Regulating the Employment of Illegal Aliens: De Canas and Section 2805

Robert S. Catz

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
REGULATING THE EMPLOYMENT OF ILLEGAL ALIENS: \textit{DE CANAS AND SECTION 2805}

\textit{Robert S. Catz*}

\textbf{INTRODUCTION}

Millions of illegal aliens\textsuperscript{1} work in the United States and while their number can only be roughly estimated, it appears to be growing at an alarming rate.\textsuperscript{2} Most of the recent illegal immigration to this country has been by Mexican nationals.\textsuperscript{3} Thus the states adjacent to the Mexican border have received a large percentage of the illegals\textsuperscript{4} and it is there that illegal alien workers are most heavily concentrated.

The federal government has been ineffective in attempting to control the number of illegal aliens being absorbed into the American economy. Congress has recently augmented efforts to seal the national borders,\textsuperscript{5} but this has not significantly diminished the rate of illegal immigration into this country.\textsuperscript{6} The

\textsuperscript{*} Professor of Law, Antioch School of Law; A.B., 1967, University of Southern California; J.D., 1970, Golden Gate University; LL.M., 1973, University of Missouri-Kansas City; Member, District of Columbia Bar.


2. Castillo, \textit{supra} note 1, at 1, col. 1. While it is difficult to obtain accurate data on illegal aliens, their number can be approximated by studying their economic impact. For a discussion of this problem, see V. Briggs, \textit{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} (U. of Tex.), Apr. 10-11, 1975. Compare this with the following statement of Leonard Chapman, Commissioner of the Immigration and Naturalization Service (I.N.S.): "If we could count them, we could catch them." \textit{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 \textit{1975 Hearings}].

3. See text accompanying notes 32-38 infra.


5. \textit{See note 39 infra.}

federal government and the state of California have begun to focus on regulating employers, as an alternative method of preventing illegal immigration. While the federal government has yet to act on the problem, California, in 1971, enacted legislation designed to protect its citizens from employment competition with illegal aliens. California Labor Code section 2805 prohibits employers in California from knowingly employing aliens not authorized to work in this country, and provides civil penalties for employer violations.

Early attempts to enforce the law were challenged as unconstitutional on the ground that the statute was preempted by federal constitutional authority to regulate immigration and naturalization. In February, 1976, the United States Supreme Court held that a state may impose sanctions on employers of illegal aliens so long as those sanctions do not conflict with existing federal controls. The Court then remanded *De Canas v. Bica*, directing the California court to decide whether section 2805 conflicted with specific federal laws or regulations. Significant questions remain. First, does section 2805 conflict with the existing federal regulations of immigration, and second, if the statute is not preempted, what other problems exist to prevent its effective implementation?

This article explores the magnitude of the problem of illegal immigration and federal efforts to solve it. It examines section 2805 and *De Canas* in depth and argues that the statute is not in conflict with federal immigration laws. Finally, the article will review some of the problems that will undoubtedly arise in the wake of any attempt to implement section 2805.

---

8. For example, in Dolores Canning Co. v. Howard, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974), three industrial employers sought to test the constitutionality of the labor statute. The State Labor Commissioner defended the statute, contending that it had no direct impact on immigration and that it was a proper exercise of California's police power to protect the working conditions of domestic employees. The trial court agreed with the plaintiffs' arguments, finding that the statute encroached upon the exclusive right of Congress to regulate immigration and that it was void for vagueness in violation of the due process clause. The appellate court affirmed, concluding that the statute was preempted by federal law. For unexplained reasons, the state of California did not appeal.
9. *De Canas v. Bica*, 424 U.S. 351 (1976); see Note, 17 SANTA CLARA L. REV. 198 (1977). The *De Canas* Court recognized that, in the absence of federal legislation, states possess broad authority under their police powers to regulate employment relationships to protect their domestic labor force. *Id.* at 356-60.
10. *Id.* at 363-65.
ILLEGAL ALIENS IN THE WORK FORCE

The presence of illegal aliens in the national labor pool is not a recent occurrence. Since the enactment of the first immigration laws, aliens have been illegally entering the country and seeking employment. Various federal executive departments, congressional committees and private organizations have concluded that illegal immigration has adversely affected American society. The broad concerns are that illegal aliens divert America’s resources from its citizens and indirectly impair the standard of living of many Americans.

Specifically, illegal aliens take jobs which could be held by American workers. In 1977 there were over thirty-one thousand unemployed Californians, while estimates of the number of employed illegal aliens run as high as two million. The number of illegal aliens presently in the country has been estimated at six million. The Effects of Proposed Legislation Prohibiting the Employment of Illegal Aliens on Small Businesses: Hearings on S. 1928 Before the Senate Select Comm. on Small Business, 94th Cong., 2d Sess. 34 (1976) (testimony of Leonard Chapman, Comm’r, I.N.S.) [hereinafter cited as 1976 Hearings]. Other estimates include eight million, Karkashian, supra note 11, at 4, and one-half million to three million, Fragomen, supra note 11, at 2. The Library of Congress estimates that their number is as high as twelve million. CONGRESSIONAL RESEARCH SERVICE, ILLEGAL ALIENS: EXISTING LEGISLATION AND LEGISLATIVE ACTION IN THE 92ND AND 93RD CONGRESSES (CRS 75-28 ED 1975) [hereinafter cited as CRS].


See, e.g., Karkashian, supra note 11, at 11-21; 1975 Hearings, supra note 2, at 47 (testimony of Laurence H. Silberman, acting Att’y Gen.); id. at 112-13 (testimony of Richard F. Schubert, Undersecretary of Labor).

