FEDERALISM'S TUG OF WAR: ALABAMA'S IMMIGRATION LAW AND THE SCOPE OF STATE POWER IN IMMIGRATION

I. INTRODUCTION

In June 2011, the Alabama legislature passed and Governor Robert Bentley signed the Beason–Hammon Alabama Taxpayer and Citizen Protection Act (ATCPA).[1] Every state considered immigration policy during its 2011 legislative session,[2] and Alabama became part of a growing number of states to pass laws attempting to reduce activity by undocumented persons within state lines.[3] The law has evoked a strong

1. Beason–Hammon Alabama Taxpayer and Citizen Protection Act (ATCPA), No. 2011-535, 2011 ALA. ACTS ____ (codified as amended at ALA. CODE §§ 31-13-1 to 31-13-30, 32-6-9).

2. Press Release, Nat'l Conference of State Legislatures, States Continue to Step Up to the Plate on Immigration Issues, (Aug. 9, 2011), http://www.ncsl.org/default.aspx?tabid=23361.

3. *See* GILLIAN JOHNSTON & ANN MORSE, NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (2011),

response among immigrants and nonimmigrants alike, as immigrants have boycotted businesses and people have taken to the streets to protest the law.[4] Looking beyond the emotional response, the ATCPA and similar state laws raise myriad legal questions. These laws pose particularly difficult questions about the role of state power to supplement and extend federal legislation.

Courts evaluate federalism issues associated with state regulations by employing preemption analysis under the Supremacy Clause.[5] Preemption addresses state and federal relations in two respects—the powers traditionally left to states generally and the powers Congress specifically leaves to the states after passing legislation.[6] Courts have reached disparate conclusions on whether state regulation of immigrant activity is preempted by Congress or an exercise of the traditional state police power remaining with the states. This Note contends that the Supreme Court's Commerce Clause cases, which have considered these difficult questions of federalism, can assist courts in developing a more consistent answer on the scope of the state police power. The concepts of federalism, the Commerce Clause, and immigration are historically intertwined and retain contemporary relevance.[7] Furthermore, this Note argues that the federal immigration laws leave states with extensive power to regulate immigrant activity within their borders. However, that power to regulate may be circumscribed by the dormant Commerce Clause. Thus, the Commerce Clause is relevant both to determine the expanse of state power and to ascertain its limits.

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http://www.ncsl.org/default.aspx?tabid=21857. In 2005, just 300 bills were introduced and 39 were enacted, but in 2010, more than 1400 bills were introduced and 208 were enacted into law. *Id*.

4. *See* Eric Velasco, *Marchers Silently Protest New Alabama Immigration Law in Downtown Birmingham*, THE BIRMINGHAM NEWS (June 26, 2011, 9:04 AM), http://blog.al.com/spotnews/2011/06/marchers_silently_protest_new.html; *see also* Kim Chandler, *Hispanics Urged to Boycott Schools, Work and Shopping to Protest Alabama's New Immigration Law*, THE BIRMINGHAM NEWS (Oct. 12, 2011, 11:11 AM) http://blog.al.com/spotnews/2011/10/hispan ics_urged_to_boycott_sch.html.

5. *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1299–1300 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, *dismissed in part*, *remanded in part*, 691 F.3d 1269 (11th Cir. 2012).

6. *Id*. at 1300–01.

7. *See* Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 745 (1996) (discussing the historical analysis of immigration and federalism through the Commerce Clause).

II. THE ATCPA: A COMPREHENSIVE STATE REGULATION OF UNDOCUMENTED IMMIGRANTS[8]

The ATCPA, more so even than other extensive state laws, seeks to utilize the full resources of state law to detect unlawful aliens within Alabama. The law's broad scope adds to its complexity, and this Note distills the sections into four types of provisions based on particular aspects of state law. In May 2012, the Alabama legislature readdressed the law by modifying a number of the provisions.[9] Although these specific modifications may affect the constitutionality of particular sections, they do not impact the central purpose of the regime enacted in 2011: to utilize multiple aspects of available state law to influence immigrant activity.

One series of provisions (Class I) seeks to engage in cooperative federalism, prohibiting a state or local entity from enacting policies that limit "communication between its officers and federal immigration officials" and requiring the Attorney General to attempt to negotiate an agreement with the Department of Homeland Security (DHS) to enforce immigration laws.[10] These provisions correspond closely with applicable federal law and were not specifically challenged by the United States in its preliminary injunction suit.[11]

A second set of provisions (Class II) imposes limitations on aliens directly. The ATCPA denies public benefits to illegal aliens (with narrow exceptions) and specifically prohibits undocumented aliens from enrolling in or attending "any public postsecondary education institution in this state."[12] The ATCPA also imposes a series of penalties on aliens, including establishing a state crime for "willful failure to complete or carry an alien registration document" pursuant to the applicable federal law.[13] It is also "unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state."[14] Another provision prohibits aliens from entering into a "business transaction" with state or

8. There is considerable debate over the most appropriate terminology to refer to persons unlawfully within the United States. This Note attempts to employ different terms in different places. However, it will use the term "illegal immigration" frequently, as this is commonly used within the ATCPA and commonly used by Alabamians to describe and discuss the ATCPA.

