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ILLEGAL ALIENS AND WORKERS’ COMPENSATION: THE AFTERMATH OF SURE-TAN AND IRCA

I. INTRODUCTION

In Sure-Tan, Inc. v. NLRB, the United States Supreme Court finally settled the controversial issue of whether illegal aliens are entitled to protection under the National Labor Relations Act, and held that they are so entitled. In the decision, the Supreme Court sustained the Board’s finding that an employer commits an unfair labor practice when he reports certain illegal aliens, who are among his employees, to the Immigration and Naturalization Service. Before the Sure-Tan case reached the Supreme Court, the Administrative Law Judge, the Board, and the Court of Appeals for the Seventh Circuit had each found the employer to be in violation of section 8(a)(3) of the NLRA. The Supreme Court similarly held

2. Id. at 892.
3. Id. at 897.
4. Id. at 888.
5. Id.
6. Id. at 889.
7. National Labor Relations Act §8(a)(3), 29 U.S.C. § 158(a)(3) (1982) (stating that “[i]t shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage
that the employer's actions violated the NLRA and ordered the
traditional Board remedies of backpay and reinstatement, provided
that the discriminatees could establish lawful presence in the United
States. 8 Today, the results of the Sure-Tan decision are as controver-
sial as the issue itself.

Although the Sure-Tan decision is relatively recent, other labor
cases have descended from that decision. 9 These cases include the
entitlement of illegal aliens to minimum wage, 10 overtime pay, 11 and
workers' compensation benefits. 12 By holding that illegal aliens are
within the definition of "employee" under the NLRA, the Supreme
Court has profoundly affected the area of workers' compensation.
Today, every state in this nation, except one, allows illegal aliens to
collect workers' compensation benefits. 13

The purpose of this Note is to demonstrate that illegal aliens
should not be protected by the labor laws of this country, and thus
should not be entitled to workers' compensation benefits. The labor
protections granted to American citizens should not be extended to
illegal aliens for a number of reasons. This Note will establish that
the Sure-Tan decision, granting labor protection to illegal aliens, is
poorly reasoned. 14 Additionally, this Note will explore the results of
Sure-Tan and illustrate how that decision, unsoundly decided as it
was, has effected the areas of workers' compensation, 15 minimum
wage, 16 and overtime pay. 17 This Note will also examine the issue of
federal immigration policy, and it will demonstrate that even if the

8. 467 U.S. at 906.
10. Patel, 846 F.2d at 700 (stating that the overtime and minimum wage provisions of
the Fair Labor Standards Act are applicable to illegal aliens).
11. Id.
12. See North, Labor Market Rights of Foreign-born Workers, 105 MONTHLY LAB.
REV. 32 (1981) (discussing that illegal aliens are protected by the workers' compensation statutes enacted in every state but Vermont).
13. Id. at 33.
14. See infra text accompanying notes 55-106 (analyzing in detail the faulty rationale
behind the Supreme Court's decision in Sure-Tan).
15. See infra text accompanying notes 107-32 (analyzing in detail the application of the
Sure-Tan decision to extend workers' compensation benefits to illegal aliens).
16. See infra text accompanying notes 133-57 (analyzing in detail the extension of the
Fair Labor Standards Act's minimum wage and overtime provisions to undocumented aliens
based on the Sure-Tan decision).
17. Id.
Sure-Tan decision rested on a more solid footing, the federal government's concern with halting illegal immigration into this country, along with other factors involved in federal immigration policy, requires a different conclusion. In fact, this note will propose that the congressional enactment of the Immigration Reform and Control Act represents a legislative decree that the Sure-Tan decision should be overruled. Finally, this Note will discuss why the various constitutional arguments offered in support of illegal aliens' rights to workers' compensation benefits must fail.

II. THE SUPREME COURT'S DECISION IN Sure-Tan

A. Sure-Tan, Inc. v. NLRB

In 1984, the Supreme Court held that illegal aliens are entitled to protection under the NLRA. In Sure-Tan, Inc. v. NLRB, the Court, agreeing with the National Labor Relations Board (hereinafter “NLRB”), held that illegal aliens are “employees” within the meaning of section 2(3) of the Act, and are thus entitled to all the constitutional guarantees as the Equal Protection Clause or the doctrine of federal pre-emption would not require granting illegal aliens protection under workers' compensation statutes.


20. Id.

21. See infra text accompanying notes 168-75 (discussing in detail that the enactment of IRCA would now prohibit the Sure-Tan decision).

22. See infra text accompanying notes 176-225 (analyzing in detail that the application of such constitutional guarantees as the Equal Protection Clause or the doctrine of federal pre-emption would not require granting illegal aliens protection under workers' compensation statutes).

23. 467 U.S. at 883.


The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to
rights and privileges afforded by it.\textsuperscript{25}

In \textit{Sure-Tan}, the petitioner, two small leather processing companies, which for the purposes of the NLRA constituted a single integrated employer, was found guilty of an unfair labor practice by reporting a number of its employees, who were illegal aliens, to the Immigration and Naturalization Service (hereinafter "INS").\textsuperscript{26}

These employees later accepted voluntary departure from the U.S., rather than face formal deportation proceedings.\textsuperscript{27}

The petitioner's actions followed from the successful union organization drive by the Chicago Leather Workers Union in organizing its employees.\textsuperscript{28} In 1976, the union had prevailed in a Board election, against the wishes of the petitioner, and became the exclusive collective bargaining representative of Sure-Tan, Inc.'s employees.\textsuperscript{29}

Following the election, petitioner filed objections to the election with the Board, arguing that a majority of the eligible voters were illegal aliens.\textsuperscript{30} However, the Board overruled the objections and stated that the union would be certified, regardless of whether the voting employees were illegal aliens.\textsuperscript{31} The petitioner then sent a letter to the INS, requesting that the agency investigate the legal status of a number of its employees.\textsuperscript{32} Agents of the INS did make the requested inquiry, and discovered that five of the petitioner's employees "were living and working illegally in the United States."\textsuperscript{33} All five employees accepted a grant of voluntary departure as a substitute for deportation.\textsuperscript{34}

The Board later issued complaints alleging that the petitioner had committed unfair labor practices.\textsuperscript{35} The Board affirmed the administrative law judge's finding that the petitioner violated sections 8(a)(1)\textsuperscript{36} and (3)\textsuperscript{37} by prompting the INS investigation "solely be-

\begin{itemize}
\item \textsuperscript{25} T. 467 U.S. at 892. The Supreme Court states that "since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'" \textit{Id.}
\item \textsuperscript{26} \textit{Id.} at 887.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 888.
\item \textsuperscript{29} \textit{Id.} at 886.
\item \textsuperscript{30} \textit{Id.} at 887.
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982). The text of section 8(a)(1) reads in relevant part, that "[i]t shall be an unfair labor practice for an em-
cause the employees supported the Union."