See, e.g., Karkashian, supra note 11, at 14-15.

See, e.g., Fragomen, supra note 11, at 19; 1975 Hearings, supra note 2, at 194, 200 (testimony of Andrew J. Biemiller, AFL-CIO).

Karkashian, supra note 11, at 11; BUSINESS WEEK, June 13, 1977, at 87.


19. 1976 Hearings, supra note 13, at 30-31 (testimony of Leonard Chapman, Comm’r, I.N.S.). A recent report stated that the border patrol had been apprehending 200 illegal aliens per day in Los Angeles and Orange counties. In addition, approximately 200,000 illegal aliens were caught in Southern California in 1974 (about 180,000
conventional argument that illegals take only those jobs which citizens are unwilling to do can no longer be made. The Immigration and Naturalization Service (I.N.S.) apprehends large numbers of illegal aliens earning in excess of $10,000 per year who are employed as skilled craftsmen or as white-collar workers. Additionally, alternative citizen labor pools exist for the agricultural and service jobs traditionally held by illegals and illegal aliens are increasingly affecting the job market at all levels.

Furthermore, the employment of illegal aliens adversely affects the interests of their co-workers. It depresses wages and impairs the working conditions of citizens. For example, in California the average hourly wage is $4.47 per hour, but only $2.50 per hour for illegals. That difference by definition holds down wages generally. Moreover, illegal aliens hamper efforts to improve working conditions by reducing the effectiveness of employee organizations.

Additionally, the use of illegal alien labor often encourages abusive labor practices. One common abuse occurs when illegals of them in the Los Angeles area); 32,000 are employed in San Francisco; 120,000 are believed to be doing agricultural work in California's Central Valley. Moreover, I.N.S. reports that Los Angeles has approximately 135,000 illegally employed aliens. U.S. News & World Report, Feb. 3, 1975, at 27-30.


22. Id.

23. Illegal Mexican aliens, for example, have been used as strike breakers, making it difficult for farm laborers to unionize. Chavez Charges Scheme, Wash. Post, Sept. 23, 1974, at C-3, col. 6. Cesar Chavez has also stated: "The illegal workers from Mexico are a severe problem. It is a problem that is beyond our control . . . [W]e say, let them come in with their families, if the country needs them. Let them be legal. Then they will stand up to 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 unionization, especially in such occupations as farm work, was expressed in United States v. Brignoni-Ponce, 422 U.S. 873 (1975). See also Greene, Immigration Law and Rural Poverty—The Problems of the Illegal Entrant, 1969 Duke L.J. 475, 488-89; Hearings on "Illegal Aliens" Before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. 1356 (1972) (remarks of Robert Brown, Assoc. Manpower Adm'r, U.S. Training & Employment Servs., Dep't of Labor).

24. Karkashian, supra note 11, at 13. 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
Illegal aliens who are apprehended by immigration officials leave the country under the procedure of "voluntary departure." Employers who make a practice of hiring illegal aliens are aware of this procedure and rely on it to significantly reduce payroll expenditures. After an illegal alien employee has been apprehended, the employer can deny that he owes the worker back wages, knowing that the worker will voluntarily depart from the country within hours of apprehension and will be unable to pursue a wage claim.

Finally, the charge is also made that as recipients of social services and allotments from many governmental programs, illegal aliens divert limited resources from deserving American citizens and increase the burden on American taxpayers. For example, in 1974 Los Angeles submitted a bill to the federal government for eight million dollars—an estimate of its ex-

---


26. See Ortega, Plight of the Mexican Wetbacks, 58 A.B.A.J. 251, 252 (1972). In fiscal year 1975, 674,252 illegals were expelled from this country. Of these only 23,438 were deported. The others left without formal orders of deportation. 1975 I.N.S. ANN. REP. 19, 90 (Table 23). See also Munoz, The Right of an Illegal Alien to Maintain a Civil Action, 63 CALIF. L. REV. 762, 776-82 (1975); Hinojosa, An Illegal Alien's Right to Sue for Back Wages Under the Fair Labor Standard Act: Abolishing the Economic Incentive to Hire Illegal Labor, 9 CLEARINGHOUSE REV. 18 (1975).

27. Karkashian, supra note 11, at 18-21; see BUSINESS WEEK, June 13, 1977, at 86. This charge has been disputed by the Domestic Council Committee on Illegal Aliens, which found that illegal aliens do not account for a significant portion of the cost of social programs. DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT 192-200 (1976) [hereinafter cited as COUNCIL REPORT].
penditures for the medical care of illegal aliens; the same year San Diego estimated that it spent $1.9 million on the medical care of illegal aliens; it has also been estimated that the Los Angeles School District spends $150-$200 million a year educating the children of illegal aliens.

Although the effects of illegal aliens in the work force are not new, two recent developments have combined to exacerbate the problem and force new efforts to deal with it. First, the recession in the American economy and the accompanying high rate of unemployment have caused increasing concern that illegal aliens are displacing a significant portion of the domestic labor force and thereby elevating the unemployment rate. When the nation is experiencing economic growth and prosperity the problem of illegal aliens in the labor force is tolerable, but the realization that our economic resources are limited forces choices that otherwise might not have to be made.

