Federal Pre-emption and the "Right" of Undocumented Alien Children to a Public Education: A Partial Reply

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Introduction

The doctrine of federal pre-emption[1] has long been a vehicle by which state legislation may be struck down as an invalid encroachment upon an area of federal responsibility or concern. Such judicial action is a remedy to either a conflict[2] between state and federal statutes, or state action in an area normally reserved to the exclusive control of the federal government.[3] This doctrine has recently been the focus of academic commentary[4] as well as a number of Supreme Court decisions.[5]

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1. This doctrine is derived from the Supremacy Clause of the United States Constitution: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

2. The Court has adopted numerous variations of the "conflict" concept, using terms such as: interference, repugnance, irreconcilable, and inconsistent. The clearest conflict cases obviously present themselves when federal and state statutes stand diametrically opposed upon the same subject. These are easily recognized and pose no significant problems. Similarly, no difficulties are encountered if the respective statutes are directed at completely unrelated topics. It is the instances lying between these two extremes which present conceptual and analytical problems for the courts. *See* Hirsch, *Toward A New View of Federal Pre-emption*, 1972 U. ILL. L.F. 515, 526-28 [hereinafter cited as Hirsch]; Note, *The Pre-emption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 626, 646-49 (1975) [hereinafter cited as *Pre-emption Doctrine*]; Note, *A Framework for Pre-emption Analysis* 88 YALE L.J. 111 (1978).

3. *Pre-emption Doctrine, supra* note 2, at 625, 642-46; Hirsch, *supra* note 2, at 529-33.

4. *See, e.g.*, Note, *Conceptual Refinement of the Doctrine of Federal Pre-emption*, 22 J. PUB. L. 391 (1973); Engdahl, *Pre-emptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); *Pre-emption Doctrine, supra* note 2; Hirsch, *supra* note 2.

5. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Goldstein v. California, 412 U.S. 546 (1973).

These decisions establish a significant departure from the more traditional, federally oriented pre-emption analysis in favor of a more liberal, state oriented approach.[6] In contrast to the frequently broad application of the doctrine by the Warren Court, the Burger Court has adopted a pre-emption analysis which has had the effect of enhancing local and state autonomy.

In 1976, the Supreme Court refused to hold pre-empted a California statute prohibiting the employment of aliens "not entitled to lawful residence."[7] The Court resorted to a state oriented, somewhat deferential pre-emption analysis and established "a viable and uniform standard by which to decide future pre-emption questions."[8] That case, *De Canas v. Bica*,[9] in addition to spawning wide-spread commentary,[10] induced the present authors to herald the end of the implied federal pre-emption doctrine.[11] It was contended that the Supreme Court, as evidenced by *De Canas*, has returned to the theory of "cooperative federalism"[12] which prevailed during the early 1930's. The Supreme Court's return to that methodology indicates its sensitivity to the problems faced by the states[13] and "portends a period wherein state legislation

6. For more extensive discussion, see *Pre-emption Doctrine, supra* note 2. *See also* comment, Goldstein v. California, Breaking Up Federal Copyright Pre-emption, 74 COLUM. L. REV. 960 (1974).

7. CAL. LAB. CODE § 2805 (West Supp. 1976). The statute reads in full 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 a 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)."

8. Catz & Lenard, *The Demise of the Implied Federal Pre-emption Doctrine*, 4 HASTINGS CONST. L.Q. 295, 295 (1977) [hereinafter cited as Catz & Lenard].

9. 424 U.S. 351 (1976).

10. *See, e.g.*, Benke, *Doctrine of Pre-emption and the Illegal Alien: A Case for State Regulations and a Uniform Pre-emption Theory*, 13 SAN DIEGO L. REV. 166 (1975); Catz, *Regulating the Employment of Illegal Aliens: DeCanas and Section 2805*, 17 SANTA CLARA L. REV. 751 (1977); Note, *Pre-emption in the Field of Immigration: Decanas v. Bica*, 14 SAN DIEGO L. REV. 282 (1976); Note, 17 SANTA CLARA L. REV. 198 (1977); Note, 12 TEX. INT'L L.J. 87 (1977); Note, 16 VA. J. INT'L L. 963 (1976); Note, 9 VAND. J. TRANSNAT'L L. 907 (1976); Note, *Regulation of Illegal Aliens: Sanctions Against Employers Who Knowingly Hire Undocumented Workers*, 4 W. ST. U. L. REV. 41 (1976).

11. Catz & Lenard, *supra* note 8.

12. "Cooperative federalism" regards federal and state governments as "mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand." *Pre-emption Doctrine, supra* note 2, at 623, quoting from Wright, *The Advisory Commission on Intergovernmental Relations: Unique Features and Policy Orientation*, 25 PUB. AD. REV. 193, 199-200 n.26 (1965).

13. In New York Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973), a case involv-

will be permitted to supplement federal legislative schemes."[14]

Nearly six months prior to the *De Canas* decision, Texas, in an effort to alleviate the perceived problems posed by undocumented aliens, amended a section of the Texas Education Code.[15] Prior to the amendment, public education was provided free to "all children."[16] The statute had been interpreted to include undocumented children within its ambit.[17] As amended,[18] however, children of undocumented aliens were required to pay tuition. As interpreted by a federal district court in Texas,[19] the purpose underlying this exclusion was, in part, "to prevent the potential drain on [educational] funds should Tyler become a haven for illegal aliens."[20] The amended statute was the subject of a

ing welfare services, the Court, per Justice Powell, recognized that "[t]o the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping most state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution." *Id.* at 413.

14. Catz & Lenard, *supra* note 8, at 320.

15. TEX. EDUC. CODE ANN. tit. 2 § 21.031 (Vernon Supp. 1978).

16. TEX. EDUC. CODE ANN. tit. 2 § 21.031 (Vernon 1972) (amended 1975) provided a free public education to any child who was a resident of the school district.

17. Op. Tex. Att'y Gen. No. H-586, April 18, 1975, interpreted this section specifically to include undocumented children.