9. *See* Act of May 16, 2012, No. 2012-491, 2012 ALA. ACTS ____ (amending ALA. CODE §§ 31-13-3 to 31-13-30, 32-6-9, 32-6-10.1).

10. ATCPA §§ 4–6.

11. *See generally* United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, *dismissed in part, remanded in part*, 691 F.3d 1269 (11th Cir. 2012); *see also* Complaint, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746-SLB).

12. ATCPA §§ 7–8.

13. *Id*. at § 10.

14. *Id*. at § 11.

local government, which essentially denies certification for unlawful aliens in various fields requiring a state or municipal license.[15]

A third set of provisions (Class III) provides directives to law enforcement and other state officials. All public schools are required to "determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program."[16] The secretary of state and local county election officers are required to ascertain whether a prospective voter has fulfilled the citizenship requirements.[17] The law also requires law enforcement to make a "reasonable attempt . . . , when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation" if the officer has a "reasonable suspicion . . . that the person is an alien who is unlawfully present in the United States."[18] Law enforcement is also required to ascertain the legal status of a person "charged with a crime for which bail is required, or is confined for any period in a state, county, or municipal jail."[19] Officers are also required to transport a person arrested for driving without a license to a magistrate and to inquire into that person's legal status.[20]

A fourth set of provisions (Class IV) regulates other actors, primarily businesses that support or employ illegal aliens. The ATCPA places a series of requirements on recipients of any government "contract, grant, or incentive," including enrollment in a voluntary federal program to verify the legal status of aliens (E-Verify[21]) and imposes sanctions for failure to comply with the requirements.[22] Section 15 establishes licensing penalties for businesses that "knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama."[23] Businesses are required to enroll in E-Verify and could face

15. *Id*. at § 30.
16. *Id*. at § 28.
17. *Id*. at § 29.
18. *Id*. at § 12.
19. *Id*. at § 19.
20. *Id*. at § 18.
21. The E-Verify program involves an online comparison of I-9 employment information with records from the Department of Homeland Security and the Social Security Administration to determine legal status. The program is currently used by 387,000 employers in the U.S., on a largely voluntary basis. U.S. Citizenship and Immigration Services, *What is E-Verify?*, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VgnVCM1000004718190aRCRD&vgnextchannel=e94888e60a405110VgnVCM1000004718190aRCRD (last updated July 18, 2012).
22. ATCPA § 9.
23. *Id*. at § 15(a).

suspension of their business licenses if they fail to comply.[24] The ATCPA also prohibits businesses from deducting wages to aliens as a "business expense for any state income or business tax purposes in this state"[25] and establishes a cause of action for lawful job applicants to sue employers who hire undocumented aliens.[26] Another section of the law voids any contract between a party and an illegal alien, with limited exceptions.[27] The ATCPA establishes a state crime that parallels the federal crime to "[c]onceal, harbor, or shield . . . an alien from detection in any place in this state," as well as crimes for encouraging aliens to come to Alabama or transporting an alien within the state.[28] The law also establishes a set of criminal penalties for those who deal in "false identification documents."[29]

The ATCPA has been extensively reviewed already by lower federal courts.[30] The U.S. Department of Justice (DOJ) challenged the law in the Northern District of Alabama, contending that because the ATCPA "attempts to set state-specific immigration policy, it legislates in an area constitutionally reserved to the federal government" and is preempted by federal law.[31] The DOJ specifically challenged ten provisions in the ATCPA, arguing that they should be enjoined while litigation proceeds in the federal courts.[32] In September 2011, Chief U.S. District Judge Sharon L. Blackburn issued a preliminary injunction on four of the ten challenged sections.[33] Specifically, Judge Blackburn enjoined portions of §11 making it a misdemeanor for unauthorized aliens to seek or perform work;[34] portions of §13 creating a state prohibition on harboring, transporting, or otherwise assisting the concealment of unlawful aliens;[35] portions of §16 prohibiting employers from claiming wages paid to unauthorized aliens for tax deductions;[36] and portions of §17 allowing a new civil cause of action for lawful job applicants against an employer who passes the applicant over in favor of an undocumented worker.[37] On appeal, the Eleventh Circuit left

24. *Id*. at §§ 15(b), 15(c).
25. *Id*. at § 16(a).
26. *Id*. at § 17.
27. *Id*. at § 27.
28. *Id*. at § 13.
29. *Id*. at § 14.
30. Instead of analyzing each ATCPA provision individually, this Note attempts when possible to place them into one of four categories of challenged provisions identified below.
31. Complaint at 22–23, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746-SLB).
32. United States v. Alabama, 813 F. Supp. 2d at 1292–93 (setting out each of the challenged provisions analyzed in depth in her opinion).
33. *Id*.
34. *Id*. at 1311–19.
35. *Id*. at 1328–36.
36. *Id*. at 1338–39.
37. *Id*. at 1339–42.

the lower court ruling largely intact but enjoined two additional sections: the violation for failure to carry federal registration papers in §10 and the requirement that public schools evaluate the legal status of children in §28.[38] Other provisions have been subsequently enjoined during the appeals process[39]

In an additional lawsuit, Judge Blackburn further interpreted the ATCPA. She rejected a challenge to the entire law as either a regulation of immigration or an attempt to classify aliens.[40]

Although these rulings have left parts of the law intact, courts have evaluated these laws section by section instead of determining that they are wholly legal or illegal.[41] Judge Blackburn has joined a series of other judges in making rulings on similar immigration laws.[42] As this Note will demonstrate, these rulings diverge in their federalism analyses in many respects. The Commerce Clause analysis can provide a more consistent framework for these courts.