Second, the rate of illegal immigration from Mexico has increased significantly in recent years. The search for employment is the major incentive for illegal immigration from Mexico, since currently, half of Mexico's eight million available

---

28. 1975 Hearings, supra note 2, at 243 (testimony of California Congressman George Danielson).
29. Karkashian, supra note 11, at 15.
30. 1975 Hearings, supra note 2, at 242 (testimony of California Congressman George Danielson).
31. For a discussion of United States immigration policy as it relates to economic conditions, see Higham, American Immigration Policy in Historical Perspective, 21 L. & CONTEMP. PROB. 213 (1956).
32. Of the 776,600 illegal aliens arrested by the I.N.S. in fiscal year 1975, 680,392 or 89% were Mexican nationals. 1975 I.N.S. ANN. REP. 13, 100 (Table 27B). Of the 667,689 illegals who entered without inspection, 654,836 or 98.19% were Mexican nationals. Id. at 100 (Table 27B). The I.N.S. is simply too understaffed to be able to detect every illegal entry. The Supreme Court has noted the failure of the border check point system for detection of illegal entries: "The entire [check point system], however, 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..." United States v. Ortiz, 422 U.S. 891, 915 (1975) (White, J., concurring). See also United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
33. For an analysis of the Mexican regions which produce most of the illegal immigrants to the United States, see Dagodag, Source Regions and Composition of Illegal Mexican Immigration to California, 9 INT’L MIGRATION REV. 499 (1975). Note also the following: "The mass migration of Mexicans to northern border areas is the result of a close contact of two different systems of government reflecting different degrees of development." San Diego Eve. Trib., May 23, 1976, § A, at 6, col. 4 (statement of Jose Lopez Portillo, President of Mexico).
workers are unemployed. The outlook in the foreseeable future appears to be even grimmer, as it is not clear that the Mexican economy will be able to keep pace with the 3.5 percent rate of annual population growth. It appears that unemployment levels in Mexico will become even more staggering in the immediate future since forty-five percent of the population is under fifteen years of age. It has been estimated that this will cause the number of the unemployed in Mexico to reach fifteen million in ten years. This unusually high and rising rate of unemployment in Mexico causes the jobless in that country to come to the United States in search of employment. As the unemployment rate continues to grow in Mexico, it is likely that there will be increased pressure to immigrate to the United States where, even in a recession, jobs are relatively easy to find. As in the past, unrelieved immigration pressure will translate into increased numbers of illegal entries.

While the problem exists throughout the nation, it is particularly severe in California. California’s proximity to Mexico, its many opportunities for agricultural and industrial employment and the presence of large numbers of Spanish speaking residents account for California’s great attraction of illegal immigrants from Mexico. There are approximately 1.7 million illegal aliens in California, which is about seven percent of the state’s population. Appropriately, both the federal government and the state of California have been seeking new ways to solve the problem of illegal aliens in the work force and most of those solutions have focused on regulating the employer.

**FEDERAL ATTEMPTS TO CONTROL ILLEGAL ENTRY: FOCUSING ON THE EMPLOYER**

The federal government has the primary responsibility for regulating both lawful and unlawful immigration, and enforcement responsibility has been delegated to the I.N.S. The growth in illegal immigration has resulted in a series of federal

---

35. *Id.* This figure becomes more meaningful when it is noted that at this rate Mexico’s population will increase from approximately 62.3 million in 1976 to 134.4 million in 2000. *COUNCIL REPORT, supra* note 27, at 46.
37. *Id.*
38. 1976 *Hearings, supra* note 13, at 43 (Table submitted by I.N.S.); Address by Leonard Chapman, Comm’r, I.N.S., before the Los Angeles World Affairs Council, Los Angeles, Cal. (Apr. 10, 1975).
attempts to reduce the influx of illegals. Increasingly, Congress
is turning to regulation of the employer as a mechanism for
preventing the employment of illegals and thus discouraging
illegal immigration.

The most direct method of curbing illegal immigration
involves tightening security at the borders and national ports
of entry in order to curtail the entry of illegal aliens into this
country. However, even with a greatly increased commitment
of federal resources, our borders cannot be effectively sealed.
Recently intensified efforts to guard our borders against illegal
immigration have failed to significantly reduce the rate of ille-
gal entry.39

This failure has prompted alternative approaches to re-
ducing illegal immigration. Several different tactics have been
considered. The Nixon Administration, for example, supported
a proposal to impose more severe criminal penalties on illegal
aliens who are apprehended.40 Further, administrative action
deny illegal aliens eligibility for major federal public assis-
tance programs has been taken.41 Focusing on denying employ-
ment to illegal aliens, the Social Security Administration has
instituted a program whereby an applicant for a social security
card, who is unwilling to provide proof of citizenship or lawful
resident alien status, is given the choice of either withdrawing
the application or having it forwarded to I.N.S. for investiga-
tion.42 Although the program has been in effect since 1974 and
has resulted in a significant number of applications being
withdrawn,43 it has not visibly affected the rate of unlawful
immigration.44

Legislative attention has recently turned to the elimina-
tion of an employer’s incentive to hire illegal aliens. Civil or

39. From 1971 to 1975, the budget for the I.N.S. increased from $111.5 million
to $183 million, 1975 Hearings, supra note 2, at 420 (statement of Michael G. Harpold).
Despite this rise, I.N.S. was only able to respond to 69% of the border sensor alarms.
Id. at 343 (testimony of Leonard Chapman, Comm'r, I.N.S.).
40. CRS, supra note 13, at 10.
41. COUNCIL REPORT, supra note 27, at 199.
42. 42 U.S.C. § 405(c)(2)(B)(i) (Supp. II 1972) required the Social Security Ad-
ministration to determine that persons to whom it issues cards are not prohibited from
engaging in employment. For the guidelines, see 20 C.F.R. §§ 422.104-.107 (1976).
43. COUNCIL REPORT, supra note 27, at 91-93. This program has caused the with-
drawal of a great number of applications for social security cards; between March,
1974, and February, 1975, for example, 39,000 applications were withdrawn.
44. Id. at 92. However, its effectiveness as a deterrent to illegal immigration and
as an obstacle to the employment of illegal aliens is questionable in light of the increas-
ing immigration and employment of illegal aliens.
criminal sanctions, or both, might be used to eliminate the economic advantages associated with the hiring of illegal aliens. Moreover, the threat of sanction might cause an otherwise careless employer to earnestly inquire into the legal status of a prospective employee.