The Board agreed with the Administrative Law Judge that "the discriminatees' subsequent deportation was the proximate result of the discriminatorily motivated action by [petitioner] and constitutes a constructive discharge." The Board then ordered the petitioner to comply with its traditional remedies for unfair labor practice violations, reinstatement and backpay.

The court of appeals agreed with the Board, holding that the petitioner had violated the NLRA by constructively discharging the undocumented alien employees. The court of appeals then ordered the petitioner to comply with the Board's remedy provisions.

The Supreme Court of the United States affirmed the Board's finding that an unfair labor practice had been committed. The Court held that illegal aliens are protected from the unfair labor practices of their employers. It reasoned that "[t]he Board has consistently held that undocumented aliens are 'employees' within the meaning of section 2(3) of the Act." In the Sure-Tan decision, the Court stated that the Board's construction of the term "employee" is entitled to "considerable deference." The deference afforded the NLRB stems from the fact that it is the NLRB's task, as an agency created by Congress to administer the NLRA, to define that term.

The Supreme Court, relying on the Board's interpretation, found that since illegal aliens are not among the list of specified exemptions under section 2(3) of the Act they come within "the broad statutory definition of 'employee.'" The Court accepted the Board's interpretation of section 2(3) as being inclusive of undocumented aliens because, at the time of the opinion in Sure-Tan, no provision of the INA made the employment of illegal aliens unlawful. Thus, the

38. 467 U.S. at 888.
39. Id.
40. Id.
41. Id. at 889.
42. Id. at 889-90.
43. Id. at 894.
44. Id. at 892.
45. Id. at 891.
46. Id.
47. Id.
48. Id. at 892.
49. See IRCA, supra note 19.
50. 467 U.S. at 892-93. The Supreme Court states that "Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or
Supreme Court held that by including illegal aliens within the definition of employee under the NLRA, the Board's interpretation was fully consistent with the INA and federal immigration policy.\textsuperscript{51}

Justices Powell and Rehnquist dissented from the majority opinion.\textsuperscript{52} Their dissent suggests that it is very unlikely that Congress intended the term "employee" to embrace, for purposes of NLRA protection, persons unlawfully present in the United States.\textsuperscript{53} The dissent suggests that illegal aliens are not entitled to protection under the NLRA because they are "persons wanted by the United States for the violation of our criminal laws."\textsuperscript{54}

Justices Powell and Rehnquist, in their dissent, seem to have a better understanding of the serious and complex ramifications of the majority's holding in \textit{Sure-Tan}. The majority's opinion is a much weaker argument in light of its poor reasoning.

\textbf{B. Case Criticism}

The majority opinion in \textit{Sure-Tan} is open to very serious criticism because of the amount of deference afforded to the NLRB's interpretation of section 2(3). Federal labor and immigration policies, coupled with the lack of a valid rationale behind the Board's decision to include illegal aliens within the definition of "employee" under the Act, illustrate that the deference given to the Board has achieved the wrong result in granting the labor protections of the NLRA and workers' compensation statutes to illegal aliens.

The Supreme Court, in adopting the NLRB's interpretation of the term "employee" as being inclusive of illegal aliens, gives too much deference to the Board's finding that section 2(3) extends coverage of the NLRA to undocumented aliens. The Supreme Court stated that its decision was based on the fact the Board has consistently found that "undocumented aliens are 'employees' within the meaning of . . . the Act."\textsuperscript{55}

Early in the history of federal labor policy, the deference afforded to the NLRB's findings of fact was based on the theory that the Board is an agency "created by Congress to carry out a policy working in the United States without appropriate authorization." \textit{Id.}

\textsuperscript{51} \textit{Id.} at 892. The Court holds "[c]ounterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act." \textit{Id.}

\textsuperscript{52} \textit{Id.} at 913.

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} 467 U.S. at 891.
expressed in broad statutory terms."\textsuperscript{56} That deference is based partly on the fact that the administrative law judge is in a position to observe the witnesses on a first hand basis.\textsuperscript{57} Also, the amount of deference given by reviewing courts is due to the fact that the Board is "one of those agencies with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."\textsuperscript{58} As a result of this practice of affording special deference to Board findings, reviewing courts must adhere to a strict standard of ensuring that there is substantial evidence on the record as a whole to support the Board's findings.\textsuperscript{59} This standard of review, incorporated in section \textsuperscript{10(f)} of the NLRA, however "eludes precise definition."\textsuperscript{60}

The principles guiding reviewing courts are clearly general and overbroad; thus, judges have broad discretion in deciding the amount of deference to afford Board findings. As a result, the "[a]pplication of this deferential standard . . . has not been consistent. The acceptance given decisions of the NLRB by the Supreme Court has hardly been steadfast, and the passage of time has not revealed a trend toward one preferred position."\textsuperscript{61} In exercising their discretion, reviewing courts will look to many factors in deciding the amount of deference to grant a Board finding.\textsuperscript{62} A more restrictive approach to judicial review has thus emerged. Under this theory the Board's findings are entitled to "some" deference.\textsuperscript{63} But as the Court has held, "this deference is constrained by our obligation to honor the clear

\textsuperscript{56.} NLRB v. United Ins. Co. of Am., 390 U.S. 254, 260 (1968). The Supreme Court held that "[t]he respect required in a given case may be determinative of the outcome, for if great weight is given to an agency's interpretation, it must be given effect even if the court would have decided otherwise in the first instance." \textit{Id.; see also} A. Cox, D. Bok & R. Gorman, \textit{Labor Law}, at 108 (10th ed. 1986) [hereinafter \textit{Labor Law}].

\textsuperscript{57.} \textit{See Labor Law}, supra note 56, at 108.

\textsuperscript{58.} \textit{Id.; see also} United Camera Corp. v. NLRB, 340 U.S. 474 (1951).

\textsuperscript{59.} \textit{See Labor Law}, supra note 56. The authors state, "[i]n reviewing an order issued by the NLRB, courts must accept the Board's findings of fact if supported by substantial evidence on the record considered as a whole." \textit{Id.} at 108.

\textsuperscript{60.} \textit{See National Labor Relations Act \S 10(f), 29 U.S.C. \S 160(f) (1982)}. The relevant part of \textsuperscript{10(f)} provides that "the finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." \textit{Id.}

\textsuperscript{61.} \textit{See Labor Law}, supra note 56. The authors state that "this general standard of review eludes a precise definition." \textit{Id.}


\textsuperscript{63.} \textit{See generally} W. Gellhorn, C. Byse & P. Strauss, \textit{Administrative Law}, at 251-57 (7th ed. 1979) (stating that in determining what degree of deference is appropriate, an appraisal of several factors should be made, including whether the issue involved is factual or legal).

\textsuperscript{64.} Southeastern Community College v. Davis, 442 U.S. 397, 411-12 (1979).
meaning of a statute, as revealed by its language, purpose and history."