III. THE COMMERCE CLAUSE, AMERICAN FEDERALISM, AND IMMIGRATION

Of the contributions the American system has made to political theory, federalism may be the one that is most uniquely American.[43] The idea of multiple sovereigns competing for power within a common system would be considered foreign in much of the world.[44] This idea has frequently been at issue in both legislation and litigation involving the Commerce Clause.[45] The Commerce Clause, federalism, and immigration are historically intertwined, and their historical evolution is relevant to contemporary debates. The early Commerce Clause cases tended to define federal authority with respect to state police power in a way that is now relevant in determining where federal immigration authority ends and state power begins.

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38. United States v. Alabama, 443 F. App'x 411, 420 (11th Cir. 2011).

39. *See* Hispanic Interest Coal. of Ala. v. Bentley, No. 11-14535, 2012 WL 3553613, at *6–7 (11th Cir. Aug. 20, 2012) (discussing the history of the Alabama immigration law litigation before the court).

40. Hispanic Interest Coal. of Ala. v. Bentley, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *17–18 (N.D. Ala. Sept. 28, 2011) *aff'd in part*, *vacated in part*, *rev'd in part*, 691 F.3d 1236 (11th Cir. 2012).

41. *See, e.g.*, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

42. *See, e.g.*, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) *and aff'd in part*, *rev'd in part*, *and remanded*, 132 S. Ct. 2492 (U.S. 2012) *and aff'd in part*, *rev'd in part*, 689 F.3d 1132 (9th Cir. 2012); United States v. South Carolina, 840 F. Supp. 2d 898 (D.S.C. 2011).

43. United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

44. *See, e.g.*, 1958 CONST. art. III (Fr.), *available at* http://www.assemblee-nationale.fr/english/8ab.asp#I.

45. *Lopez*, 514 U.S. at 552–59.

A. American Federalism Defined

Early Americans wanted a weak federal power, and the Articles of Confederation enshrined the sovereignty of the individual states balanced against a weak central government.[46] However, pragmatic concerns inspired changes in the federal–state governmental balance. A series of incidents convinced many political elites that America needed a stronger national government.[47] Many of the participants of the Constitutional Convention in 1787 came from such nationalizing backgrounds.[48] With Shays' Rebellion fresh in the national mind, nationalists had the public support necessary to pursue a new governing framework.[49] At the Convention, some nationalists such as James Madison proposed a national government that eviscerated all state power.[50] However, the delegates considered a series of different options and ultimately chose a regime with active national and state governments.[51]

The resulting framework led to an immediate concern about the boundaries of state and national power.[52] When drafting the Constitution, the framers moved from the common idea of "unitary" sovereignty to a new concept of "divided" sovereignty.[53] In *The Federalist*, Madison took the position that the state and federal governments serve the same constituencies but have different powers and purposes.[54] As a leading proponent of the Constitution and a leading figure in expounding its meaning, Madison imagined a "pragmatic" division of sovereignty in which "[t]he boundary lines between the national and state authorities would be worked out over time."[55] The Anti-Federalists were opposed to such a fluid approach, emphasizing that such ambiguous provisions as the Necessary and Proper Clause, the General Welfare Clause, and the Preamble could be manipulated to effectively end all limits on the expanse of federal power.[56] These opponents of the Constitution also opposed the Commerce Clause, fearing it would lead to a virtually unfettered general

46. ARTICLES OF CONFEDERATION of 1781, art. II.

47. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 143–44 (1985).

48. *Id*. at 167–78.

49. *Id*.

50. *Id*. at 206.

51. *Id*. at 213–14.

52. *See, e.g*., *id*. at 276–84 (discussing the Framer's concerns about which method of ratification would ensure that the states did not gain too much power over the federal government).

53. *Id*. at 276.

54. THE FEDERALIST NO. 46 (James Madison).

55. GEORGE W. CAREY, IN DEFENSE OF THE CONSTITUTION 88 (Liberty Fund 1995) (1989).

56. BRUTUS, ESSAY V (1787), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 382 (Bruce Frohnen, ed., 2002).

federal power.[57] Given that the federal power was to be supreme in some areas, it became important for legislatures and courts to define those areas of federal authority. Increasingly, this has been a field defined more by discretion than absolute rules.[58]

B. Federalism and the Commerce Clause

One essential power delegated to Congress in the Constitution is the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[59] The Marshall Court avoided the issue in early years and only began to expound upon its meaning cautiously. Despite the caution, the Court hinted at an expansive meaning.[60]

Beginning in the mid-nineteenth century, the Court began to consider a dividing line based on the states' police power. [61] The Framers had claimed to allow states jurisdiction over "internal police" while denying the national government this power.[62] The Court struggled to define this power and distinguish it from the commerce power.[63] Justice Story described the state police power as a power that "extends over all subjects within their territorial limits, and includes the power of deportation of undesirable persons."[64] Chief Justice Roger Taney defined it as "the powers of government inherent in their [state] sovereignty,"[65] including quarantine

57. *See, e.g.*, THE FEDERAL FARMER, LETTER III (1787), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 320, 323 (Bruce Frohnen, ed., 2002) (identifying a list of powers that could "soon defeat the operations of the state laws and governments").