Presently, the Immigration and Nationality Act of 1952 (I.N.A.), the basic law governing immigration and naturalization, provides for criminal sanctions and deportation for illegal entry. It does not, however, penalize employers of illegal aliens in any way. The Act defines the smuggling, harboring, transporting, or encouraging illegal entries as felonies, but it contains the following exculpatory proviso: "Provided, however, that for the purposes of this section, employment (including the usual and normal practices related to employment) shall not be deemed to constitute harboring." Thus employers, many of whom are duplicitous in illegal immigration by knowingly employing illegal aliens, are not now violating federal law. Additionally, the Act does not contain even minimal sanctions for aliens who accept employment in violation of the conditions of their admission.

46. For judicial interpretation of the term "harboring," see United States v. Mack, 112 F.2d 290, 291 (2d Cir. 1940); United States v. Smith, 112 F.2d 83, 85 (2d Cir. 1940); Susnjar v. United States, 27 F.2d 223, 224 (6th Cir. 1928).
49. "The INS has interpreted the employment proviso as if it gives full authority to employers to contract for and use illegal entrants with impunity. Immigration officials make repeated raids on businesses of consistent users of illegal-entry employees and many are apprehended. The employers and their agents are rarely prosecuted." Greene, Public Agency Distortion of Congressional Will: Federal Policy Towards Non-Resident Alien Labor, 40 GEO. WASH. L. REV. 440, 454 (1972).
The only existing federal legislation that attempts to regulate employers of illegal aliens is the Farm Labor Contractor Registration Act of 1963 (FLCRA),\(^5\) which authorizes the Secretary of Labor to suspend, revoke, or refuse to issue or renew a certificate of registration to any farm labor contractor who "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."\(^5\) In addition, the amendment to the Act provides that any farm labor contractor who has not registered under the Act, or whose registration has been revoked or suspended, will be subject to a criminal penalty of up to a $500 fine and/or a prison sentence of up to one year, if such a contractor knowingly engages the services of an illegal alien.\(^5\) Subsequent offenses are punishable by fines of up to $10,000 and three years in prison.\(^5\) Finally, the Act provides for civil remedies by employees to enforce its provisions.\(^5\) Given the range of jobs presently held by illegals, the FLCRA is too narrow to affect the level of illegal employment and to date, the federal government has not comprehensively regulated the employment of illegal aliens.

In recent years there has been an effort to pass federal legislation sanctioning employers of illegal aliens.\(^5\) However, the House of Representatives and the Senate have yet to agree on the specific contents of such a bill. In the 92nd, 93rd, and 94th Congresses the United States House of Representatives passed legislation which prohibited the knowing employment of illegal aliens.\(^5\) Each bill died in the Senate Judiciary Committee.\(^5\) Three bills were subsequently introduced in Congress.
which would have made employment of illegal aliens unlawful and which would have provided sanctions for employers.

The House bill, commonly known as the Rodino bill, would have sanctioned employers who “knowingly” hired illegal aliens. The sanctions were three-tiered: first, a citation would be issued; next a civil penalty could be imposed; finally, if the violation is willful and the first two sanctions had been imposed on the offender, then there was a criminal penalty. In addition, the bill allowed for injunctions against employers who repeatedly violated the law.

In July, 1974, Senator Kennedy introduced a bill prohibiting the employment of illegal aliens. The bill did not include criminal penalties but provided for administrative and civil sanctions of graduated severity, with a maximum fine of $2000 for each illegal alien employed. The bill did not require that the employer “knowingly” provide unlawful employment in order to be subjected to sanction and liability could be avoided if the employer affirmatively made a “bona fide inquiry” as to the possible status of an employee as an illegal alien and obtained a signed statement from the employee attesting to the lawfulness of his status.

A third bill dealing with the employment of illegal aliens was introduced in the Senate on March 4, 1976. Like the Rodino bill, it sanctioned employers who “knowingly” hired illegal aliens. The sanctions involved differ from both of the...
previously discussed bills. Unlike the Rodino bill and the Kennedy bill, the first offense was punishable by the administrative issuance of a citation. Instead civil penalties are immediately imposed.\(^69\) The first offense was punishable by a fine up to $500.\(^70\) Each subsequent offense was punishable by a fine up to $1000.\(^71\) In contrast with the Rodino bill, it did not impose penal sanctions on a recalcitrant employer.

Although all three pieces of proposed legislation differ in important respects, their primary significance lies in the fact that none has been enacted. The result is that an important mechanism for funneling jobs away from illegal aliens and toward unemployed citizens has been left unutilized. With this concern in mind, the state of California enacted Labor Code section 2805.

**CALIFORNIA ATTEMPTS TO REGULATE ALIEN EMPLOYMENT: LABOR CODE SECTION 2805 AND De Canas**

Believing that the federal government had failed to adequately deal with a pressing state problem, the California legislature enacted Labor Code section 2805 in 1971. The section provides:

(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).\(^72\)

The statute has several noteworthy elements; first, it is broad in scope, applying not just to agricultural employers but to any employment situation where the hiring of an illegal alien

---

69. Id.
70. Id.
71. Id.
"would have an adverse effect on lawful resident workers." Thus, the statute was specifically designed to remedy the adverse effect of a substantial number of illegals in all segments of the California labor market.