Using this new approach, and considering the various factors involved in the Sure-Tan decision, it is apparent that the Supreme Court should not have deferred its interpretation of the term "employee" to the NLRB. Instead, the Supreme Court should have reviewed the record to determine whether there was substantial evidence to support the Board's finding that illegal aliens are entitled to protection under the NLRA. Under the new restrictive approach to judicial review, the Court should have also inquired into the policies and purposes underlying the NLRA, while being mindful of federal immigration policy.

In reviewing the record, the Supreme Court in Sure-Tan should have realized that the NLRB has continually neglected to put forth any sufficient rationale to justify its interpretation of the Act so as to include illegal aliens. The Court in Sure-Tan deferred the interpretation of section 2(3) to the Board because, according to the Court, the Board has had a long history of consistently holding that illegal aliens are to be included in the definition of "employee." In fact, however, this practice has not had a long history, but dates back only to 1973. In holding that illegal aliens are employees under the NLRA, the Board merely cites to earlier decisions that stand either for the same proposition, or for the rule that non-citizenship is not

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65. Int'l Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979). The Supreme Court states that "[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference," this deference is limited to a reasonable interpretation of the statute. Southeastern Community College, 442 U.S. at 411.


67. 442 U.S. at 411-12.

68. See Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (stating that according to the "accommodation" doctrine, the NLRB is required to take into account other federal statutes when administering the NLRA).


70. 467 U.S. at 891.

71. See Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973). The NLRB held that a challenge to a union's majority status, based on the fact that those holding authorization cards were aliens, must fail. Id.

72. See, e.g., Sun Country Citrus, Inc., 268 N.L.R.B. 700 (1984) (stating that illegal aliens possess section 7 rights and may not be discriminatorily treated for the exercise of those
a basis for exclusion from a bargaining unit or disqualification from voting in elections conducted by the Board. As a result, a clear Board policy has developed in which it has refused to discriminate based on the legal status of alien employees. However, this policy of non-discrimination is not applicable to illegal aliens, who enter and remain in this country in knowing violation of federal law, and whose unlawful status results from an intentional discrimination by an affirmative congressional decision. Furthermore, in

rights without violating section 8(a)(1)); La Mousse, Inc., 259 N.L.R.B. 37 (1981) (holding that an employee's status as an illegal alien is irrelevant in a discriminatory discharge case); Apollo Tire Co., 236 N.L.R.B. 1627 (1978) (finding that an employee's illegal alien status is irrelevant in a discriminatory discharge case); Hasa Chem., Inc., 235 N.L.R.B. 903 (1978) (stating that the NLRA protects illegal alien employees who are interrogated and coerced by their employer in violation of section 8(a)(1)); Sure-Tan, Inc., 234 N.L.R.B. 1187 (1978) (holding that an employee's illegal alien status is not relevant in a discriminatory discharge case); John Dory Boat Works, 229 N.L.R.B. 844 (1977) (stating that the NLRA extends protections to illegal alien employees who are interrogated and coerced by their employer in violation of section 8(a)(1)); Sure-Tan, Inc., 231 N.L.R.B. 138 (1977) (finding that the alien status of employees in bargaining unit is no bar to Board certification of union); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976) (holding that NLRA protects illegal alien employees from discriminatory discharges in violation of section 8(a)(3)); Handling Equip. Corp., 209 N.L.R.B. 64, 65 (1974) (finding that illegal aliens “lacking working papers” are employees covered under the Act); Lawrence Rigging Inc., 202 N.L.R.B. 1094 (1973) (holding that an alien employee, legally in the country on a visa, but without a green card, was eligible to vote as an “employee” in a Board election).

73. See, e.g., Lawrence Rigging, Inc., 202 N.L.R.B. 1094, 1095 (1973) (holding that the eligibility of aliens to vote in Board certification elections was to be “well established”); Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492, 1493 (1953) (holding that the eligibility of aliens to vote in Board certification elections was “well established”); In re Cities Serv. Oil Co., 87 N.L.R.B. 324, 331 (1949) (rejecting an employer's objections to election); In re Azusa Citrus Ass'n, 65 N.L.R.B. 1136, 1138 (1946) (rejecting a petition to exclude Mexican nationals from bargaining unit); In re Allen & Sandiland Packing Co., 59 N.L.R.B. 724, 730 (1944) (rejecting a petition to exclude Mexican nationals from a bargaining unit); In re Dan Logan & J.R. Paxton, 55 N.L.R.B. 310, 315 (1944) (holding that noncitizenship does not disqualify employees from voting in elections because the Act does not distinguish citizens from noncitizens, and that by not making such a distinction, it effectuates the purpose of the Act).

74. See supra note 73 (discussing illegal aliens' eligibility to vote in Board elections, despite their illegal status).


77. See 8 U.S.C. § 1181 (1976) (specifying qualifications of each class of immigrant
Plyer v. Doe, the Court recognized the legitimacy of excluding illegal aliens from the same privileges that those who are lawfully present in the United States are entitled to, stating that illegal alienage is not a suspect classification under the Equal Protection Clause, because their presence in this country, in violation of federal law, is not a "constitutional irrelevancy."

The Supreme Court in Sure-Tan relied on the Board's interpretation of the term "employee" and then attempted to support its decision with a statement that the holding was consistent with both the policies and purposes underlying the NLRA and federal immigration policy, as contained in the INA. However, not only does that interpretation of "employee," as defined by the Board and adopted in Sure-Tan, lack any sufficient rationale, it also directly conflicts with the federal government's labor and immigration policies.

In holding that illegal aliens are "employees" within the meaning of the Act, the Supreme Court believed that it would further the policies of the NLRA by encouraging and protecting the collective bargaining process. However, a review of the purposes and policies of the statute demonstrates that Sure-Tan simply fails to do so.

Unlike those who are specifically excluded from section 2(3)'s definition of "employee," illegal aliens are not mentioned in the Act. The legislative history of the NLRA offers no indication that Congress ever considered the Act as being applicable to illegal aliens. As stated by Senator Wagner, the sponsor of the NLRA,
the policies behind the Act were designed to equalize the balance of economic power between American workers and their employers. The Act sought to foster the collective bargaining process while at the same time attempted to lift the American nation out of the Depression by stimulating the demand for goods. Therefore, it seems doubtful that Senator Wagner, in sponsoring the bill, and Congress, in enacting the NLRA, ever intended to place persons unlawfully present in this country under the Act's protection.

Furthermore, in the debates preceding the enactment of both the NLRA and the Labor Management Relations Act there were frequent references to "American workingmen." These references should be interpreted as requiring that workers be American citizens in order to enjoy the protections of the Act. These references to the "American workingmen" represent an explicit recognition of the Act's applicability. Thus, the congressional history of the Act clearly indicates a desire to exclude illegal aliens. In fact, before reaching the Supreme Court, the Court of Appeals for the Seventh Circuit in Sure-Tan correctly commented that the references to "American workingmen" in the NLRA's legislative history may mean that only American residents are entitled to the protections under the Act.

