The decision opens the way for further state regulation of illegal aliens and further economic improvement for lawfully resident workers.

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