Second, like the Farm Labor Contract Registration Act and two of the bills currently pending in the United States Congress, Labor Code section 2805 makes it unlawful for employers to knowingly employ aliens not entitled to legal residence in the United States. Unlike the Kennedy bill, section 2805 does not offer any affirmative steps which the employer might take to relieve himself of his liability.

Finally, the California statute imposes civil fines on an employer, but does not authorize the issuance of a citation, as do the Kennedy and Rodino bills, nor does it impose criminal sanctions on an employer who repeatedly violates the law. Also, the range of fines authorized by the California statute is somewhat lower than the range of fines in the proposed federal legislation. Significantly, subsection (c) of section 2805 provides for civil actions against violators of the Act. In effect, this subsection requires the courts to open their doors to lawful workers who were injured by the employment of illegal aliens. If implemented this statute can provide an important method of discouraging illegal immigration.

Preemption—The Major Hurdle

The primary obstacle to implementation of Labor Code section 2805 was the federal preemption doctrine. Since the regulation of immigration and naturalization is a plenary power vested in the federal government, the states are without power to regulate immigration. Whether section 2805 was an attempt to regulate immigration was unclear, but several California Court of Appeal cases in the late 1960's indicated that any law affecting illegal aliens was preempted.

73. CAL. LAB. CODE § 2805(a) (West Supp. 1977).
74. The development of the "adverse effect" policy is discussed in Dellon, Foreign Agricultural Workers and the Prevention of Adverse Effect, 17 LAB. L.J. 739 (1966).
76. Id.
77. Id. § 2805(b).
78. Id. § 2805(b).
79. Id.
80. Id. § 2805(b). The fine ranges from $200 to $500 per offense.
81. Id. § 2805(c).
The early cases — a false start. One of the early efforts to diminish the impact of illegal aliens on the California work force was initiated in 1968 by Mexican-American farmworkers in the Sacramento Valley. The workers filed a suit alleging that farm owners, as a common practice, knowingly employed Mexican nationals who had entered the United States in violation of federal immigration laws. The plaintiffs contended that employers were violating the state unfair competition statute by preferring illegal labor to domestic labor and sought an injunction prohibiting farm owner-operators from knowingly employing illegal entrants. The trial court sustained defendant's demurrer, finding the unfair competition statute inapplicable and holding that the state court was without jurisdiction over immigration, as the subject was preempted by federal legislation.

On appeal the California Court of Appeal noted the obvious adverse impact of illegal alien competition on the domestic workers.

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 rational 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 . . . [which] must be ascribed to the self-imposed impotence of our national government.

Having described with sympathy the plight of the plaintiff American farmworkers, the court denied the requested injunction.

---


84. Cal. Civ. Code § 3369 (West 1970) provides in part: “Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.”

85. 9 Cal. App. 3d at 590, 88 Cal. Rptr. at 444.

86. Id.

87. Id. at 597, 88 Cal. Rptr. at 449.

88. Id. at 599, 88 Cal. Rptr. at 451.
The court concluded that farm owner-operators should not be subjected to the burdensome requirement of inquiring into each job applicant's naturalization status, because the federal government was unwilling or unable to conduct the same inquiry. Instead the court concluded that the burden should be placed upon the federal government to reduce the flow of illegal entrants.

In *Cobos v. Mello-Dy Ranch,* the California Court of Appeal again refused to find state jurisdiction to enjoin the employment of illegal aliens. The court stated:

The federal Immigration and Nationality Act of 1952 . . . establishes comprehensive controls over the admission of foreign workers as immigrants.

. . . "[O]ne of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country" . . . . Comprehensive legislation by the Congress upon this subject may well be designed to preempt the field and to bar state action . . . .

In this judicial climate, California attempted to regulate the employers of illegal aliens by adopting section 2805.

*De Canas.* Shortly after the passage of section 2805, two migrant California farmworkers sued their employers under section 2805(c) for violating section 2805(a). The farmworkers alleged that they had been denied continued employment by the contractors while illegal aliens were working for the contractors and sought reinstatement of their employment and a permanent injunction against the contractors' willful employment of illegal aliens. The superior court held, in *De Canas v. Bica,* that section 2805 was unconstitutional on the ground that it regulated employment of illegal aliens, an area which in the court's judgment had been preempted by enactment of the federal Immigration and Nationality Act of 1952. The trial

---

89. *Id.*
90. *Id.*
92. *Id.* at 950, 98 Cal. Rptr. at 133 (citations omitted). For a similar holding on the jurisdiction issue, see also *Larez v. Oberti,* 23 Cal. App. 3d 217, 100 Cal. Rptr. 57 (1972).
93. See text accompanying note 72 *supra.*
court dismissed the complaint. The California Court of Appeal affirmed and, after the Supreme Court of California denied review, the United States Supreme Court granted certiorari to consider: "Whether section 2805(a) is unconstitutional either because it is an attempt to regulate immigration and naturalization or because it is preempted under the Supremacy Clause . . . of the Constitution, by the Immigration and Nationality Act . . . "

The United States Supreme Court’s opinion in De Canas dealt with whether section 2805 was an attempt to regulate immigration and if not whether the field was otherwise preempted. The opinion began with the undisputed assertion that the power to regulate immigration is exclusively federal. However, the Court made an important distinction between the field of immigration which is 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.