The deference afforded the Board's interpretation in Sure-Tan should also be viewed as unsound because that decision is inconsistent with federal immigration policy. At the time of the Sure-Tan decision, the Supreme Court held that its decision was in accord
with federal immigration policy because the INA did not make it unlawful for an employer to hire illegal aliens. 93 However, in 1986, Congress enacted the Immigration Reform and Control Act, 94 which prohibits the employment of undocumented aliens. 95 As a result, the Sure-Tan decision is in direct conflict with current U.S. immigration policy. The Supreme Court has itself stated that the employment of undocumented aliens in periods of high unemployment deprives citizens of jobs. 96 In fact, several states have enacted statutes to prevent the employment of illegal aliens for this very reason. 97 The Supreme Court is incorrect in stating that the Sure-Tan decision is consistent with federal immigration policy. The Court's assertion simply does not square with the fact that a primary purpose of the INA is to preserve jobs for American workers. 98 Undocumented alien workers reduce the employment opportunities available to American workers. 99 As a result, members of the executive and legislative branches argue that the influx of unlawful entrants is an immediate national problem. 100 Furthermore, the presence of illegal alien employees has serious impact on those American workers who remain gainfully employed by seriously depressing wage scales and working conditions while also diminishing the effectiveness of labor unions. 101 Therefore, the Supreme Court in its Sure-Tan decision ignores federal immigration policy by granting labor protection to illegal aliens, while the

93. See 467 U.S. at 892 (stating that the Supreme Court "[did] not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act.").
94. See IRCA, supra note 19.
95. Id.
96. 467 U.S. at 893.
99. Id. at 892-93.
100. See, e.g., HEARINGS BEFORE THE SUBCOMM. ON IMMIGRATION, REFUGEES, AND INTERNATIONAL LAW OF THE HOUSE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 223 (1981). [hereinafter HEARINGS]. Proponents of immigration reform justify sweeping changes based on the proposition that the influx of illegal aliens is a national problem and argue their position with two assertions. See id. First, the number of illegal aliens entering this country will continue to grow unless action is taken to limit their entry. See id. Second, many illegal aliens who are apprehended in the U.S. are working in jobs that pay well and are attractive to those legally present in the United States. See id.
INA would afford no such statutory protection.

Finally, the deference afforded the Board’s interpretation of the term “employee” should be viewed as unwisely granted because the results of Sure-Tan conflict with a recently enacted piece of federal immigration legislation. In 1986, congressional enactment of the Immigration Reform and Control Act prohibited the employment of any illegal alien. This law, which is in direct opposition to the Sure-Tan decision, must prevail. It is a well-established principle that the Board must abide by certain rules of construction and interpretation. According to Southern Steamship Co. v. NLRB and the “accommodation” doctrine, the Board must address other federal statutes, including immigration policy, when administering the NLRA. The NLRB’s interpretations and construction of the Act must be fully consistent with other federal statutes and their underlying policies. Therefore, because the Board’s interpretation of section 2(3) ignores federal immigration policy and since it is now illegal for undocumented aliens to work in the United States, the deference afforded to the NLRB’s interpretation of “employee” should be viewed as ill-conceived.

Application of the NLRA to illegal aliens is the result of stretching and extrapolating the purposes of the Act. However, when combined with the fact that there is no valid basis for the Board’s interpretation of section 2(3) as being inclusive of illegal aliens, the legislative history and policies of the NLRA along with federal immigration laws require a different result than the one in Sure-Tan.

III. RESULTS OF THE Sure-Tan DECISION

A. Workers’ Compensation

The Supreme Court’s Sure-Tan decision is now cited in a long line of cases that stand for the proposition that illegal aliens are employees within the meaning of section 2(3) of the NLRA. However, Sure-Tan has also been used to extend labor protection to illegal aliens beyond the realm of the NLRA and the federal immigration laws.
One such area, dramatically affected by the Sure-Tan decision, is workers' compensation.¹⁰⁸

Workers' compensation benefits are a form of labor protection granted to employees who are injured during the course of their employment.¹¹⁰ Unlike the NLRA, workers' compensation is not a form of protection afforded by the federal government.¹¹¹ Instead, workers' compensation benefits are granted by the various states, each with its own requirements for entitlement.¹¹² Although there are variations among the different state statutes, some of the more common elements necessary to collect these benefits include the existence of a contract of employment, either express or implied,¹¹³ and an injury sustained while in the actual performance of services for an employer.¹¹⁴ In the overwhelming majority of states, the right of an injured employee to workers' compensation is not conditioned on his citizenship or legal status in this country.¹¹⁵

Although the states are free to enact their own legislation dealing with workers' compensation benefits, the Sure-Tan decision has been an influential factor in favor of extending such labor rights to illegal aliens.¹¹⁶ Today, in every state but Vermont,¹¹⁷ employers are required by state legislation to provide workers' compensation protection for injured workers, legal and illegal residents alike.¹¹⁸ Like the Court in Sure-Tan, many state courts have relied indirectly on the Board's interpretation of section 2(3) to hold that illegal aliens are protected by state labor statutes.¹¹⁹ The language of these statutes is based, either entirely or in part, upon the language of section 2(3) in defining those "employees" covered by these state labor statutes.¹²⁰ Consequently, the NLRB's interpretation of the term "em-

¹⁰⁸ See Patel, 660 F. Supp. at 1528; Cenvill Dev. Corp., 478 So. 2d at 1168; Gene's Harvesting, 421 So. 2d at 701.
¹⁰⁹ See North, supra note 12.
¹¹⁰ See 81 AM. JUR. 2D Workmen's Compensation § 151 (1976).
¹¹¹ See 81 AM. JUR. 2D Workmen's Compensation § 152 (1976).
¹¹² Id.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ See 81 AM. JUR. 2D Workmen's Compensation § 155 (1976).
¹¹⁶ See Cenvill Dev. Corp., 478 So. 2d at 1168; Gene's Harvesting, 421 So. 2d at 701.
¹¹⁷ See North, supra note 12.
¹¹⁸ Id. at 33.
¹¹⁹ See, e.g., Cenvill Dev. Corp., 478 So. 2d at 1168; Gene's Harvesting, 421 So. 2d at 701.
¹²⁰ See FLA. STAT. § 440.02(11)(a) (Supp. 1980). The Florida workers' compensation statute follows the form of section 2(3) of the NLRA in defining "employees" entitled to protection under the statute by listing a few explicit exceptions to the statute's coverage. See id.
"employee" carries great weight in these states. Thus, in granting workers' compensation benefits to illegal aliens, various jurisdictions have relied, either entirely or in part, on the Sure-Tan decision.

A recent Florida case, *Cenvill Development Corp. v. Candelo,* although decided before the opinion in Sure-Tan, mirrors the Supreme Court's reasoning, and thus suffers from the same weaknesses as the Supreme Court's decision. In *Cenvill Development Corp.* the District Court of Appeal for the First District reversed a lower court decision which had held that undocumented aliens are not entitled to workers' compensation benefits due to their unlawful presence in this country. The District Court of Appeal, however, using a line of reasoning identical to that of the Supreme Court's in Sure-Tan, held that illegal aliens are entitled to protection under Florida's workers' compensation statute. The District Court of Appeal reasoned that illegal aliens are "employees" as defined by the state's workers' compensation statute. The language of the Florida statute, by listing those who are and who are not covered by the state legislation, mimics that of section 2(3) of the NLRA in defining "employee."