18. The amended section of the Texas Education Code reads:

(a) All *children who are citizens of the United States or legally admitted aliens* and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year *shall be entitled to the benefits of the Available School Fund* for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

(d) In order for a person under the age of 18 years to establish a residence for the purpose of attending the public free schools separate and apart from his parent, guardian, or other person having lawful control of him under an order of a court, it must be established that his presence in the school district is not for the primary purpose of attending the public free schools. The board of trustees shall be responsible for determining whether an applicant for admission is a resident of the school district for purposes of attending the public schools. TEX. EDUC. CODE ANN. tit. 2 § 21.031 (emphasis added).

19. Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978), appeal pending, No. 78-3311 (5th Cir.). *See also*, Hernandez v. Houston Independent School Dist., 558 S.W.2d 121 (Tex. Civ. App. 1977).

20. Doe v. Plyler, 458 F. Supp. 569, 575 (E.D. Tex. 1978). *See also*, Note, *The Equal*

recent law review article by Robert Kane and Felix Velarde-Muñoz in which the authors contended that under a federal pre-emption analysis the statute would necessarily be invalid.[21] The Texas statute was successfully challenged in federal district court[22] on several constitutional grounds, one of which was the federal pre-emption doctrine as developed by *De Canas*.[23]

It is the purpose of this commentary to demonstrate that the authors Kane and Velarde-Muñoz and the district court misinterpreted the meaning of *De Canas*, and that as a result their analysis of the Texas statute was inaccurate. The *De Canas* decision and the evolution of the pre-emption doctrine to its present state will be reviewed. With that as a predicate, the Texas statute will be measured against the considerations expressed in *De Canas*. It will be contended that so far as pre-emption is concerned, the Texas statute is precisely the type of local legislation which was contemplated by the Supreme Court in its desire to "reconcile 'the operation of both [state and federal] statutory schemes with one another.' "[24]

I. Pre-emption and *De Canas v. Bica*

A. Pre-emption

Historically, the pre-emptive nature of federal power is controlling in two instances. First, a state enactment will be invalidated whenever it deals with a subject matter over which Congress, in enacting similar legislation, has expressed its intent to be the sole legislative force in the area. This is commonly referred to as the "occupation" doctrine. Second, a state's attempt to regulate a given field will be invalidated, even if Congress has not expressed any pre-emptive intent, if enforcing the

Treatment of Aliens: Preemption or Equal Protection?, 31 STAN. L. REV. 1069, 1079-84 (1979).

21. Kane & Velarde-Muñoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Undocumented Children Access to Public Education*, 5 HASTINGS CONST. L.Q. 461 (1978) [hereinafter cited as Kane and Velarde-Muñoz]. For another version of the authors article, *see Right of Undocumented Children to Attend Public Schools in Texas*, 4 CHICAGO L. REV. 61 (1977).

22. *See* Doe v. Plyler, *supra* note 19, which held that section 21.031 violated the equal protection clause of the fourteenth amendment. *But see* Hernandez v. Houston Independent School District, *supra* note 19, which held that section 21.031 was not violative of equal protection.

23. The authors also argued that the statute violates equal protection and both procedural and substantive due process. A reply to their analysis based on those grounds is beyond the scope of this commentary, instead we focus solely on the pre-emption challenge.

24. Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963).

state statute will bring about a conflict with the federal standard. This is termed the "conflict" ground for pre-emption.[25] Of course, state attempts to regulate a field reserved to the federal government by the Constitution, such as interstate commerce, will be totally void of impact. This is not based on principles of pre-emption, however, and should not be so regarded.[26] Generally, pre-emption implies the existence of federal legislation.

The "occupation" doctrine differs from the "conflict" concept in several significant particulars. The scope of "occupation" is much more comprehensive. Where an intent to occupy the field is discerned, the state is prohibited from legislating even though the respective laws may coexist without conflicting, and the possibly enhancing effect of the state law will not rescue it from invalidation. Further, the two concepts diverge with respect to the focus of review. In a "conflict" analysis, the state law is examined in order to ascertain whether it stands as an obstacle to the achievement of a federal purpose.[27] The emphasis of an "occupation" analysis is upon the federal statute, first to determine whether an application of the occupation doctrine is warranted, and then to delineate the intended boundaries of such an occupation. Only then is the state statute scrutinized in order to determine whether it falls within the previously established perimeters. Additionally, before a finding of pre-emption by occupation is made, it must be reasonable to presume that Congress would have intended to preclude the state action in question.[28]

Federal occupation of the field may be manifested in several ways. First, and the most facile in application, Congress may expressly provide either in the statute itself or in the corresponding legislative history that it intends to supersede any state enactments in the particular area.[29] Second, the nature of the subject matter being regulated may be such that the two laws or regulatory schemes must either inherently conflict or be duplicative.[30] In such cases, the subject matter is considered to be "necessarily national in import,"[31] thereby rendering local regulation necessarily impossible. This occurs when Congress acts pur-

25. *See Pre-emption Doctrine, supra* note 2; Hirsch, *supra* note 2. *See also* Comment, *Pre-emption as a Preferential Ground: A New Era of Construction*, 12 STAN. L. REV. 208 (1959).

26. *See, e.g.*, Southern Pacific Co. v. Ariz. *ex rel.* Sullivan, 325 U.S. 761 (1945).

27. Perez v. Campbell, 402 U.S. 637 (1971).

28. Amalgamated Transit Union v. Byrne, 568 F.2d 1025, 1028 (3d Cir. 1977).

29. *E.g.*, Railway Labor Act § 2 Eleventh, 45 U.S.C. § 152 (1972).

30. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

31. Goldstein v. California, 412 U.S. 546, 554 (1973).

suant to an expressly granted power in the Constitution, such as the power to regulate copyrights. Finally, and what has proved to be the most difficult in application, congressional occupation may be implied.[32] The Court may look to a number of factors in determining when congressional pre-emptive intent is to be implied:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . [T]he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[33]

Both the "conflict" and the "occupation" concepts have undergone periodic variations in their application. Prior to 1941, the Supreme Court tended to avoid "expansive judicial assessments of federally regulated subject matter, transferring to the Congress primary responsibility for accomplishing pre-emption."[34] Under this permissive notion, once it was determined that a state was acting within its proper institutional sphere, any legislation enacted in furtherance of legitimate state interests was examined with a heightened judicial solicitude. As a result, the traditional grounds for pre-emption were modified. Congressional occupation of the field was not to be implied, but rather required a specific showing that it is "the clear and manifest purpose of Congress."[35] Similarly, pre-emption due to conflict with a federal scheme required the existence of an actual conflict.[36]

This permissive analysis prevailed until 1941, when the Supreme Court's decision in *Hines v. Davidowitz*,[37] began a period of expansive federal pre-emption. *Hines* involved the Alien Registration Act of 1940[38] and a Pennsylvania statute[39] containing a similar registration requirement but with the additional requirements that aliens carry identification cards and produce them upon demand. The Court departed from its prior approach to pre-emption and instead sought to

32. It is contended that *De Canas* has rendered this particular application obsolete. *See* note 8 *supra*.

33. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

34. *Pre-emption Doctrine, supra* note 2, at 627.

35. Rice v. Santa Fe Elevator Corp., *supra* note 33 at 230.

36. Farmers Educ. & Cooperative Union of America v. WDAU, Inc., 360 U.S. 525 (1959).

37. 312 U.S. 52 (1941).

38. Ch. 439, 54 Stat. 670 (repealed by Act of June 27, 1952, 8 U.S.C. §§ 1301-1306 (1970)).

39. PA. STAT. ANN. tit. 35, §§ 1801-1806 (Purdon Supp. 1940).

determine whether the Pennsylvania Alien Registration Act stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[40] *Hines* began a doctrinal shift from the presumption of validity of state regulation to a presumption of pre-emption by any concurrent federal legislation.[41] In contrast to the earlier, permissive pre-emption analysis, where *actual* conflict was required, the mere presence of a *perceived potential* conflict sufficed to oust the state from the legislative arena.[42] The "clear intent to occupy" standard was also abandoned, with the Court indulging in efforts to discern unarticulated congressional intent.[43] The result was the invalidation of many state enactments.

In contrast to this trend, recent Supreme Court decisions have once again breathed life into the state oriented pre-emption analysis characteristic of the pre-*Hines* decisions. In a "conflict" analysis, the Court will still consider the objectives of the federal and state statutes, but in light of the deferential attitude toward legitimate state interests, "conflicts, to merit judicial rather that cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial."[44] Moreover, even when a conflict, actual or potential, is apparent, the state enactment is to be pre-empted "only to the extent necessary to protect the achievement of the aims"[45] of the federal law. Whether the conflict in question will be characterized as substantial will depend upon whether the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[46]

The analysis of "occupation" has also reverted to its pre-*Hines*, state oriented approach. In addition to shifting the burden of proving pre-emptive intent to the challengers of the state enactment,[47] the Court has specifically indicated the return of the "clear intent" standard:

> 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

40. 312 U.S. at 67.

41. Townsend v. Swank, 404 U.S. 282 (1971); Free v. Bland, 369 U.S. 663 (1962).

42. *E.g.*, Pennsylvania v. Nelson, 350 U.S. 497 (1956).

43. *E.g.*, California v. Zook, 336 U.S. 725, 732-33 (1949).

44. New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 423 n.29 (1973).

45. Silver v. New York Stock Exchange, 373 U.S. 341, 361 (1963). *See also* Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973).

46. Florida Lime & Avocado Growers v. Paul, *supra* note 30, at 141.

47. New York Dep't of Social Servs. v. Dublino, *supra* note 44, at 415-16.

exercise of federal supremacy is not lightly to be presumed.[48]

In another context, the Court again emphasized that pre-emptive intent will not be presumed and state law will be upheld unless there is affirmative evidence, based on specific statutory language or the legislative history, that "Congress has unmistakably so ordained."[49]

Even evaluation of the subject matter area has undergone metamorphosis to the point where, although Congress has acted in furtherance of a specific constitutional grant of power, concurrent state laws will be pre-empted only where the state enactment will be "absolutely and totally *contradictory* and *repugnant*."[50] This circumstance will be present only when the federal act involves "matters which are *necessarily* national in import,"[51] and when, at the same time, an inescapable conflict exists between the two laws.[52] By 1976, the Court thus had laid the groundwork for the flourishing of coordinate state and federal legislative efforts. It was against this background that *De Canas v. Bica*[53] was decided.

B. De Canas

De Canas involved a challenge to a California statute which prohibited the employment of aliens "not entitled to lawful residence in the United States."[54] Under a provision which permitted civil suits for violations of the statute,[55] petitioners, a husband and wife who were lawful resident aliens, sued the respondents, a farm labor contractor and his foreman. They alleged that respondents had offered them continued employment, which petitioners accepted, leaving jobs they had held for a substantial period of time. Subsequently, respondents hired several illegal aliens, resulting in a surplus of workers. Petitioners were discharged in favor of the illegal aliens and sought reinstatement, an injunction against the respondents' continued, willful employment of illegal aliens, and punitive and compensatory damages based upon a charge of unfair competition.[56]

The trial court dismissed the complaint, finding section 2805 to be

48. 413 U.S. at 413, quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

49. Florida Lime & Avocado Growers v. Paul, *supra* note 30, at 142.

50. Goldstein v. California, 412 U.S. 546, 553 (1973), quoting THE FEDERALIST No. 32 at 241 (A. Hamilton) (B. Wright ed. 1961) (emphasis in original).

51. 412 U.S. at 554 (emphasis in original).

52. *Id.*

53. 424 U.S. 351 (1976).

