

# The Burger Court Opinion Writing Database

*De Canas v. Bica*

424 U.S. 351 (1976)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 19, 1976

Re: 74-882 - DeCanas v. Bica & Silva

Dear Bill;

I had laid this case aside because I was having some of the same problems that Potter raised.

As clarified I can go along and I join.

Regards,

W. G. B. B.

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: ~~2/11/76~~

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-882

Lenor Alberti DeCanas and  
 Miguel Canas,  
 Petitioners,  
 v.  
 Anthony G. Bica and  
 Juan Silva.

On Writ of Certiorari to the  
 Court of Appeal of California  
 for the Second Appellate District.

[February —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

California Labor Code § 2805 (a) provides that "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."<sup>1</sup> The question presented in this case is whether § 2805 (a) is unconstitutional either because it is an attempt to regulate immigration and naturalization or because it is pre-empted under the Supremacy Clause, Art. VI, cl. 2, of the Constitution, by the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.* (INA), the

<sup>1</sup> Section 2805 of the California Labor Code 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 (\$200.00) nor more than five hundred dollars (\$500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 13, 1976

RE: No. 74-882 DeCanas v. Bica

Dear Potter:

Thanks for your note. I guess what I was trying to convey does not clearly enough emerge.

The idea is that a number of our earlier cases cited in Takahashi and Graham had supported discrimination by States against resident aliens in a wide range of occupations. Clarke v. Deckebach, 274 U.S. 392 is illustrative. That decision sustained a city ordinance prohibiting the issuance to aliens of licenses to operate pool and billiard rooms. The Court held "It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods." But the "doctrinal foundations" of Clarke were undermined in Takahashi where the Court held that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." This is what we said in In re Griffiths, 413 U.S., at 721.

I suggest that rather than delete the clause I revise the sentence to read as follows: "Although the 'doctrinal foundations' of the cited cases, which generally arose under the Equal Protection Clause, for example, Clarke v. Deckebach, 274 U.S. 392 (1927) 'were undermined in Takahashi,' see In re Griffiths, 413 U.S. 717, 718-722 (1973), Graham v. Richardson, supra, at 372, 373, they remain authority that", etc. to the end of the sentence.

Do you think this will straighten out the difficulty?

Sincerely,



Mr. Justice Stewart

cc: The Conference

STYLISTIC CHANGES

11 4, 13

To: The Chief Justice  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackman  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: \_\_\_\_\_

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 74-882

Leonor Alberti DeCanas  
and Miguel Canas, Petitioners,  
v.  
Anthony G. Bica and Juan Silva.

On Writ of Certiorari to the Court of Appeal of California for the Second Appellate District.

[February 25, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

California Labor Code § 2805 (a) provides that "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."<sup>1</sup> The question presented in this case is whether § 2805 (a) is unconstitutional either because it is an attempt to regulate immigration and naturalization or because it is pre-empted under the Supremacy Clause, Art. VI, cl. 2, of the Constitution, by the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.* (INA), the

<sup>1</sup> Section 2805 of the California Labor Code reads in full text as follows:

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"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 13, 1976

74-882 -- DeCanas v. Bica

Dear Bill,

I agree with your opinion in this case and expect to join it. It contains one clause, however, that causes me some trouble, perhaps because I do not understand it. The clause begins with the words "and employed" in the fourth line on p. 4. Whatever it means, this clause is surely unnecessary to the sense of the paragraph in which it appears, and I hope you will agree to its deletion. The sentence in question would then read: "Although these earlier cases generally arose under the Equal Protection Clause, they remain authority . . ." If this deletion is made, I shall be glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.  
✓

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 13, 1976

74-882 - DeCanas v. Bica

Dear Bill,

Although I should still rather prefer that the clause in question be deleted, I should gladly acquiesce in your opinion if the clause is modified along the lines suggested in your letter.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 17, 1976

Re: No. 74-882 - DeCanas v. Bica

Dear Bill:

Subject to further consideration of Part III  
in accordance with our conversation, I join your  
opinion.

Sincerely,



Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 19, 1976

Re: No. 74-882 -- DeCanas v. Bica

Dear Bill:

Please join me.

Sincerely,

*J. M.*

T. M.

Mr. Justice Brennan

cc: The Conference

✓  
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 17, 1976

Re: No. 74-882 - DeCanas v. Bica

Dear Bill:

Please join me. So far as your correspondence with Potter is concerned (about the clause on page 4), I am content with the way it was originally drafted or with the revision proposed in your letter of February 13. Having written Graham v. Richardson, I know what you are driving at.

I might add that I would have been content with an outright reversal, but I suppose it is better to remand and let the California courts work out the details as your opinion proposes.

Sincerely,

  
\_\_\_\_

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 17, 1976

No. 74-882 DeCanas v. Bica

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

1fp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 23, 1976

Re: No. 74-882 - DeCanas v. Bica & Silva

Dear Bill:

Please join me.

Sincerely,

W.W.

Mr. Justice Brennan

Copies to the Conference