Like the Supreme Court in Sure-Tan, the Florida court relied on other cases which held that nothing in the state's workers' compensation statute suggests that illegal alien workers should be excluded from coverage. Also, these courts found that since illegal aliens are not included in the list of those specifically exempted from the statute's protection, that there was no evidence of an intent to exclude illegal aliens.

Such reasoning, like that of Sure-Tan, suffers from the same lack of a valid rationale for extending coverage to illegal aliens, in light of the purposes and policies of these labor statutes. Also, the line of reasoning employed in *Cenvill Development Corp.* is in direct conflict with current federal immigration policy. The court in *Cenvill Development Corp.*, deciding the case prior to the enactment of IRCA, held that its decision was consistent with federal immigration policy because nothing within that policy prevented the lawful em-
employment of illegal aliens. However, with the enactment of IRCA, it is currently illegal for an employer to hire undocumented aliens. As a result, Cenvill Development Corp., like Sure-Tan, should yield to this prohibition contained in the recent amendment to the INA, when taken in view of its inconsistencies with federal policy, and the accommodation doctrine. Thus, the latest changes to federal immigration policy should compel the withdrawal of the labor protections granted by state legislation to illegal aliens.

B. The Fair Labor Standards Act

Like workers' compensation benefits, the protection of the Fair Labor Standards Act has also been extended to illegal aliens. Comparable to workers' compensation protection, the Fair Labor Standards Act's application is a direct result of the Sure-Tan decision. The Fair Labor Standards Act is the primary piece of federal labor legislation setting forth minimum labor standards for working conditions in the United States. The Act is designed to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." To address these concerns, the statute provides for a minimum wage and for a specified overtime rate to be paid to employees within its scope.

Like the definition of "employee" found within section 2(3) of the NLRA, the definition of "employee" under the Fair Labor Standards Act is also overbroad and general. It too lists a set of specified exemptions to the Act's definition of "employee," rather than specifically enumerating those covered by it. Similar to the way workers' compensation benefits have been extended to illegal aliens

130. Id.
131. See IRCA, supra note 19.
135. Id.
137. Id.
through the Supreme Court's decision in *Sure-Tan*, the protection of the Fair Labor Standards Act has also been granted to illegal aliens based on that holding. An example of that extension is *Patel v. Quality Inn South*. In *Patel*, the United States Court of Appeals for the Eleventh Circuit held that the definitional framework of the Fair Labor Standards Act, consisting of a broad general definition followed by several specific exceptions, strongly suggested that Congress intended an all-encompassing definition of the term "employee" that would include all workers not specifically excepted. The U.S. Court of Appeals reasoned that such a definition necessarily included illegal aliens. In *Patel*, an undocumented alien brought suit to recover unpaid overtime pay, alleging that his employer violated the overtime provisions of the Fair Labor Standards Act. At trial, the United States District Court granted the employer's motion to dismiss, reasoning that illegal aliens were not within the definition of "employee" under the Act. Thus, the court reasoned, illegal aliens had no right to complain of any violations of the Act. The district court's decision carefully evaluated both the Supreme Court's decision in *Sure-Tan*, and the recently enacted amendment to the INA, the Immigration Reform and Control Act. As a result of this analysis, the district court stated that IRCA mandated a different conclusion than the one in *Sure-Tan*. The district court held that IRCA required the federal government to hold inapplicable the protections of the Fair Labor Standards Act to illegal aliens because the INA now prohibits the lawful employment of illegal aliens. The district court stated, "if this court to interpret the protection of the FLSA to apply to illegal aliens would so obviously conflict with the purpose and policy behind the IRA so as to fly in the face of what Congress has attempted to do." The district court then rejected the Supreme

142. *Id.*
143. *Id.* at 702.
144. *Id.* at 702-3.
146. *Id.* at 1536.
147. *Id.* at 1535.
148. *Id.* at 1534-35.
149. *Id.* at 1534.
150. *Id.* at 1531.
151. *Id.*
Court's line of reasoning in Sure-Tan as "counterintuitive" to the policies behind the INA, which now evince "a foremost concern with the employment of illegal aliens." In reversing the district court's decision, the U.S. Court of Appeals rejected the exhaustive analysis which the lower court used to determine that federal labor protection should not be extended to illegal aliens. Instead, the court of appeals simply forced its holding to mimic that of the Supreme Court's in Sure-Tan. The court of appeals stated, "the Supreme Court's decision in Sure-Tan weighs heavily in favor of Patel's contention that Congress did not intend to exclude undocumented aliens from the FLSA's coverage."

By ignoring the deliberate findings of the lower court, and merely making its holding concur with that of the Supreme Court in Sure-Tan, the U.S. Court of Appeals perpetuates what should obviously be viewed as an unwise line of reasoning. The grant of protection under the FLSA, like the protections granted by various state workers' compensation laws, adopts Sure-Tan's extension of labor rights without the benefit of any sound rationale, while also conflicting directly with federal labor and immigration policies. The invalidation of Sure-Tan should thus be seen as inevitable.

IV. Federal Immigration Policy

A. INA Policy Prior to IRCA

The protections afforded to illegal aliens under cases like Sure-Tan, notwithstanding the absence of any proper rationale for extending such coverage, may have once been in accord with federal immigration policies established by the INA prior to 1986. Before the enactment of IRCA, a primary purpose of the INA was to restrict immigration in order to preserve jobs for American workers.

Thus the Supreme Court believed that by extending labor protection to illegal aliens, their coverage under the NLRA would be consistent with the policies and purposes underlying the INA. The
Court in Sure-Tan was concerned that if undocumented aliens were not protected by the NLRA, they would be exploited by having to accept low wages and poor working conditions which would compete with those of unionized U.S. workers. Enforcement of the NLRA on behalf of undocumented alien workers, the Court reasoned, would help to assure that the competition of undocumented alien employees would not adversely affect the wages and employment conditions of lawful residents.

As additional support for its holding that undocumented aliens are covered by the NLRA, the Court found that the INA is principally concerned with the terms of admission to the United States, and not with employment. The Court observed that Congress did not make it unlawful for an employer to hire undocumented aliens, nor did it create a separate criminal offense for an alien to accept employment without authorization. Therefore, the Court found that coverage of undocumented workers under the NLRA would not conflict with the INA.