54. CAL. LAB. CODE § 2805, *supra* note 7.

55. *Id.*

56. CAL. CIV. CODE § 3369 (West Supp. 1976); Appendix to Brief for Petitioners at 10a-12a, De Canas v. Bica, 424 U.S. 351 (1976).

an unconstitutional encroachment upon, and an impermissible interference with, a comprehensive federal regulatory scheme enacted pursuant to Congress' power over immigration. The California Court of Appeal affirmed,[57]interpreting section 2805 as an attempt to regulate the conditions for the admission of aliens into the country in disregard of the exclusive power of Congress to legislate in the area. Additionally, the Court of Appeal held that by virtue of the congressional enactment of the Immigration and Nationality Act,[58] any state regulation in this area was foreclosed.[59] This conclusion reflected the court's view that the INA was intended to be a comprehensive statutory scheme governing all aspects of immigration and naturalization, including the employment of aliens. After the California Supreme Court denied review,[60] the United States Supreme Court granted certiorari[61] to determine "whether § 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."[62]

In a unanimous opinion,[63] the Supreme Court, through Justice Brennan, first addressed the issue of immigration and the exclusive nature of Congress' power in that area. The Court acknowledged that notwithstanding this exclusive power, the states had never been precluded from enacting statutes regulating aliens.[64] In this respect, the Court made a significant distinction between state regulation of immigration, which would be an invalid usurpation of power in an area reserved to Congress by the Constitution, and state regulation of aliens, an area in which the states possess legislative power.[65] Immigration was narrowly defined as a "determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[66] Further, although the Court recognized that

57. De Canas v. Bica, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974).

58. Immigration and Nationality Act §§ 101-407, 8 U.S.C. §§ 1101-1503 (1970) [hereinafter cited as INA].

59. 40 Cal. App. 3d at 979, 115 Cal. Rptr. at 446.

60. 40 Cal. App. 3d at 981, 115 Cal. Rptr. at 447 (Justice Mosk dissented).

61. 422 U.S. 1040 (1975).

62. 424 U.S. 351, 352-53 (1976).

63. Justice Stevens did not participate in the consideration or decision of the case. *Id.* at 352.

64. *Id.* at 355. The Court further stated that had the Constitution of its own force required pre-emption of such state regulation, there would have been no need in prior cases to discuss relevant congressional enactments.

65. *Id.*

66. *Id.*

the regulation in question might have a "purely speculative and indirect impact on immigration,"[67] that fact alone was held insufficient to render the legislation constitutionally impermissible. The Court thus came to the preliminary conclusion that under the Constitution's notion of institutional separation of powers between the federal and state governments, "absent congressional action, § 2805 would not be an invalid state incursion on federal power."[68]

Having determined that the states are not conclusively prohibited from legislating with respect to aliens, the Court proceeded to consider whether Congress had, by enacting federal legislation in the form of the INA, intended to "occupy the field." By virtue of the Supremacy Clause,[69] the practical effect of such an intent would be to render any state action invalid, regardless of any possibly enhancing effect it might have.[70] The test employed by the Court in this portion of its analysis was derived from *Florida Lime & Avocado Growers v. Paul*,[71] which required that the state law be upheld unless "the nature of the regulated subject matter permits no other conclusion or [unless] Congress has unmistakenly so ordained."[72]

The Court refused to hold pre-empted section 2805 as an unacceptable subject for state legislation, recognizing the broad police power of the state to regulate employment relationships in order to protect the workers within its borders.[73] The Court offered several examples of the impact of illegal alien workers upon California's economy as justification for this deference. These included depriving citizens and legally admitted aliens of employment, depression of wage scales and deterioration of working conditions, and the detrimental effect illegal aliens have upon the effectiveness of labor unions.[74] The thrust of section 2805(a) was found to be the elimination of these local problems, and pre-emption based on the subject matter was therefore inapplicable.

The Court next reviewed the congressional intent in enacting the

67. *Id.* at 355-56. The impact offered by the respondents was that illegal aliens normally attracted to California in search of employment, would now migrate to other states that had no employer sanction legislation. Brief for Respondent at 5.

68. *Id.* at 356.

69. U.S. CONST. art. VI, § 2. *See* note 1 *supra.*

70. *See* notes 26-32 and accompanying text *supra.*

71. 373 U.S. 132, 142 (1963).

72. 424 U.S. at 356, quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

73. 424 U.S. at 356-57.

74. *Id.* at 357.

INA,[75] and the consistency of the statute with the California legislation. Initially, the Court noted that unless the "clear and manifest purpose of Congress" in enacting the INA was to completely foreclose any state legislation of this type, such an intention would not be presumed.[76] In attempting to ascertain congressional intent, the Court examined the language, legislative history, scope, and detail of the INA. This resulted in a finding that the central concern of the Act was the terms and conditions of entry into the country and the subsequent treatment of aliens lawfully residing therein.[77] The Court found no indication of an intent to preclude state regulation of "aliens in general, or the employment of illegal aliens in particular."[78] Moreover, given the complexity of the matter addressed, the comprehensiveness of the federal statutory scheme did not necessarily show that questions of the employment of illegal aliens were within its ambit.[79] As further evidence of congressional intent to allow concurrent state legislation, the Court focused on the Farm Labor Contractor Registration Act,[80] which contains specific provisions prohibiting the employment of illegal aliens and, most significantly, mandating compliance with "appropriate State law and regulation."[81]

The Court discussed *Hines v. Davidowitz*[82] and *Pennsylvania v. Nelson*,[83] relied on by the respondents, and distinguished those cases based on several factors:

1. Both federal statutes at issue in those cases dealt with the specific area the states were attempting to regulate;
2. In those cases there was an absence of any affirmative evidence of congressional sanctioning of state legislation;
3. The interest in those cases was the predominately federal interest in immigration and foreign affairs, whereas the state enactment in *De Canas* was fashioned to remedy local interests of great import; and
4. In those cases the burden was imposed upon lawfully admitted aliens, causing a clear conflict with the federal power over

75. INA, *supra* note 58.
76. 424 U.S. at 357.
77. *Id.* at 359.
78. *Id.* at 358.
79. *Id.* at 359. The Court quoted language from New York Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973): "Given the complexity of the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent." *Id.* at 415.
80. 7 U.S.C. §§ 2041-2053 (1973).
81. 7 U.S.C. § 2051 (1973).
82. 312 U.S. 52 (1941).
83. 350 U.S. 497 (1956).

immigration.[84]