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.” Using that definition, he found that section 2805(a) was not “a constitutionally proscribed regulation of immigration.” Brennan classified section 2805(a) as “local regulation” with only a “speculative and indirect” impact on immigration. He concluded that “absent congressional action, section 2805 would not be an invalid state incursion on federal power,” because the Consti-

99. Id. at 354.
100. Id. at 354-55.
101. Id. at 355.
102. Id. at 355-56.
103. Id.
tution does not itself require preemption of state regulation of aliens.\textsuperscript{104}

In the second part of the opinion, the Court considered the question of whether, although the Constitution does not itself preclude state regulation of aliens, such regulation is nevertheless barred by the Supremacy Clause.\textsuperscript{105} The Court used the

104. \textit{Id.}

The United States Supreme Court has evolved two approaches to determine whether a state law is preempted by federal legislation covering the same field of activity.

The first, often called "occupation," renders a state regulatory attempt invalid even though it does not impair but enhances and aids in the achievement of federal goals. Before a state law will be displaced on this theory, it must be found that "the clear and manifest purpose of Congress" was to occupy the area. Florida Lime & Avocado Growers, Inc. \textit{v.} Paul, 373 U.S. 132, 141 (1963), \textit{quoting} Rice \textit{v.} Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). As the Court has recently cautioned in New York State Dept'\textquotesingle t of Social Servs. \textit{v.} Dublino, 413 U.S. 405 (1973):

If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed. \textit{Id.} at 413, \textit{quoting} Schwartz \textit{v.} Texas, 344 U.S. 199, 202-03 (1952). In other words, to find an intent to preemptively occupy, it must be demonstrated from the text or legislative history of the federal statute that Congress has "unmistakably so ordained." Florida Lime & Avocado Growers, Inc. \textit{v.} Paul, 373 U.S. 132, 142 (1963). Before invoking the occupation theory the Court delineates the boundaries of the field in which Congress has legislated by looking to the statute, its legislative history, and its constitutional setting. Hines \textit{v.} Davidowitz, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting). Thus it has held that a state copyright law would be preempted only if it was "absolutely and totally contradictory and repugnant" to existing federal law. Goldstein \textit{v.} California, 412 U.S. 546, 553 (1973).

The second approach, often called "conflicts," renders the state statute invalid only if it conflicts with and impairs the federal scheme. There are two guidelines for making this determination. First, "[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial." New York State Dept'\textquotesingle t of Social Servs. \textit{v.} Dublino, 413 U.S. 405, 423 n.29 (1973). Second, when a potential conflict appears, the courts must make a detailed examination of the respective purposes of the federal law and the potentially conflicting state law. The purpose of this inquiry is to insure that state law will be preempted only to the extent necessary to protect the achievement of the aims of the federal law. \textit{See} Merrill Lynch, Pierce, Fenner & Smith, Inc. \textit{v.} Ware, 414 U.S. 117, 127 (1973), \textit{quoting} Silver \textit{v.} New York Stock Exch., 373 U.S. 341, 361 (1963). This approach preserves both the supremacy of the federal law and the concept of federalism.


105. U.S. CONST. art. VI.
standard for preemption set out in *Florida Lime & Avocado Growers, Inc. v. Paul.* In that case, the Court indicated that federal regulation of a particular subject would preempt state regulation either if "the nature of the regulated subject matter permits no other conclusion," or if "Congress has unmistakably so ordained" preemption.

Having previously concluded that the subject matter being regulated was aliens, not immigration, the Court noted that state regulation of employment was clearly within the state's police power. Reflecting the public debate over the problem of illegal immigration, the opinion stressed several arguments used by proponents of stringent measures to curb illegal immigration. Specifically, the Court agreed that illegal aliens take jobs away from United States citizens, "depress wage scales and working conditions," and weaken the effectiveness of labor unions. The Court took judicial notice of the particular severity of those problems in California, due to illegal immigration from Mexico. It held that the problems were of a local nature, and that section 2805(a) was, therefore, not preempted because of its subject matter.

Turning to the question of preemption by the mandate of Congress, the *De Canas* Court focused on the wording, legislative history, scope and detail of the Immigration and Nationality Act. In the Court's view, the respondents had failed to demonstrate a "clear and manifest purpose of Congress" to preempt state regulation of employment of illegal aliens. An independent review by the Court also failed to turn up an indication of such congressional intent. In fact, the Court argued, the 1974 amendments to the Farm Labor Contractor Registration Act indicated quite the contrary, that "Congress intends that states, may to the extent consistent with federal law, regulate the employment of illegal aliens." The Court relied in part upon language in section 2051 of the Act, which states:

---

107. Id. at 142.
109. Id. at 356.
110. Id. at 356-57.
111. Id. at 357.
112. Id.
113. Id. at 357-58.
115. 424 U.S. at 358-63.
"[T]his 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." Finally, the Court held that Congress had not, by the mere enactment of the Immigration and Nationality Act, preempted state authority to regulate the employment of illegal aliens.117

The Court distinguished two cases relied on by respondents, Hines v. Davidowitz118 and Pennsylvania v. Nelson,119 noting that they involved federal statutes dealing with the identical subject matter sought to be regulated by the state.120 Further, the Court noted that in neither case was there "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law," whereas the Farm Labor Contractor Registration Act121 constituted "affirmative evidence" of congressional sanction of section 2805 and similar state legislation.122 Additionally, while Hines and Nelson dealt with immigration and foreign affairs, fields where federal interest is predominant, section 2805 regulates local problems,123 and thus the governmental interest involved is state, not federal. Finally, section 2805 deals with illegal aliens while Hines and Nelson involved state regulation of aliens who were lawfully in the United States.124