Thus, the Sure-Tan decision may have at one time presented no conflict with federal immigration policy. However, that policy has since been changed. Under current immigration laws, the employment of illegal aliens is prohibited. The Board's interpretation of section 2(3), as being inclusive of illegal aliens, must acquiesce to this new policy. As a result, federal, as well as state labor protections such as workers' compensation benefits, must not be extended to illegal aliens.
B. The Immigration Reform and Control Act

In response to the concerns that unemployment will continue to rise if illegal immigration is left unrestrained, Congress recently emphasized the need to control illegal immigration by eliminating the availability of employment opportunities for illegal aliens within the United States. Senator Alan K. Simpson, the most outspoken proponent of immigration reform in Congress, successfully guided the IRCA through the Senate in 1985. This amendment to the INA makes it unlawful for an employer to hire "unauthorized aliens" knowingly or in violation of specified procedures, and establishes sanctions against employers who violate the Act's provisions.

As a result of IRCA's enactment, it should be seen that Sure-Tan is no longer a proper basis upon which to extend labor protection to the millions of illegal aliens present in this country. As the majority itself stated in Sure-Tan, the extension of labor protection to illegal aliens was consistent with the INA because at the time of the Court's decision no provision of the INA made it unlawful for an employer to hire illegal aliens. However, with the enactment of IRCA, this is no longer true. To hold that federal or state labor protection should be granted to illegal aliens after the enactment of IRCA would obstruct the intentions of Congress in drafting and enacting that piece of legislation. Allowing illegal aliens to benefit from the labor statutes enacted within this nation, at both the federal and state levels, would clearly run counter to the legislative desire to halt the influx of illegal immigrants into this country, by making employment within U.S. borders far more attractive than employment in their respective countries.

168. See, e.g., 131 CONG. REC. S7039 (1985) (statement of Sen. Simpson, introducing the Immigration Reform and Control Act of 1985, stating that "countless studies have . . . shown that illegal immigration depresses the wages and working conditions of U.S. workers.").


170. See 131 CONG. REC. S7039 (1985); see also Russell, Trying to Stem the Illegal Tide, TIME, July 8, 1985, at 50.

171. S. 1200, 99th Cong., 1st Sess., 121(a)(1); 131 CONG. REC. S7041 (1985) (stating that "it is unlawful for a person or other entity to hire, or to recruit or refer for a fee or other consideration, for employment in the United States an alien, knowing the alien is an unauthorized alien . . . with respect to such employment.").

172. 467 U.S. at 893.

Furthermore, as the Supreme Court has itself held, the administration of the NLRA by the Board must be performed in accordance with other federal policies and goals.\textsuperscript{174} Under this theory, IRCA necessitates a Board finding that section 2(3) is inapplicable to illegal aliens. Consequently, since the INA, as currently amended, prohibits the employment relationship between an employer and an illegal alien, Congress has in effect overruled the \textit{Sure-Tan} decision by legislative decree.\textsuperscript{175} With the diminution of \textit{Sure-Tan}'s sway, states should also discard the faulty reasoning employed in that case and hold that illegal aliens are no longer entitled to workers' compensation benefits, as well as the other labor protections their statutes now afford them.

V. CONSTITUTIONAL ARGUMENTS

A. The Equal Protection Clause and Illegal Aliens

The extension of statutory protection, and particularly that of labor rights, to illegal aliens has been claimed on various constitutional grounds.\textsuperscript{176} Currently, the strongest argument put forth by those who would extend such statutory protections to undocumented aliens is the Fourteenth Amendment's Equal Protection Clause.\textsuperscript{177} Proponents of such an extension claim that the Equal Protection Clause represents a constitutional guarantee, entitling illegal aliens to a host of benefits afforded U.S. born workers under federal and state legislation.\textsuperscript{178} These benefits include a multitude of social wel-

\textsuperscript{174} Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942).

\textsuperscript{175} Id.; see also Casenotes, \textit{supra} note 69, at 446 suggesting that:

Given the \textit{Sure-Tan} Court's emphasis on deciding whether a NLRA/INA conflict exists, and deferring to the INA when it perceived such a conflict, if the INA were amended to outlaw the employment of illegal aliens, the Court might well rule that the illegal alien employees should no longer be deemed employees within the NLRA.


\textsuperscript{177} See Plyler, 457 U.S. at 202; Mathews, 426 U.S. at 67.

\textsuperscript{178} See Plyler, 457 U.S. at 202; Mathews, 426 U.S. at 67.
fare payments, including workers' compensation benefits.

Under the recent Supreme Court decision of Plyler v. Doe, however, the Equal Protection Clause, as applied to illegal aliens, would not compel the states to grant workers' compensation benefits to illegal aliens. Under the Equal Protection Clause, a state, through legislation, may treat different classes of persons in different ways. However, that classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The traditional approach by which the Court determines whether a classification violates the Equal Protection Clause is limited primarily to the rather mechanical rational basis and strict scrutiny standards of review. However, in recent years, and most noticeably in Plyler v. Doe, the soundness of this two-tier analysis has been questioned.

The Supreme Court decision in Plyler v. Doe is an important one for determining whether illegal aliens are entitled to all the rights and privileges granted American born citizens, such as work-

179. See North, supra note 12 (discussing the extension of social welfare payments, including workers' compensation benefits, to illegal aliens).
181. See 7 U.S.C. § 2105(f) (Supp. IV 1980) (denying food stamps to illegal aliens); 42 U.S.C. § 1382c(a)(1)(B) (1976) (denying Supplementary Security Income benefits to aliens unlawfully present in the United States); 42 U.S.C. § 1395(o)(2) (1976) (requiring continuous U.S. residency for a five year period prior to application for medicare benefits); 45 C.F.R. § 233.50 (1979) (excluding illegal aliens from Aid to Families with Dependent Children); 45 C.F.R. § 248.50 (1976) (excluding illegal aliens from Medicaid); see also Plyler, 457 U.S. at 202 (stating that the Fourteenth Amendment's guarantee of equal protection does not entitle illegal aliens to the same benefits that legal residents enjoy); Mathews, 426 U.S. at 67 (upholding the conditioning of aliens' eligibility for participation in a federal medical insurance program on a continuous residence in the U.S. from attack on due process grounds); De Canas, 424 U.S. at 351 (upholding a California labor statute, prohibiting the employment of illegal aliens, from attack as being unconstitutional).
182. The Fourteenth Amendment to the United States Constitution provides in part that "[n]o state . . . shall deny to any person within its jurisdiction equal protection of the law." U.S. CONST. amend. XIV, § 1.
184. Id.
185. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972); see also Graham v. Richardson, 403 U.S. 365 (1971) (affording suspect class status to classification based on alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (affording suspect class status to classifications based on race); Oyama v. California, 332 U.S. 633 (1948) (affording suspect class status to classifications based on national origin).
ers' compensation benefits, under the Equal Protection Clause. In this case, a Texas statute was struck down by the Supreme Court as unconstitutional because it violated the principles of the Equal Protection Clause.\textsuperscript{188} The state statute treated illegal alien's children differently from other children regarding their admission into public schools.\textsuperscript{189} The Texas law sought "to withhold from local school districts state funds for the education of children who were not 'legally admitted' into the United States."\textsuperscript{190} In invalidating the statute, the Supreme Court's holding has had a significant impact on the constitutional rights of illegal aliens.\textsuperscript{191} First, the Court ruled that illegal aliens could claim the benefits of the Fourteenth Amendment's guarantee of equal protection.\textsuperscript{192} Second, the Court "departed from the traditional level of scrutiny previously reserved for classifications based on gender and illegitimacy, to invalidate the [Texas] statute."\textsuperscript{193} The Court, in so doing, now holds that illegal aliens are entitled to the guarantees of the Equal Protection Clause.\textsuperscript{194} However, the Court's decision also makes it clear that such guarantees do not mean that illegal aliens will be entitled to all of the same benefits which citizens and legally admitted aliens rightfully claim.\textsuperscript{195} "[T]he Equal Protection Clause confers no substantive rights, rather [it] simply measures the validity of classifications created by state laws."\textsuperscript{196}