Finally, the Court remanded the case to the California courts for determination of whether section 2805 " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the INA.[85] The Court noted that under federal law, certain classes of non-resident aliens were entitled to employment, whereas section 2805(a) made no provision for such persons.[86] The Court recognized, however, that the language barring the employment of illegal aliens had been given a restrictive interpretation which, as a practical matter, conformed to the federal standard.[87] Thus, as was previously observed, the conflict between the federal and state statutes was "illusory at best,"[88] and "in the end immaterial."[89] The importance of *De Canas* lies in the fact that "it is the first unanimous decision in which the Court has refused to presume pre-emptive intent in the mere enactment by Congress of a comprehensive statutory scheme and instead required some textual evidence of this intent, either in the legislation or its history."[90]

II. The Texas Statute

Congressional power over immigration is unquestionably exclusive.[91] *De Canas*, however, made it clear that regulation of aliens in general, and of illegal aliens in particular, is not to be equated with the regulation of immigration.[92] In that respect, state legislation affecting illegal aliens is not constitutionally proscribed absent federal legislation.[93] From that premise *De Canas* established an analysis for pre-emption questions. In the face of federal legislation, such as the INA and the Elementary and Secondary Education Act,[94] this approach consists of several tests. A local statute will be pre-empted:

1. If "Congress has unmistakably so ordained":[95] if there is an

84. 424 U.S. at 362-63.

85. *Id.* at 363, quoting Hines v. Davidowitz, *supra* note 37, at 67. An example of a non-resident alien clearly entitled to work would include employees of a foreign embassy or consulate.

86. 424 U.S. at 364.

87. *Id.*

88. Catz & Lenard, *supra* note 8, at 319.

89. *Id.*

90. *Id.* at 320.

91. U.S. CONST. art. I, § 8, cl. 4.

92. *See* text accompanying note 65 *supra.*

93. *See* text accompanying note 68 *supra.*

94. 20 U.S.C. §§ 241a-244a (1970 & Supp. V 1975).

95. 424 U.S. at 356.

expressed pre-emptive intent by Congress;
2. If "the nature of the regulated subject matter permits no other conclusion"[96] but pre-emption: if the subject matter is exclusively federal in nature;
3. If it violates the Supremacy Clause by standing "as an obstacle to the accomplishments and execution of the full purposes and objects of Congress:"[97] if there is a conflict with congressional purposes.

A. Kane and Velarde-Muñoz

In their article, Kane and Velarde-Muñoz applied these tests and concluded that section 21.031 should be held pre-empted by federal legislation. Addressing the question of whether there was congressional intent to pre-empt, they relied heavily upon Title I of the Elementary and Secondary Education Act of 1965. They contended that by defining "children" under the Act to mean "all children aged five through seventeen inclusive," Congress manifested its clear intent to assure the undocumented alien children of a free public education.[98] Any state regulation to the contrary, they argued, would necessarily be inconsistent with this congressional intent.

Kane and Velarde-Muñoz then asserted that section 21.031 "suffers even more seriously"[99] under the test of conflict with congressional purpose. As their primary contention they pointed to a potentially conflicting situation where, under the Texas statute, the "state is allowed to determine a person's immigration status."[100] As another example of frustration of congressional purpose, they cited the relationship between immigration and international relations,[101] which are exclusively federal concerns. Specifically, they focused on an amendment[102] to the Charter of the Organization of American States,[103] which provides:

> The member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:
>
> a. Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State, it shall be

96. *Id.*
97. *Id.* at 363.
98. Kane & Velarde-Muñoz, *supra* note 21, at 502.
99. *Id.* at 502.
100. *Id.* at 503.
101. *Id.* at 504.
102. Protocol of Amendment to the charter of the Organization of American States "Protocol of Buenos Aires", February 27, 1967, [1970] 21 U.S.T. 607, T.I.A.S. No. 6847.
103. 2 U.S.T. 2394, T.I.A.S. 2361.

without charge . . . .[104]

Section 21.031, Kane and Velarde-Muñoz stated, is so "contrary to the spirit of this international agreement"[105] that it might lead to an international controversy. They also advanced the policy argument that the federal government should assume more responsibility for education,[106] thus eliminating the need for state statutes like section 21.031.

B. Doe v. Plyler

At least one federal district court has generally agreed with Kane and Velarde-Muñoz's contention that the Texas education statute is pre-empted by federal law. Section 21.031 was recently challenged in the United States District Court for the Eastern District of Texas. In *Doe v. Plyler*,[107] the district court interpreted the primary purpose of Section 21.031 as providing funds for the education of United States citizens and legally admitted aliens.[108] The court also found that the purpose of a Tyler Independent School District policy implemented pursuant to the state statute was "to prevent the potential drain on local educational funds should Tyler become a haven for illegal aliens."[109] The court found that the statute suffered from a total lack of rationality between its objectives and the means chosen to achieve those objectives, and held section 21.031 unconstitutional as a violation of the Fourteenth Amendment guarantee of equal protection.

Although only indulging in dicta, the court also expressed the opinion that "under the third pre-emption principle enunciated in *De Canas*,"[110] section 21.031 would be pre-empted because it frustrated the purposes and objectives of the congressional scheme embodied both in the INA and in federal laws relating to funding and discrimination in education.[111] The court determined that one of the purposes of the immigration law was to limit the number of aliens entering the United States each year, and that the preferred manner of accomplishing this goal was by detection at the border.[112] The court found that Texas' attempt to withhold free public education from illegal aliens frustrated this purpose because it allowed illegal aliens to enter and then to be

104. 21 U.S.T. 607 T.I.A.S. No. 6847, art. 47.
105. Kane & Velarde-Muñoz, *supra* note 21 at 504.
106. *Id.* at 506.
107. 458 F. Supp. 569 (E.D. Texas 1978) (per Judge Justice).
108. *Id.* at 575.
109. *Id. See also* note 154, *infra.*
110. 458 F. Supp. at 590. *See* text accompanying note 97 *supra.*
111. *Id.*
112. *Id.* at 591.

treated like second-class citizens.[113]