The Court could not resolve the question of whether section 2805 unconstitutionally conflicts with federal law in its application and remanded the case to the California Court of Appeal for a more definite statutory construction of section 2805125 and consideration of whether the statute as construed will conflict with present federal regulations.126

Considerations for De Canas on remand. At the outset it should be recognized that the end sought to be accomplished by the enactment of section 2805 is entirely consistent with Congress' purpose in passing the Immigration and Nationality...
Act. One of the general objectives of federal immigration law as a whole is “to protect American labor against the influx of foreign labor.” More specifically the intention of Congress in passing the Immigration and Nationality Act was “to protect the American economy from job competition and from adverse working conditions as a consequence of immigration workers entering the labor market . . . .” This concern is reflected in section 2805 which on its face prohibits any employment of illegal aliens which “would have an adverse effect on lawful resident workers.” Under the I.N.A., aliens are authorized to temporarily reside (and work) in the United States only “if employed persons capable of performing such service or labor cannot be found in this country.” Aliens are authorized to permanently reside (and work) in the United States only if the Secretary of Labor finds:

(A) That 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.

Thus, the objectives of the state and federal acts are identical, when focused on the desirability of alien labor. Section 2805 actually furthers the objective of section 274 and other sections of the Immigration and Nationality Act which prohibit the immigration of illegal aliens by putting teeth into the

129. See text accompanying note 72 supra.
131. Id. § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1970). The California Labor Commission's regulations interpreting § 2805 of the California Labor Code incorporate the same standards as those used by the Department of Labor in interpreting § 212(a)(14). See Cal. Admin. Code tit. 8, §§ 16209-16209.6 (1976). The Labor Commissioner's regulations define the term "lawful resident" in § 2805 to include any non-citizen who possesses any documents issued by the "Immigration and Naturalization Service which authorizes him to work." Id. § 16209. If a prospective employee claims to be a citizen but does not possess documentation proving such status, he may sign a declaration to that effect and thus exonerate an otherwise innocent employer. Id. § 16209.3.
federal prohibition against unauthorized entry. The states have in the past aided the federal government in the implementation of federal immigration policies. For example, the states cooperate with the federal government in the determination of immigration quotas. State employment agencies determine the availability of domestic workers and the standards of working conditions in each state\textsuperscript{134} and this information is used by federal immigration authorities in determining the appropriate rates of authorized immigration.

Similarly, section 2805 parallels and relies on federal law in determining whether the employment of illegal aliens will have an adverse effect on lawful workers. The regulations of the California Division of Industrial Relations state that the labor market is deemed to be adversely affected by the employment of illegal aliens if either of two conditions are met.\textsuperscript{135} First, the employment of an illegal alien is considered to have an adverse effect on the labor market unless the job category is listed on Schedule A of the United States Department of Labor Regulations.\textsuperscript{136} Second, an adverse effect is deemed to have occurred whenever the wages of the illegal alien are lower than the prevailing federal or state minimum wage.\textsuperscript{137} Thus, section 2805 not only furthers federal policy but is subject to the control of federal immigration regulations and minimum wage law.

The regulations of the California Division of Industrial Relations also resolve an apparent conflict between section 2805 and the I.N.A. Section 2805 prohibits the employment of aliens "not entitled to lawful residence in the United States."\textsuperscript{138} Under the I.N.A., however, aliens may be authorized to work while not being entitled to lawful residence.\textsuperscript{139} The regulations of the California Division of Industrial Relations avoid this apparent conflict by defining "an alien entitled to lawful residence" to include any non-citizen who possesses any document issued by the "Immigration and Naturalization Service which authorizes him to work."\textsuperscript{140} In this way the statute can be constructed so as to avoid any conflict between it and federal immigration policies.

\textsuperscript{134} See 29 C.F.R. § 60.3(c) (1976).
\textsuperscript{135} CAL. ADMIN. CODE tit. 8, § 16209.6 (1976).
\textsuperscript{136} Id. Schedule A is found at 29 C.F.R. § 60.7 (1976).
\textsuperscript{137} CAL. ADMIN. CODE tit. 8, § 16209.6 (1976).
\textsuperscript{138} See text accompanying note 72 supra.
\textsuperscript{139} 8 U.S.C. §§ 1183, 1184(a) (1970).
\textsuperscript{140} CAL. ADMIN. CODE tit. 8, § 16209 (1976).
Regulating the employment of illegal aliens through employers is not without its difficulties even if the preemption hurdle is overcome. The statute is largely untested and undefined. Its potential problems seem endless and need to be examined.

Assuming that section 2805 is upheld, the first problem will be to determine precisely when employer liability will attach. Subsection (a) identifies three elements which must be present before sanctions may be imposed on an employer: (1) the employee must not be entitled to lawful residence; (2) his employment must have an adverse impact on lawful resident workers; and (3) the employer must knowingly employ a person of this status. Application of the statute’s scienter requirement will probably create the most difficulty.11

The regulations promulgated by the Division of Industrial Relations require employers to ascertain whether both present and prospective employees are illegal aliens.142 The employer is first required to ask whether he or she is a citizen or an alien.143 If the individual claims to be a citizen, that individual must sign a declaration asserting this fact.144 Compliance with this requirement, however, does not exculpate the employer from liability under section 2805. In rather imprecise language the regulations state:

An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution of Labor Code Section 2805 notwith-
standing his having obtained a signed declaration of citizenship from the alien. 145

Thus, the extent of an employer's obligation to inquire into the alienage of his employees is not clear when they claim to be citizens. Obtaining a signed statement is a necessary but apparently insufficient condition for an employer to avoid liability.