Thus, the holding in \textit{Plyler} would permit the states to deny statutorily provided benefits, such as workers' compensation, to illegal aliens. Although the Court in \textit{Plyler} invalidated the Texas statute, it did so because the statute imposed a lifetime hardship on a discrete class of children not accountable for their disabling status.\textsuperscript{197} Thus the Court held that even the right to an education is not a fundamental right which would require a strict scrutiny standard of

\begin{itemize}
\item \textsuperscript{188} 457 U.S. at 210.
\item \textsuperscript{189} \textit{Id.} at 206.
\item \textsuperscript{190} \textit{Id.} at 205.
\item \textsuperscript{191} \textit{Id.} at 230.
\item \textsuperscript{192} See Note, \textit{supra} note 187; \textit{see also} 457 U.S. at 212 (stating that all persons within the boundaries of a State are entitled to Fourteenth Amendment protections).
\item \textsuperscript{193} See Note, \textit{supra} note 187. This departure can be seen primarily in cases involving classifications based on sex and illegitimacy. \textit{Id.} It has been on an ad hoc basis and has not been clearly articulated. \textit{Id.}
\item \textsuperscript{194} 457 U.S. at 210.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).
\item \textsuperscript{197} 457 U.S. at 220.
\end{itemize}
review under the Equal Protection Clause.\textsuperscript{198} The decision in \textit{Plyler} should now be seen to constitutionally permit states to withhold social welfare benefits, including workers' compensation, from illegal aliens based on their illegal presence in this country.\textsuperscript{199}

B. Federal Preemption

Another constitutional argument advanced in favor of entitling illegal aliens to the rights and privileges of American born workers, including workers' compensation, is that of federal preemption.\textsuperscript{200} Under this theory of preemption, the Constitution, U.S. treaties, and federal statutes comprise the "supreme [l]aw of the [l]and."\textsuperscript{201} Through the preemption doctrine, courts reviewing the validity of a particular state statute must distinguish among areas of exclusive congressional authority,\textsuperscript{202} areas in which state and federal power may be exercised concurrently but where federal legislation either expressly or impliedly preempts state enactments;\textsuperscript{203} and areas where further state legislation has been contemplated by Congress.\textsuperscript{204} Where congressional intent is undermined by state legislation, in those areas reserved for congressional action, the Supremacy Clause of the U.S. Constitution will preempt such state legislation.\textsuperscript{205}

In the context of immigration law, state statutes that impede

\begin{itemize}
\item \textsuperscript{198} \textit{Id.} at 222.
\item \textsuperscript{199} \textit{Id.} at 222.
\item \textsuperscript{200} \textit{Id.} at 222.
\item \textsuperscript{201} \textit{Id.} at 222.
\item \textsuperscript{202} \textit{Id.} at 222.
\item \textsuperscript{203} \textit{Id.} at 222.
\item \textsuperscript{204} \textit{Id.} at 222.
\item \textsuperscript{205} \textit{Id.} at 222.
\end{itemize}
congressional authority to determine the categories of admissible aliens have been consistently invalidated under the preemption doctrine. Early in the formulation of a national immigration policy it was recognized that "[t]he [f]ederal [g]overnment has broad constitutional powers in determining what aliens shall 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. . . . The states are granted no such power." Thus, it is a well-established principle that the power to regulate immigration and enact such policy is an exclusively federal concern. The states are therefore denied the ability to interfere with such legislation and may do nothing to impede Congressional designs.

The federal government's INA sets forth this policy and preempts any state legislation that may run counter to this expression of federal objectives. Those who wish to extend statutory protection to illegal aliens, thus claim that the INA precludes any state legislation affecting illegal immigrants. They claim that the states are preempted from denying illegal aliens any statutory benefits because such action presumably falls exclusively within the jurisdiction of the federal government.

However, in recent years, the strict application of the preemption doctrine to legislation affecting illegal aliens has abated. The
willingness of courts to allow state legislation affecting illegal aliens has come about despite the fact that the "'[p]ower to regulate immigration is unquestionably exclusively a federal power.'" This recent trend is a direct result of the recognition that the influx of illegal aliens into the United States places a serious burden on state economic resources which deprives lawful residents of those benefits to which they are legally entitled. Thus in De Canas v. Bica, the Supreme Court refused to invalidate, as being preempted by the INA, a California statute designed to correct the host of problems resulting from illegal immigration.

In 1971, the California legislature enacted section 2805(a) of the California Labor Code which makes it unlawful for an employer to "knowingly employ an alien who is not entitled to lawful residence in the United States." The Court held that the statute was constitutional because it was in "harmonious accord" with federal immigration policy. The Supreme Court held that the law was also valid because "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the [s]tate." Section 2805(a) was thus upheld under the theory that federal preemption should not invalidate state legislation which is consistent with federal immigration policy and enacted through a state's police powers.

De Canas v. Bica may therefore allow states to withhold from illegal aliens benefits provided by their legislation without fear of federal preemption. A state's decision to deny social welfare benefits, such as workers' compensation, is the immediate result of the economic drain on state resources which deprive legal residents of benefits that they are entitled to under the U.S. Constitution, as well as the constitutions of the various states. The enactment of such statutes, denying illegal aliens the benefits afforded to American-born

213. Id. at 354.
214. See Hearings, supra note 100.
215. 424 U.S. at 351.
216. Id. at 355-56.
217. Id. at 352.
218. Id. at 356.
219. Id.
residents, would fall squarely within a state's police power.\textsuperscript{221} Secondly, the promulgation of such statutes would be in accord with federal immigration policy.\textsuperscript{222} The refusal to grant such benefits to illegal aliens would make entry into this country far less attractive\textsuperscript{223} and thus promote the INA's policy of halting illegal immigration. In fact, denying workers' compensation benefits to illegal aliens would not only be consistent with IRCA, it may be so required. IRCA now prohibits the employment of illegal aliens.\textsuperscript{224} To afford workers' compensation benefits to undocumented aliens for their employment-related injuries at a time when Congress has expressed a strong desire to outlaw that employment relationship would "fly in the face of what Congress has attempted to do."\textsuperscript{225}

VI. CONCLUSION

This Note has demonstrated that workers' compensation benefits may be denied to illegal aliens for several important reasons.\textsuperscript{226} Neither case law nor the U.S. Constitution compel a different result.