The district court approved the educational policy argument articulated by Kane and Velarde-Muñoz[114] when it perceived a conflict between the effect of section 21.031 and this country's "strong congressional commitment to education of disadvantaged children."[115] In support of its conclusion the court also cited the declaration of policy set forth in the ESEA[116] and the Protocol of Buenos Aires, amending the Charter of the Organization of American States,[117] and observed that federal law "prohibits denial of education opportunity to non-English speaking children through failure to provide bilingual education."[118] Finally, the court noted that "[n]othing in the Immigration and Nationality Act indicates that additional burdens on illegal aliens are to be imposed at the whim of the various states."[119]

III. Criticism of Kane and Velarde-Muñoz and *Doe v. Plyler*

A. Pre-emptive Intent of Congress

As a preliminary premise, and one which is crucial to this analysis, it must be recalled that the Court in *De Canas* noted that any pre-emptive intent must be indicated in clear and manifest terms, and that such intent will not be presumed.[120] In establishing that principle, the Court provided a distinct and manageable method of pre-emption analysis: unless Congress expressly provides for pre-emption, either explicitly in the statute, by its language, or in the legislative history, any suggestion of pre-emptive force will be rejected. This constitutes a dramatic and long overdue departure from prior judicial decisions in which the Court struggled in efforts to determine whether there was an unexpressed intent to pre-empt.

In this phase of the analysis, then, it must be determined whether Congress, pursuant to its power to regulate all aspects of immigration, intended to prohibit any state legislation such as section 21.031. The answer to this inquiry seems clear. There is nothing in the language of the INA or in its legislative history to indicate any pre-emptive intent. Certainly the statute is silent as to the right of the state to impose re-

113. *Id.*
114. *See* text accompanying note 106 *supra.*
115. 458 F. Supp. at 591.
116. *Id. See also* Kane & Velarde-Muñoz, *supra* note 21, at 502.
117. *See* note 103 *supra.*
118. 458 F. Supp. at 591.
119. *Id.* at 592.
120. 424 U.S. at 357.

strictions upon children of illegal aliens attending public schools. Further, although the Court in *De Canas* held only that in enacting the INA Congress did not ordain pre-emption of state regulation of employment of illegal aliens, the Court did establish that the central concern of the INA was the terms and conditions of entry into the country and subsequent treatment of aliens lawfully residing in this country.[121] Presumably, the state's concern in the area of education is at least as great as its interest in employment, which the Court placed among the "mainstream of . . . police power regulation."[122] It seems, therefore, that after *De Canas* the mere existence of the INA is insufficient standing alone to mandate pre-emption based upon some nebulous concept of unexpressed congressional intent.

Both Kane and Velarde-Muñoz and the *Plyeler* court felt that the Texas statute must fall under the pre-emptive force of Title I of the ESEA. Their contention misses the mark for several reasons. First, Title I of the ESEA is simply a funding measure for a comprehensive aid-to-state-education program.[123] This program is voluntary in terms of state participation; the Act simply establishes certain eligibility criteria for the states to follow in order to qualify for the federal funds. The program is designed to be administered by local public educational officials,[124] who have the primary responsibility for designing and effectuating a Title I program.[125] This plan is then submitted for approval to a "state educational agency,"[126] which insures that the program will meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low income families.[127] If the local plan is approved at the state level, it is then submitted to the United States Commissioner of Education,[128] who is responsible for administering the program and awarding federal funds.[129] In order to receive Title I funds, the State Attorney General

121. *Id.* at 359.
122. *Id.* at 356.
123. The legislative history of the ESEA provides a discussion of the purpose of the Act: "The President of the United States in a statement issued on April 1, 1965, the day the bill was reported by the subcommittee to the full Committee on Labor and Public Welfare, succinctly epitomized the purpose of this legislation. He said: 'This bill has a simple purpose: To improve the education of young Americans . . .' " S. REP. NO. 146, 89th Cong., 1st Sess. 1, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 1446, 1448.
124. 45 C.F.R. §§ 100b.10-.15 (1978).
125. 20 U.S.C. § 241e (1976).
126. *Id.*
127. *Id.*
128. *Id.* at § 241f.
129. *Id.* at § 241b.

must also submit and sign an assurance to the United States Commissioner of Education stating that all Title I regulations will be observed even if they conflict with state law.[130] It appears, therefore, that if state law prevented a state or local agency from compliance with all relevant Title I requirements, and the state could or would not comply, the funds would be withheld by the Commissioner.

Assuming, then, that the ESEA mandates the availability of free education to all children, including children of illegal aliens, the net effect of the Texas statute would be to prevent the state from fulfilling the requirements of Title I of the Act. Texas would, as a result, be ineligible for any Title I funds,[131] and would then be forced to make a political decision as to the desirability of either repealing the statute or depriving *all* of its educationally disadvantaged children of the benefit of Title I funds.[132] This choice has no bearing whatsoever on the issue of pre-emption. Instead, it is a matter of meeting the requirements of ESEA or not receiving funds under that Act.

The ESEA is an attempt to provide liberal educational benefits, and Congress has chosen to do so by providing incentives for the states to participate voluntarily in the program. But until such time as the state has chosen to participate, it is virtually free to provide whatever manner of education it chooses. Of course, other constitutional prohibitions might bar improper legislation, but that does not implicate a pre-emption analysis. Accordingly, although the *Plyler* court may have been responding to great moral pressure, its legal application of the pre-emption doctrine was erroneous and presents a situation where the court strayed from what seems to be "sound and established constitutional principles in order to reach a just result in a particular case; this gives meaning to the ancient warning that 'hard cases make a bad law.' "[133]

The *Plyler* court found no indication in the INA that states may impose additional burdens on aliens. But since *De Canas*, where the Court noted that state legislation would not be presumed to be foreclosed absent a clear purpose of Congress, the argument advanced by the *Plyler* court has not been significant in establishing pre-emptive intent. Additionally, as *De Canas* and its predecessors clearly estab-

130. *Id.* at § 241f(a)(1).