The regulations require that, if an applicant or employee claims to be an alien, the employer must obtain proof of the alien's lawful residence status. 146 This requirement is satisfied when the employer is furnished with a "Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes [the person] to work." 147 The regulation leaves open the possibility that other documents may be sufficient to prove the alien's lawful resident status 148 and it is not stated that the employer is relieved of potential liability, if he is furnished with any such documentation. The regulations do state however, that, if the employer does not receive documented proof of the alien's status within three days, the employer shall be presumed to have the requisite knowledge of the unlawfulness of the alien's employment. 149 Thus, the precise conduct that the statute is attempting to illicit from employers is unclear, because in no case do either the statute or the regulations provide the employer a course of action he may follow to avoid liability.

Beyond definitional problems, there is some doubt as to how effectively section 2805 and the corresponding regulations will eliminate the employment of illegal aliens. If vigorously enforced, it should effectively exclude persons confessing to be aliens who cannot produce the necessary documentation. However, to avoid this predicament, an illegal alien need only sign a statement claiming to be a United States citizen. The regulations stipulate that this declaration must be made under penalty of perjury 150 but there is little reason to suppose that this

145. Id.
146. Id. § 16209.4.
147. Id. §§ 16209, 16209.4. The Form I-151, Alien Registration Receipt Card, also known as the "Green Card," identifies the holder as a lawful permanent resident of the United States. 8 C.F.R. § 264.1(b) (1976).
149. Id. § 16209.4.
150. Id. §§ 16209.3, 16209.4.
would significantly deter illegals seeking employment, given the risks which are already assumed by illegal aliens.

The statute has the greatest potential for impact insofar as it provides the means for displaced workers to enforce the statute privately.\textsuperscript{151} Displaced citizen workers, such as the \textit{De Canas} farmworkers, could effect the removal of illegal aliens from employment. While an employer may be able to show that he does not knowingly employ illegals, if displaced workers can prove that there are illegals working, the employer may not lawfully retain them.\textsuperscript{152} Furthermore, such an action would put the employer on notice that illegal aliens are attracted to job opportunities which he holds open. The employer might thereby in the future be subject to the fines prescribed by the statute.\textsuperscript{153} Thus, section 2805 may prove to be highly useful to displaced workers seeking to cause an employer not to hire illegal aliens.

In some situations the statute could detrimentally affect citizen workers. Since, liability for employers is so open ended, and since they have no effective means of protecting themselves from that liability, it is likely that they will not hire anyone they remotely suspect of being an illegal alien. It is easy to imagine that employers wishing to play it safe might refuse employment to persons with English language difficulties and persons of Mexican descent, who claim to be citizens or lawful resident aliens. Yet, such an employer, who attempts to avoid liability under section 2805 in the only way possible, runs the risk of violating Title VII of the Civil Rights Act of 1964,\textsuperscript{154} by refusing to employ a citizen or lawful resident alien on the basis of race, color or national origin. The employer is forced to steer between the Scylla of sanctions under 2805 and the Charybdis of liability under Title VII for employment discrimination.

In order to assist employers in this dilemma, the statute or regulations might be amended to provide employers with a reasonable means to assure themselves that they can be free from liability under section 2805. Alternatively, an administrative grievance mechanism might be established in order to assist both employer and employee. Beyond the dilemma that the employer must struggle with, it is clear that the Mexican-

\textsuperscript{151} \textit{Cal. Lab. Code} § 2805(c) (West Supp. 1977).
\textsuperscript{152} \textit{Id.} § 2805(a).
\textsuperscript{153} \textit{Id.} § 2805(b).
American population will suffer from the implementation of this statute. The problem of illegal aliens in California, and indeed the reasons for the enactment of section 2805, turns on the presence of over one million illegal Mexican nationals in the labor pool. Any effort by an employer to follow the commands of section 2805 will necessarily require employers to closely scrutinize every individual who seeks employment and has a Mexican heritage. Thus, the burden of being asked if you are a citizen will fall most heavily on Mexican-Americans.

CONCLUSION

Illegal immigration is a significant problem in California and the nation. Illegal aliens continue to hold jobs during a period of high unemployment in the domestic labor force. In addition, illegal aliens depress wages and undermine the effectiveness of labor unions. As the problem grows the State of California has come to recognize that the federal government cannot solve the problem by merely patrolling the nation's borders. Because of Congress' unwillingness to eliminate incentives for employers to hire illegals, the California legislature adopted Labor Code section 2805, making employers liable for knowingly employing illegal aliens. In the absence of federal legislation the De Canas decision permits the states to regulate the employment of illegal aliens, so long as no conflict with federal standards under the I.N.A. arises. Although Labor Code section 2805 and its implementing regulations have problems of statutory construction, not the least of which are vagueness and breadth of application (which must be corrected for it to be an effective tool), at least California has taken a major legislative step forward.

The Supreme Court's validation of Labor Code section 2805, if vigorously enforced by California officials and by state courts, could result in economic relief for the state's labor force and the economy in general. As other states begin to enact similar measures, the federal government will need to pass a uniform federal scheme to regulate illegal alien employment. Effective federal regulation would bestow many of the benefits of a state statute without creating the practical difficulties of multiple legislative schemes. Besides the inherent enforcement benefits of a uniform national policy, federal legislation will be needed to avoid the potential problem that illegal aliens in search of employment will be attracted to those states that have no explicit legislation regulating their employment.