58. CAREY, *supra* note 55, at 117–18.

59. U.S. CONST. art. I, § 8.

60. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824). The Court's holding in *Gibbons* is narrowly based on the supremacy of Congress. The Court does not consider whether only Congress can regulate commerce and states cannot regulate it at all "because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation." *Id*. at 200. In a case such as this, "the acts of New-York must yield to the law of Congress." *Id*. at 210. Since the case was decided on the basis of a federal statute, the role of the Commerce Clause was not fully defined in *Gibbons*. However, the case is most well known for its broad definition of commerce as "intercourse." *Id*. at 189–90. *See also* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447–48 (1827).

61. The word "police" originates from the Greek "polis," also meaning "state" or "commonwealth." ALFRED RUSSELL, THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW 23 (1900). History suggests the idea came to England from France. *Id*. at 24. The idea of a police power generally is not distinctly American or distinctly republican—it came from France and Prussia, strong monarchies, and was used in the English monarchic tradition. MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 91 (2005). There may also be various powers that differ in wartime or emergencies, but that is beyond the scope of this Note. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 473 (1934).

62. DUBBER, *supra* note 61, at 86.

63. RUSSELL, *supra* note 61, at 24–27; *see also* DUBBER, *supra* note 61, at 143.

64. RUSSELL, *supra* note 61, at 24–25.

65. *Id*. at 26.

laws, criminal punishment, court systems, recording laws, and commercial regulation.[66]

The Court's position shifted several times in the twentieth century. By the 1930s, the Court settled on the substantial effects test, holding that if a law of Congress can be rationally construed to have a substantial effect on interstate commerce, the law is valid.[67] This broad construction of the Commerce Clause has empowered Congress to act with great deference in many fields, including antitrust law,[68] employment law,[69] and civil rights law.[70] Later, the Court's opinions began to reflect concerns about striking a different federal–state balance.[71] By the 1990s, a majority of the Court was willing to strike down a congressional act.[72] The Court's two major cases in the final decade of the twentieth century demonstrated increased concern about federal intrusion into areas of traditional state authority.[73]

C. Federalism, Commerce, and Immigration

In the colonial era, some colonies sought to prohibit the transportation of criminals into the colonies, though the British government rejected this legislation.[74] During the early Republic, states openly regulated immigration.[75] The Supreme Court considered an early New York regulation and characterized it as "not a regulation of commerce, but of

66. *Id*.

67. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); *see also* Wickard v. Filburn, 317 U.S. 111, 124 (1942).

68. United States v. E.C. Knight Co., 156 U.S. 1 (1895) (narrowing statute but upholding constitutionality of the Sherman Antitrust Act).

69. *Jones & Laughlin Steel Corp*., 301 U.S. 1.

70. Katzenbach v. McClung, 379 U.S. 294 (1964).

71. Perez v. United States, 402 U.S. 146, 157–58 (1971) (Stewart, J., dissenting); *see also* Nat'l League of Cities v. Usery, 426 U.S. 833, 845–52 (1976). These two 1970s cases are instructive in the Court's movement in the Commerce Clause. In *Perez*, Justice Stewart's dissent hints at the limits of the commerce power. He notes that "it is not enough to say that loan sharking is a national problem, for all crime is a national problem. It is not enough to say that . . . loan sharking has interstate characteristics, for any crime may have an interstate setting." 402 U.S. at 157. Justice Stewart was concerned that such broad readings of the commerce power could allow Congress to reach "almost all criminal activity, be it shoplifting or violence in the streets." *Id*. at 158.

72. *See generally* United States v. Lopez, 514 U.S. 549 (1995).

73. *See id*. at 564–66; *see also* United States v. Morrison, 529 U.S. 598, 599 (2000). The Court's willingness to strike down congressional statutes was later limited. *See* Gonzales v. Raich, 545 U.S. 1 (2005). However, the Court's stance on the Commerce Clause remains uncertain. *See* Alderman v. United States, 131 S. Ct. 700 (2011) (Thomas, J., dissenting from denial of certiorari).

74. Gerald L. Neuman, *The Lost Century of Immigration Law*, 93 COLUM. L. REV. 1833, 1841 (1993). The comparison between the English colonies and the central government in Britain is an interesting parallel to the comparison between the states and the federal government in Washington today.

75. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C.L. REV. 1557, 1567 (2008).

police."[76] State regulations often involved a variety of state concerns, such as containing the spread of contagious disease[77] or confronting poverty.[78] States were often the sole regulators in the immigration field, as the federal government did not regulate foreign convicts like many states and did not address European immigration until 1875.[79]

After the Civil War, as immigration to the United States increased, the Court began to change course to reflect the growing international and commercial concerns associated with immigration.[80] A California statute allowed a "Commissioner of Immigration" to determine which arrivals on ships to California should be allowed to enter.[81] The Court, citing the relevance of the foreign policy and foreign commerce powers, held that "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."[82] Although it recognized that immigration powers were left with Congress, the Court did not establish a specific constitutional location for the power.[83] As a result, a number of powers have been asserted to authorize congressional regulation of immigration.[84] By the early twentieth century, Congress's power to regulate the movement of persons under the Commerce Clause was undisputed.[85] Thus, the Commerce Clause was a means through which Congress could choose to regulate immigrants, particularly those already in the country.[86]

During the latter half of the twentieth century, Congress regulated immigration extensively, passing major legislation in 1952, 1986, and 1996.[87] In 1952, Congress enacted the Immigration and Nationality Act (INA).[88] The legislative history indicates that Congress sought "to enact a comprehensive . . . immigration, naturalization, and nationality code."[89] The House Committee studying the legislation acknowledged the supreme

76. Mayor of New York v. Miln, 36 U.S. (11 Peters) 102, 102 (1837).

77. Neuman, *supra* note 74, at 1859.

78. *Id*. at 1846.