131. *Id.* at § 241j. *See also* NATIONAL ADVISORY COUNCIL ON THE EDUCATION OF DISADVANTAGED CHILDREN, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 29 (1972), where the Council specifically recommended and urged strong enforcement of all Title I regulations, even if conflicting with state law.

132. *See also* Rosado v. Wyman, 397 U.S. 397, 420-23 (1970).

133. Vlandis v. Kline, 412 U.S. 441, 459 (1973) (Burger, C.J., dissenting).

lished, the contention of pre-emption based upon the comprehensiveness of the congressional legislative scheme has been uniformly rejected.[134] As the Supreme Court stated in a different field of inquiry: "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem."[135] The *De Canas* Court acknowledged that the complexity of the subject of immigration and naturalization required comprehensive legislation, yet refused to find any pre-emptive intent regarding state regulation of illegal aliens.[136]

The *Plyler* court believed that additional support for the pre-emption of the Texas statute could be gained from consideration of *Kent v. Dulles*[137] in that "[t]he questions of section 21.031's consistency with congressional intent and of its validity under the equal protection clause are intimately related. Congressional sensitivity to the constitutional rights of those it regulates is traditionally assumed by courts in assessing congressional intent."[138] But the *Plyler* court's application of this principle to the facts before it was of doubtful validity. The court intimated that since the illegal aliens had established roots in this country, they, like legal aliens, were entitled to the equal protection of the laws, including the right to free education. Even assuming that free education is a constitutionally protected right of legal aliens, it is not clear that illegal aliens can claim the same right simply because they have managed to reside illegally in the country for some time. And even if that were true, a statute's invalidity with respect to the equal protection guarantee is not a basis for pre-emption.

Kane and Velarde-Muñoz pointed out that the *De Canas* Court cited the Federal Farm Labor Contractor Registration Act as an example of the lack of congressional intent to prohibit state regulation of illegal alien laborers.[139] They deemed it significant that there is no federal statute that similarly contemplates state regulation of the education of undocumented children.[140] But in doing so, Kane and Velarde-Muñoz overestimated the *De Canas* Court's reliance on the Farm Labor Contractor Registration Act for its pre-emption analysis. The

134. 424 U.S. at 359-60.
135. New York Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973).
136. 424 U.S. at 359.
137. 357 U.S. 116 (1958).
138. 458 F. Supp. at 591.
139. 424 U.S. at 361-62.
140. Kane & Velarde-Muñoz, *supra* note 21 at 502.

FLCRA was not considered in the Court's determination of congressional intent. The Court had already found, before even turning to the FLCRA, that there was no congressional intent to pre-empt statutes like California's section 2805. That state action was permissible under the FLCRA was not indispensable to the finding of a lack of congressional intent to pre-empt. Instead, the FLCRA was used only as an example to demonstrate that the Court's decision was reasonable. Therefore, that Kane and Velarde-Muñoz have found no federal statute allowing state regulation of undocumented aliens is not a significant, much less a controlling, consideration in a pre-emption analysis.

There is a dearth of evidence of any congressional intent to prohibit state legislation like Texas' section 21.031. Therefore, in light of the Supreme Court's hesitancy to strike down facially valid state laws absent a clear showing of a congressional mandate, the arguments put forth by Kane and Velarde-Muñoz and by the *Plyler* court fall far short of the required "clear manifestation of intention" to supersede the otherwise legitimate exercise of power by the state.[141]

B. Exclusively Federal Subject Matter

Under the second of the *De Canas* criteria for pre-emption, the subject matter of the state and federal laws must be of such a nature that any state regulation must either duplicate or conflict with the federal regulation.[142] Such duplication or conflict must be inherent in the federal regulatory scheme in order for local regulation to be precluded. In *De Canas*, the employment of aliens was held not to be a subject matter which "permits no other conclusion"[143] than pre-emption. This was based on the broad authority enjoyed by the states, under their police power, to regulate and control the employment relationship.[144] In acting to remedy the extensive impact of illegal aliens upon the local economy, California was "certainly within the mainstream of such police power regulation."[145]

The nature of the subject matter of the Texas statute, education, is also one which does not preclude concurrent local regulation. While Kane and Velarde-Muñoz urged that the federal government should

141. New York Dep't of Social Servs. v. Dublino, *supra* note 130, at 413, quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

142. 424 U.S. at 356. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

143. 424 U.S. at 356.

144. *Id.*

145. *Id.*

assume more responsibility for education,[146] this responsibility has historically been left to the states, and has traditionally been a subject of state and local concern under the police powers. As the Supreme Court has noted when dealing with local regulation of education: "The very complexity of the problems of financing and managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect."[147] Although the cases establishing this local supremacy in the area of education have arisen mainly in the area of equal protection,[148] the overriding principles still apply. These principles clearly establish the lack of "doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education."[149] In a decision plainly illustrative of the deference to local control over public education, the Supreme Court unmistakably laid this issue to rest: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[150]

C. Conflict with Congressional Purposes

The third test enunciated in *De Canas* requires a court to examine the two statutes and then to determine the existence and extent of any conflict between them.[151] If the state law is found to conflict totally with the federal law, pre-emption is compulsory. On the other hand, the state law should be upheld unless the purposes and objectives of the federal scheme will be frustrated.[152] Kane and Velarde-Muñoz and the *Plyler* court both stressed the close relationship between matters of immigration and international relations and contended that the Texas statute somehow conflicts with an amendment to the OAS Charter. But the Texas statute and the Charter Amendment are totally unrelated,

146. *See* note 106 and accompanying text *supra*.

147. San Antonio School District v. Rodriguez, 411 U.S. 1, 42 (1973), quoting from Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972).

148. *E.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

149. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).

150. Milliken v. Bradley, 418 U.S. 717, 741-42 (1974).

151. 424 U.S. at 363. *See* Perez v. Campbell, 402 U.S. 637, 644 (1971).

152. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

and, as a matter of statutory interpretation, the Charter Amendment does not require pre-emption of the statute.