The Supreme Court's \textit{Sure-Tan} decision, holding that illegal aliens are "employees" within the meaning of section 2(3) of the NLRA, should be viewed as invalid.\textsuperscript{227} The Court's opinion in \textit{Sure-Tan} suffers from serious defects in its reasoning, in that there is no valid justification for the extension of labor protection to illegal aliens.\textsuperscript{228} Another critical flaw with the \textit{Sure-Tan} decision is that its results run counter to both federal labor and immigration policies.\textsuperscript{229}

\begin{itemize}
\item \textsuperscript{221} 424 U.S. at 356.
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{See House Select Comm. on Population, 95th Cong., 2d Sess., Legal and Illegal Immigration to the United States} 3, 16-17 (Comm. Print 1978); 125 \textit{Cong. Rec.} 13,286 (1978) (statement of Rep. Sawyer) (stating that employment in the United States is a "magnet that attract aliens because job opportunities in this country are so much better than in illegal aliens' homelands."); C. Keely, \textit{U.S. Immigration: A Policy Analysis}, at 53-62 (1979) (stating that illegal migration is "viewed as the result of economic and demographic determinism-that is, a large labor pool in sending countries seeking better job opportunities, coupled with the desire of U.S. employers for cheap labor.").
\item \textsuperscript{224} \textit{See IRCA, supra} note 19.
\item \textsuperscript{226} \textit{See supra} text accompanying notes 55-225 (analyzing in detail the faulty rationale behind the Supreme Court's \textit{Sure-Tan} decision, and the application of workers' compensation benefits based on that holding).
\item \textsuperscript{227} \textit{See supra} text accompanying notes 55-106 (analyzing in detail the defective reasoning in the \textit{Sure-Tan} decision).
\item \textsuperscript{228} \textit{See supra} text accompanying notes 69-70 (explaining that the Supreme Court relied on a Board interpretation which lacks any justification for extending labor protection to illegal aliens).
\item \textsuperscript{229} \textit{See supra} text accompanying notes 81-106 (explaining in greater detail that the \textit{Sure-Tan} decision conflicts with both federal labor and immigration policies).
\end{itemize}
Through the invalidation of *Sure-Tan*, the states would be allowed to deny illegal aliens social welfare benefits, such as workers' compensation. The fact that such statutes employ language very similar to section 2(3) in defining those "employees" covered by state legislation has given Board interpretation of the section extensive influence. With the rejection of *Sure-Tan*, illegal aliens would no longer fall within the statutory definition of "employee" under the NLRA and state labor statutes. As a result, undocumented aliens would not be entitled to statutory labor protections, including workers' compensation.

Denying workers' compensation benefits to illegal aliens is consistent with federal immigration policy. The chief goal of U.S. immigration policy is to protect the employment opportunities available to U.S. workers. By refusing to grant illegal aliens such labor protection as workers' compensation benefits, their attraction to the U.S. employment market would certainly decline. As set out in IRCA, illegal aliens are now prevented from lawful employment within U.S. borders. By denying them workers' compensation protection, and thus making the U.S. labor market far less attractive, states would be acting in accord with congressional objectives to protect the employment opportunities of U.S. workers.

Finally, the withdrawal of workers' compensation benefits from illegal aliens would not violate the various constitutional propositions advanced in favor of extending such statutory protection to illegal aliens. The Fourteenth Amendment's Equal Protection Clause should not be seen as requiring the states to afford illegal aliens all the benefits that they grant legal residents. As the recent case of *Plyler v. Doe* has illustrated, the equal protection clause of the Four-

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230. *See supra* text accompanying notes 107-31 (analyzing in detail how the *Sure-Tan* decision is influential in state decisions extending workers' compensation benefits to illegal aliens).

231. *See supra* text accompanying notes 130-32 (analyzing the fact that IRCA now outlaws the employment relationship between an employer and an illegal alien, and thus should require a withdrawal of labor protections from those unlawfully present in this country).


233. *See Hearings, supra* note 100.


235. *See supra* text accompanying note 173.

236. *See supra* text accompanying notes 176-225 (analyzing in detail the application of such constitutional guarantees as the Equal Protection Clause and the doctrine of federal preemption to legislation affecting illegal aliens).

237. *See supra* text accompanying note 176-99 (discussing in detail that the Equal Protection Clause would not guarantee workers' compensation benefits to illegal aliens).
tenth Amendment does not afford illegal aliens suspect classification or a strict scrutiny standard of review in determining the constitutionality of their disparate treatment at the state level. Nor does the doctrine of federal preemption necessitate that such benefits as workers' compensation be granted to illegal aliens. State statutes dealing with illegal aliens are no longer viewed as automatically preempted by the INA. This is especially true where the state's regulation of illegal aliens falls within its police powers. Statutes denying these benefits to illegal aliens would be in keeping with the states' police powers and in accord with federal immigration policy.

The IRCA, the recently enacted amendment to the INA, prohibits the employment of illegal aliens. It is a revolutionary and dramatic reaction by Congress in response to the calls to halt the rapidly increasing influx of illegal immigration into this nation. Its objective is to keep open the employment opportunities available to American citizens. As a result, workers' compensation benefits should be denied to illegal aliens. However, the states have relied on the Supreme Court decision in Sure-Tan to extend these labor benefits to illegal aliens. The lack of any meaningful rationale behind that decision, and the fact that the results of Sure-Tan run counter to U.S. labor and immigration policies, require a different conclusion. Such a conclusion would mandate a Board finding that illegal aliens are not "employees" within the meaning of section 2(3) of the NLRA. An interpretation of the NLRA as being exclusive of illegal aliens would strengthen the argument in favor of denying illegal aliens workers' compensation benefits. Finally, not only does federal immigration policy suggest that illegal aliens should be denied workers' compensation benefits, but enactment of IRCA may now require such action. Such state legislation, withdrawing the protection of

238. Id.
239. See supra text accompanying notes 200-25 (discussing in detail the application of the doctrine of federal preemption to illegal aliens' entitlements to workers' compensation).
240. Id.
241. Id.
242. Id.
243. See IRCA, supra note 19.
244. See, e.g., Cenvill Dev. Corp. v. Candelo, 478 So. 2d 1168 (Fla. Dist. Ct. App. 1985) (holding that illegal aliens are entitled to workers' compensation benefits under state law); Gene's Harvesting v. Rodriguez, 421 So. 2d 701 (Fla. Dist. Ct. App. 1982) (holding that there is no evidence of any intent to exclude illegal aliens from the protections of the state's workmens' compensation statute).
workers' compensation benefits to those persons unlawfully present in this country, would stand up to a constitutional attack. 245

Mark Anthony Miele

245. See supra text accompanying notes 176-225 (analyzing in detail that the withdrawal of workers' compensation benefits from illegal aliens would stand up in face of the constitutional propositions advanced in favor of extending such benefits to those unlawfully present in the U.S.).