79. *Id*. at 1843–44.

80. *Id*. at 1865 (discussing the impact of race and slavery on immigration laws prior to the Civil War).

81. Chy Lung v. Freeman, 92 U.S. 275, 277 (1875).

82. *Id*. at 280.

83. Stumpf, *supra* note 75, at 1572.

84. Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006).

85. Champion v. Ames, 188 U.S. 321, 325 (1903).

86. Edwards v. California, 314 U.S. 160, 176–77 (1941) (striking down state regulation on the movement of persons as violating the dormant Commerce Clause).

87. United States v. Alabama, 813 F. Supp. 2d 1282, 1294–99 (N.D. Ala. 2011).

88. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified throughout 8 U.S.C.).

89. H.R. REP. NO. 82-1365, at 1 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1653.

power of Congress, but it defined that power carefully to be largely confined to the entry of aliens into the country and the deportation of those unlawfully in the country.[90] Specifically, the House Report stated that Congress had the power "to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended."[91] The law built on prior immigration laws by reclassifying aliens for deportation and admission purposes.[92] These aspects related largely to action at the border and deportation across it and did not reach directly into the states.[93] The bill was submitted for review to the State Department, suggesting a close connection with foreign affairs.[94] However, some aspects of the law did reach the states, including a provision establishing penalties for one who "willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, *in any place*," illegal aliens.[95] The Court, in *DeCanas v. Bica*, defined the immigration power in the INA narrowly as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[96] This left states with "broad authority under their police powers" to regulate immigrants who may pass unlawfully into a particular state.[97]

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), which sought to provide a federal scheme for penalizing employers who hire illegal aliens.[98] Congress moved in a new direction, seeking to regulate border crossings by targeting domestic activity.[99] The major 1952 reforms involved changes in how the government would determine admission, for instance eliminating consideration of racial or sexual discrimination, allowing the government to consider skill areas of need, and altering deportation bases and proceedings.[100] In 1986, Congress asserted a more active role in regulating immigrants within the borders by penalizing those who hire them.[101] Additionally, the legislation required

90. *Id*. at 1654.
91. *Id*. at 1676.
92. *Id*. at 1673–82.
93. *Id*. at 1679.
94. *Id*. at 1678.
95. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 274(a)(3), 66 Stat. 163, 229 (codified at 8.U.S.C. § 1324(a) (containing more recent language)) (emphasis added).
96. DeCanas v. Bica, 424 U.S. 351, 355 (1976).
97. *Id*. at 356–57.
98. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, §274A, 100 Stat. 3359, 3360 (codified at 8 U.S.C.§ 1324a).
99. H.R. REP. 99-682, pt. 1, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650; *see also* Stumpf, *supra* note 75, at 1582.
100. H.R. REP. NO. 82-1365 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1679.
101. H.R. REP. NO. 99-682, pt. 1, at 5650.

states to verify the legal status of immigrants seeking to participate in certain welfare programs.[102]

Ten years later, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which enacted a series of pilot programs for identifying aliens (the most notable being the E-Verify program), and allowed states to use these programs on a voluntary basis for identifying aliens.[103] The law also required state and local governments to permit state and local employees to assist federal officers, attempting to end a series of "sanctuary laws" passed by municipalities.[104] President Clinton's signing statement indicates the primacy of federal regulation on illegal immigrants *within* the United States.[105] He noted that the law regulated immigration "at the border, in the workplace, and in the criminal justice system,"[106] the latter two categories being areas traditionally reserved for the states.[107] Clinton also noted that Congress had rejected an amendment that would have "allowed States to refuse to educate the children of illegal immigrants."[108] President Clinton's statement reflects the growing consensus that the federal power is supreme as it relates to immigration, and states could only regulate undocumented immigrants when they were authorized to do so by Congress.

However, the power to regulate these persons has never been exclusively federal. IRCA included a preemption clause that still explicitly allowed states to retain the power to enact "licensing and similar laws" to regulate employers of illegal aliens.[109] Its legislative history also included an explanation that the preemption clause is "not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation."[110] The INA has allowed states the power to act without an agreement with the Attorney General to "otherwise . . . cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully

102. *Id*. at 5670 (covered programs were Aid to Families with Dependent Children, Medicaid, Unemployment Compensation, Food Stamps, Supplemental Security Income, Housing Assistance, and Higher Education Assistance).

103. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in various sections of 8 U.S.C. and 18 U.S.C.); *see also* United States v. Alabama, 813 F. Supp. 2d 1282, 1298 (N.D. Ala. 2011).

104. Pham, *supra* note 84, at 1384.

105. Statement by President William J. Clinton Upon Signing H.R. 3610, *reprinted* in 1996 U.S.C.C.A.N. 3391.

106. *Id*. at 3391.