The purposes of the OAS as set forth in the Charter, which was signed at Bogatá in 1948, were only to elevate and promote the respective countries' economic and social conditions by establishing certain goals that each country would strive to achieve within its own system. There is no intimation anywhere in the Charter, nor in the Protocol, indicating an intent that it be an agreement of non-discrimination between the countries. Moreover, the Protocol was not intended to achieve or mandate the contrary; one of the expressed purposes was framed in terms of countries "defending their sovereignty, their territorial integrity . . . ."[153] This was simply one of many agreements of the kind commonly entered into by countries whereby they espouse their intention to elevate their own economic and social status by adopting certain goals. The spirit of this Agreement is not frustrated by Texas' rational discrimination against illegal aliens since it was not intended to address that issue. The Agreement does not carry any force of pre-emption with respect to section 21.031.

Kane and Velarde-Muñoz believed that the Texas statute "requires a state or local agency to inquire into and determine each child's immigration status," and that this inquiry causes a conflict with congressional purpose.[154] Actually, their belief is without a basis in fact. A person's immigration status is determined by federal law,[155] and Texas would only inquire to ascertain the nature of the alien's status. This in no way encroaches upon any exclusive federal activity. Rather, it is a legitimate inquiry that furthers the policies of the INA by removing another incentive for illegal aliens to immigrate.

De Canas clearly indicated that the central concern of the INA was the "terms and conditions of admission to the country."[156] It would be an unreasonable interpretation of section 21.031 to say that it

153. 21 U.S.T. 659.

154. Kane & Velarde-Muñoz, *supra* note 21 at 501.

155. In July, 1977, the Board of Trustees of the Tyler School District adopted the following policy, which clearly relies on federal law, and does not require an independent determination of immigration status. "The Tyler Independent School District shall enroll all qualified students who are citizens of the United States or legally admitted aliens, and who are residents of this school district, free of tuition charge. Illegal alien children may enroll and attend schools in the Tyler Independent School District by payment of the full tuition fee. A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." 458 F. Supp. at 572.

156. 424 U.S. at 359.

is aimed at controlling immigration. Its main concern is a fiscal one, and, as such, any impact it has upon immigration would be indirect Such indirect impact would not render the state law constitutionally prohibited.[157] The *Plyler* court saw the Texas statute as frustrating the purposes of the INA by allowing illegal aliens to enter and then be treated as second class citizens.[158] This logic is strained at best, for it is difficult to imagine how Texas, in making free public education unavailable to illegal aliens, provides any incentive for such persons to immigrate. In fact, it is evident that the two schemes are directed at dissimilar goals, but with similar effects the Texas statute is aimed at preserving the fiscal integrity of its educational funding. The immigration laws are aimed at controlling the "terms and conditions of admission to the country and the subsequent treatment of aliens *lawfully* in this country."[159] In light of their divergent thrusts, it is hard to conceptualize any possible conflict between the two.

The challenged Texas statute discriminates on the basis of illegal immigration status which is both rational and constitutional. Since there is no conflict with any federal statute, and since section 21.031 thwarts no significant federal scheme, pre-emption based on conflict or interference is inappropriate.

Conclusion

The federal pre-emption doctrine has undergone several periods of evolution, its focus shifting from decisions favoring federal interests to those favoring state interests. Recent Supreme Court decisions in the area of federal pre-emption analysis such as *De Canas v. Bica* have revealed a reluctance to find that Congress has acted to occupy a regulatory field. As a result, there is a great deal of permissible state power to regulate.

In *De Canas* the Supreme Court removed the spectre of pre-emption on the basis of an obscure notion of implied congressional intent, leaving only objective factors to be applied. These factors require a court to determine whether state power to regulate is per se pre-empted by congressional power. If not, then pre-emption will be found only where Congress has explicitly so provided,[160] where the nature of the subject matter is necessarily national and no other conclusion but pre-

157. *Id.* at 355-56.
158. 458 F. Supp. at 591.
159. 424 U.S. at 359.
160. *See* text accompanying note 95 *supra.*

emption is possible,[161] or where the state law ineluctably conflicts with or frustrates the "accomplishments and execution of the full purposes and objectives of Congress."[162]

De Canas thus established a mode of pre-emption analysis which is capable of uniform application. The proper starting point of such an analysis must be that the historic police powers of the state should be preserved, especially where the field is one traditionally occupied by the states, as is the field of education. Then, unless it can be demonstrated that Congress has expressed a clear and manifest purpose to occupy an entire regulatory field, a court should be reluctant to invalidate the state act. The fact that this analysis has been twice misapplied in the examination of section 21.031 is basically a reflection of the highly volatile and morally troublesome subject of illegal aliens and their children. Unless an appropriate federal response to this problem is enacted, states will continue in their attempts to insulate themselves from the potential impact of illegal aliens.

It is one thing for a state statute to be invalidated as being in direct conflict with an Act of Congress where direct repugnance or conflict is demonstrated. It is quite another matter for the courts to strike down state legislation, which the state could otherwise enact, by use of the metaphor "occupied the field." Unless Congress expressly states in the statute or the corresponding legislative history that it intends to preempt state involvement in the subject matter, the courts should abstain from invalidating state law unless it clearly conflicts with federal law or would frustrate a federal statutory scheme, or unless from the totality of the circumstances it is clear that Congress has sought to occupy the field to the express exclusion of the states.

Until such exclusive federal legislation develops, however, statutes such as section 21.031 should survive the *De Canas* pre-emption test since Congress has not expressly indicated an intent to occupy the field, since the subject matter is clearly not national, and since there is no objective demonstration that the statute stands as an obstacle to the accomplishment of congressional purpose. It seems, therefore, that in future analyses of similar laws under the pre-emption doctrine as developed by *De Canas*, the words of Chief Justice Burger should be kept in mind:

> The urge to cure every disadvantage human beings can experience exerts an inexorable pressure to expand judicial doctrine. But that urge should not move the Court to erect standards that

161. *See* text accompanying note 96 *supra*.
162. *See* text accompanying note 97 *supra*.

are unrealistic and indeed unexplained for evaluating the constitutionality of state statutes.[163]

163. Vlandis v. Kline, 412 U.S. at 463.