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Judicial Sabotage of Prop. 187

By Bruce Fein

Constitutional reasoning is an exceptionally elastic discipline. As Judge Learned Hand observed, the text of the Constitution and interpretive doctrines fashioned by the United States Supreme Court are weak barriers against judicial smuggling of personal biases into constitutional rulings. A prime example is the decision of United States District Judge Mariana R. Pfaelzer in *LULAC vs. Wilson* (Nov. 20, 1995) holding unconstitutional the major cornerstones of California's Proposition 187, a measure calculated to reinforce the prevailing congressional attack on illegal immigration.

Judge Pfaelzer brandished the doctrine of congressional preemption to reach bizarre conclusions. Generally speaking, the preemption doctrine prohibits state laws that would defeat or materially interfere with a federal policy. In *LULAC*, the mandates of Proposition 187 that state law enforcement officials cooperate with the federal Immigration and Naturalization Service in the identification and deportation of illegal aliens were held to war with congressional desires — in other words, that Congress exulted in circumvention of its immigration laws.

Section 4 of Proposition 187 requires state law enforcement agencies to verify the legal status of every arrestee suspected of undocumented status through interrogation, and a demand for documentation. If verification is not forthcoming, the arrestee must be informed of his apparent illegal status, and the necessity of either legalizing his presence or departing the country. State agencies must further notify the Attorney General of the United States and the INS of suspected illegal aliens, and must cooperate fully with federal officials in the enforcement of federal immigration laws.

Section 9 of the proposition directs the California Attorney General to alert the INS of all reports received from state agencies pertaining to persons who are "suspected of being present in the United States in violation of federal immigration laws." Companion sections require state agents to question all applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine pertinent documents; and, to report suspected illegal aliens to state and federal authorities.

Unless they are creatures who have been hibernating for several years, can there by any reasonable doubt that the overwhelming majority in Congress welcomes state initiatives like Proposition 187 insofar as they strengthen the enforcement of federal immigration laws? It seems safe to presume that Congress wishes its laws against illegal aliens to be honored more in the observance than in the breach. Recently Congresses have tightened laws against illegal immigration and bolstered the federal enforcement arsenal by increasing border patrol agents and endorsing a proto-Chinese Wall in the proximity of the Mexican border. Congressional hectoring also prompted the INS to streamline the process for adjudicating asylum claims to deter evasion of immigration restrictions; and, members generally cheered the interdiction of would-be immigrants form Haiti and Cuba on the high seas ordered by Presidents George Bush and Bill Clinton. The congressional ensemble against illegals also includes ineligibility for Aid to Families with Dependent Children, Food Stamps, Medicaid, and Unemployment Compensation.

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Judge Pfaelzer insisted, nevertheless, that Congress intended to prevent states from assisting in the identification, apprehension and deportation of illegal aliens, an obtuseness that verifies Justice Oliver Wendell Holmes' quip that judges need education in the obvious. Judge Pfaelzer was unable to marshal a single reason to believe Congress would deplore such assistance. She also declined to suggest that federal foot soldiers fighting the tides of illegal immigration, like King Henry V before Agincourt, would rejoice over the absence of state reserves to make their success stories all the more heroic. Judge Pfaelzer, an aspiring Ursa Major of the law, relied solely on a wooden application of the Supreme Court precedent in *De Canas vs. Bica* (1976).

In that case, the High Court upheld a California law prohibiting the knowing employment of illegal aliens when federal legislation was silent on the issue. In passing, the Court noted that state laws that "regulate immigration" are ordinarily preempted because the Constitution entrusts that power exclusively to Congress. But contrary to Judge Pfaelzer's whimsy, the law enforcement cooperation provisions of Proposition 187 do not "regulate" immigration, they simply fortify the regulatory edifice erected by Congress. If federal immigration authorities do not want the enforcement assistance of California (a proposition that encroaches

on the domain of incredulity), then they may effortlessly throw state reports of suspected illegals in the trash can. Judge Pfaelzer seems to have forgotten that the Constitution was conceived in the Age of Enlightenment, not during the Dark Ages.

Proposition 187 also excluded illegal aliens from a host of publicly funded social services, including non-emergency health care and elementary and secondary schooling. Judge Pfaelzer generally condemned the exclusion by a casuistical interpretation of a cluster of federal welfare programs to require coverage of illegals. But that condemnation imputed schizophrenia to Congress — that it simultaneously wished to exclude and to entice illegal immigrants — a highly disfavored canon of statutory construction.

Judge Pfaelzer's sabotage of Proposition 187 should prompt Congress to enact legislation instructing jurists to desist from interpreting federal immigration laws to preempt state efforts to bolster federal enforcement and deterrence programs, unless there is an irreconcilable conflict between the two. Otherwise, judges unsympathetic to strict immigration controls will continue to confound congressional will and sound constitutional doctrine. ■