107. Stumpf, *supra* note 75, at 1557.

108. Statement by President William J. Clinton Upon Signing H.R. 3610, *reprinted* in 1996 U.S.C.C.A.N. 3391, 3391; H.R. REP. NO. 99-682, pt. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649.

109. 8 U.S.C. § 1324a(h)(2) (2006).

110. H.R. REP. NO. 99-682, pt. 1, at 5662.

present in the United States."[111] Federal officials are also required to cooperate with local law enforcement in certain situations.[112]

Courts must now balance federal and state powers in the immigration context. Courts have been willing to uphold some state and local laws. In 2008, a U.S. district court in Missouri upheld a local ordinance penalizing employers of illegal aliens.[113] Three years later, the Supreme Court in *Chamber of Commerce of U.S. v. Whiting* upheld parts of an Arizona law punishing employers through business licensing.[114] Other lower courts have rejected state immigration laws.[115] Most recently in *Arizona v. United States*, the Court complicated matters further by striking down provisions of the Arizona law penalizing illegal immigrants from soliciting work, requiring illegal immigrants to carry registration papers, and allowing police officers to arrest certain illegal immigrants without a warrant.[116] The *Arizona* Court also upheld a provision requiring law enforcement officers to make efforts to ascertain the immigration status of persons if there is a reasonable suspicion that they are in the country illegally.[117] Combining the Commerce Clause analysis with the preemption analysis of the Supremacy Clause can create a more consistent framework.

IV. USING THE COMMERCE CLAUSE TO FURTHER A PREEMPTION ARGUMENT IN FAVOR OF THE ATCPA

The Court's Commerce Clause analysis can help inform courts grappling with the Supremacy Clause problem of preemption in immigration cases.[118] The legality of state immigration laws often turns on whether they regulate "immigration."[119] The federally regulated area of immigration—determining who should be in the country and under what conditions they may remain—contrasts sharply with state powers in

111. 8 U.S.C. § 1357(g)(10) (2006); United States v. Arizona, 641 F.3d 339, 369–70 (9th Cir. 2011) (Bea, J., concurring in part and dissenting in part).

112. *See, e.g.*, 8 U.S.C. §§ 1373(a)–1373(c) (2006); Petition for Writ of Certiorari at 5, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182) (petition before U.S. Supreme Court on Arizona immigration law).

113. Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *31 (E.D. Mo. Jan. 31, 2008).

114. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1970 (2011).

115. *See, e.g.*, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980 (D. Ariz. 2010); Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010), *aff'g in part and vacating in part* 496 F.Supp.2d 477.

116. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

117. *Id*.

118. There are two types of preemption: express and implied preemption. Implied preemption is often divided into conflict and field preemption. *Lozano*, 620 F.3d at 203–04.

119. *Id*. at 204–05.

criminal law enforcement, contract law, and other areas of state law.[120] In both the express and implied preemption context, determining the scope of traditional state authority is imperative. The Commerce Clause can inform this analysis.

A. The Commerce Clause and Express Preemption

Although federal statutes may completely preempt any state regulation in a particular field, the relationship between the federal regime and possible state regimes tends to be more complex.[121] Federal laws often contain provisions that specifically preempt and others that specifically allow state regulation.[122] Immigration laws frequently involve the "savings" provision in IRCA that preempts state regulation of employers of illegal aliens but allows states to continue to enact "licensing and similar laws" to regulate employers.[123]

A significant number of state immigration statutes thus turn on whether they are "licensing [or] similar laws" under IRCA.[124] These terms were not defined by Congress, and courts have had to fill in the gaps.[125] Recently, the Supreme Court has suggested that it will interpret these terms with respect to the traditional powers of states.[126]

The term "licensing" was addressed by the Supreme Court in *Whiting*.[127] The Court upheld a business licensing statute extending to revocation of "articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State."[128] The Court permitted Arizona to adopt its own procedures for imposing licensing sanctions instead of relying on the federal government for guidance.[129] The Court also granted certiorari on the Third Circuit's opinion in *Lozano v. City of Hazleton* and vacated the opinion for the court

120. *Id*. at 206.

121. In *Arizona v. United States*, the Court's majority determined that making failure to comply with federal registration laws a state offense was preempted because Congress had "occupied the field of alien registration." 132 S. Ct. at 2502. However, the Court did not find that Congress had completely occupied the field of immigration in other respects, in part because it upheld a portion of the Arizona immigration law, adding to parts already upheld in *Whiting*. *See id*. at 2509–10. Justice Scalia also critiqued any reliance on field preemption in immigration, an area where states historically exercised control. *Id*. at 2514–15 (Scalia, J., concurring in part and dissenting in part).

122. Petition for Writ of Certiorari at 3, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

123. 8 U.S.C. § 1324a(h)(2) (2006).

124. *Id*.; *see, e.g*., Lozano v. City of Hazleton, 620 F.3d 170, 208–09 (3d Cir. 2010), *vacated and remanded*, 131 S. Ct. 2958 (2011) (mem.).

125. *Lozano*, 620 F.3d at 208.

126. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1979–80 (2011).

127. *Id*. at 1977–78.

128. *Id*. at 1978.

129. *Id*. at 1979.

to reconsider restrictions on business licensing and rental housing after *Whiting*.[130]

In *Whiting*, the majority's holding emphasized the notion of traditional state authority.[131] Chief Justice Roberts stated: "Regulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[132] This is consistent with the historical record. In a study of police power laws passed in New York between 1781 and 1801, many state police power regulations involved the regulation of businesses.[133] In *Brown v. Maryland*, the Court struck down a state licensing fee on importers, but it notably did so because it was an impost and not because it was a license.[134] In 1830, the Supreme Court considered a licensing ordinance for auctioneers passed in Alexandria, Virginia, in 1800.[135] The case was decided on different grounds, but the Court accepted that the Virginia legislature could confer the power.[136] More recently, the general concept of registering businesses and corporations, both domestic and foreign, in states where they do business has become a fixture of state codes.[137]

The Court's decision in *Whiting* marks a significant departure from some lower courts because it carves out an area of state authority without regard to the magnitude of punishment.[138] The Court's reasoning in *Whiting* is consistent with the Missouri district court's rationale in *Gray v. City of Valley Park*.[139] That court noted that the scope of the preemption clause is not a question of *magnitude*, stating bluntly "that whether or not the denial of a business permit is a greater or lesser sanction than fines and imprisonment is an irrelevant inquiry."[140] Given that the magnitude is irrelevant and states could pass either "large" or "small" sanctions on employers if valid, validity should instead turn on whether the regulation is

130. *Lozano*, 620 F.3d at 224.

131. *Whiting*, 131 S. Ct. at 1979–80.

132. *Id*. at 1983.

133. DUBBER, *supra* note 61, at 88–89 (including regulations on mines, ferries, hawkers and peddlers, and buying and selling of offices).

134. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 437, 440 (1827).

135. Fowle v. Common Council, 28 U.S. (3 Pet.) 398, 404 (1830). The licensing scheme was amended in 1817 but continued. *Id*. at 405.

136. *Id*. at 407.

137. *See, e.g*., ALA. CODE § 10A-2-1.01 (1975).

138. The majority finds that a law revoking articles of incorporation, certificates of partnership, and many other business associations fits "comfortably within the savings clause." Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1978 (2011). The dissent criticizes this interpretation as "broad enough to include virtually any permission." *Id*. at 1988 (Breyer, J., dissenting). This language suggests that the majority in *Whiting* is comfortable with states being able to act broadly as long as it is within the scope of their traditional authority.

139. Gray v. City of Valley Park, No. 4:07CV0081 ERW, 2008 WL 294294, at *10 (E.D. Mo. Jan. 31, 2008).

140. *Id*.

one traditionally outside the scope of federal interest.[141] This invokes the idea of a state police power that is discussed more directly within the implied preemption analysis. Such an analysis would also be relevant in the immigration context for express preemption.

Once the express preemption clause becomes a question of traditional areas of state authority, the Court's recent Commerce Clause cases provide valuable information on the traditional areas of that authority. Although the Court does not use traditional state police power as its test for whether a congressional statute is constitutional, the Justices continue to use this delineation as an analytical tool.[142] This tool can more directly be applied in the IRCA context, where the law may directly permit state action in certain traditional areas of state authority.

The dissent in *Whiting* was concerned that the majority opinion would leave open the door to regulating immigration through almost any form of permission.[143] Thus, the dissent construed the exception narrowly, limiting it to "*employment-related* licensing systems" instead of extending it to corporate charters and other types of licensing laws.[144] However, the majority rejected this approach and left open the possibility of extensive regulation in all licensing and similar laws.[145]

In its Commerce Clause cases, the Court has often sought to define the contours of federal power at least partially around traditional areas of state regulation.[146] Rejecting attenuated reasoning that the federal government can regulate guns in school zones where there are "costs of crime,"[147] the Court noted that applying this reasoning makes it "difficult to perceive any limitation on federal power, even in areas such as *criminal law enforcement*

141. *Whiting*, 131 S. Ct. at 1983.

142. In *Usery*, a majority of the Court evaluated the impact of a federal statute on "traditional aspects of state sovereignty" and attempted to limit the reach of Congress, at least to municipalities. 426 U.S. 833, 849 (1976). The *Usery* approach was later abandoned, as the Court noted that the Fair Labor Standards Act was valid under the Commerce Clause and the application of these laws to state entities based on the traditional state function dichotomy was unworkable. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–40 (1985). It is worth noting that this distinction based on traditional areas of state sovereignty was only used in the narrow question of whether valid legislation passed under the Commerce Clause could bind state and local governments; the Court may, and has, attempted to consider whether legislation passed by Congress is valid under the Commerce Clause based on its possible impact on areas where the state has been sovereign. *Id*.; *see also* United States v. Lopez, 514 U.S. 549, 564–65 (1995). Thus, even if not dispositive, the possible impact of congressional statutes on traditional state activities remains persuasive and has been analyzed by the Court. *Garcia*, 469 U.S. at 537–40.

143. *Whiting*, 131 S. Ct. at 1993 (Breyer, J., dissenting).

144. *Id*. at 1992.

145. *Id*. at 1978 (majority opinion).

146. *Lopez*, 514 U.S. at 564.

147. *Id*. (internal quotation marks omitted).

or education where States historically have been sovereign."[148] The Court also considered areas of child-rearing and family law to be traditional areas for the states as sovereigns.[149] Justice Kennedy provided a wide role for states as "laboratories for experimentation" where they are "exercising their own judgment in an area to which States lay claim by right of history and expertise . . . ."[150] In his concurrence, Justice Thomas enumerated his own set of areas of traditional state power, including powers "to regulate marriage, littering, or cruelty to animals . . . ."[151] His concurrence develops a sweeping theory of state power, noting that "most areas of life . . . would remain outside the reach of the Federal Government" based on the intent of the Framers.[152]

Under any of the approaches outlined by the Justices in *Lopez*, a significant number of the ATCPA provisions would not be preempted by IRCA. Judge Blackburn enjoined both § 16 (tax deductions) and § 17 (cause of action against an employer).[153] Applying the broader reasoning of *Gray* and *Whiting*, these provisions should survive a preemption challenge. Here, Alabama is essentially creating a tort action against employers in favor of prospective legal employees. Tort law is an area traditionally within the purview of the states.[154] In this critical sense, it is similar to the licensing law, and thus they are "similar laws" within the scope of IRCA's savings provisions.[155] Other sections of the law relating to law enforcement would also pass muster.[156]

This approach is ripe for criticism in that this interpretation may allow the exception to swallow up the entire rule.[157] IRCA is a complex set of controls and procedures for punishing employers that hire undocumented aliens.[158] Each of the state provisions is an additional procedure for punishing employers, and the courts have already strongly suggested that the preemption clause does not limit states in the *magnitude* of punishment,

148. *Id*. (emphasis added). Although education and law enforcement are both shared powers where the federal government also can regulate, Chief Justice Rehnquist's concern appears to have been that the federal government could comprehensively regulate in these two fields and displace the state role. That concern is analogous to the presumption applied in the Supremacy Clause context. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

149. *Lopez*, 514 U.S. at 565.

150. *Id*. at 581, 583 (Kennedy, J., concurring).

151. *Id*. at 585 (Thomas, J., concurring).

152. *Id*. at 590.

153. United States v. Alabama, 813 F. Supp. 2d 1282, 1339, 1342 (N.D. Ala. 2011).

154. *See* United States v. Morrison, 529 U.S. 598, 654 (2000).

155. 8 U.S.C. § 1324a(h)(2) (2006).

156. *See supra* notes 16–20.

157. Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1988 (2011) (Breyer, J., dissenting).

158. H.R. REP. NO. 99-682, pt. 1, at 46, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650.

rather it merely limits the means of punishment to those already governed by federal law.[159]

However, such an approach may be more attractive in the aftermath of the Court's decision in *Arizona v. U.S.* The challenged provisions in the Arizona law touched on state functions of employment law and law enforcement.[160] Justice Kennedy, writing for the majority, focused extensively on the level of *federal* involvement in a given area.[161] For instance, the majority opinion determined "that the Federal Government has occupied the field of alien registration" by adopting an extensive regulatory scheme that could not be replicated at the state level.[162] Similarly, central to Justice Kennedy's reasoning in striking down the employment provision prohibiting aliens from seeking work was the idea that prior to the adoption of IRCA, states had extensive power to punish employers and employees, but after the adoption of IRCA, the federal government had limited state action.[163]

It may be more necessary to consider Congress's express provisions in areas where Congress has *not* regulated as extensively. Many of the Alabama provisions seek to regulate immigrants in areas the federal government has not explored. The Alabama law provisions, particularly Class IV, regulate businesses.[164] For example, §17, discussed above, creates a state cause of action for lawful job applicants to sue employers and could be likely classified as state tort law.[165] This area has not been as extensively regulated by Congress. The same is true of areas such as property law covered by the ATCPA. Furthermore, *Arizona* largely avoided the question of regulating businesses, and these regulations may be viewed more favorably, if *Whiting* is any indication.

Courts can continue to acknowledge that determining who can be in the country is exclusively in the federal domain.[166] However, as the regulation of immigration has become more of a domestic process, the federal government has had to regulate areas often controlled by the states.[167] When it does so, its actions should be subject to scrutiny.

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159. *Whiting*, 131 S. Ct. at 1979; *see also* Gray v. City of Valley Park, Missouri, No. 4:07CV00881 ERW, 2008 WL 294294, at *10 (E.D. Mo. Jan. 31, 2008).

160. *See* Arizona v. U.S., 132 S. Ct. 2492 (2012).

161. *Id*.

162. *Id*. at 2502.

163. *Id*. at 2504–05.

164. *See* ATCPA §§ 9, 15, 16, 17.

165. *Id*. at § 17.

166. Gray v. City of Valley Park, Missouri, No. 4:07CV00881 ERW, 2008 WL 294294, at *10 (E.D. Mo. Jan. 31, 2008); *see also* DeCanas v. Bica, 424 U.S. 351, 354 (1976).

167. Stumpf, *supra* note 75, at 1576.

B. A Presumption of State Power: Implied Preemption and the ATCPA

In implied preemption cases, there is a presumption against congressional action superseding traditional state powers.[168] Thus, the Commerce Clause cases that have sought to define areas of state sovereignty can help define the contours of this presumption.[169]

Courts have struggled in applying the presumption against preemption with consistency. In interpreting the ATCPA, Judge Blackburn applied the presumption against federal preemption narrowly, but the presumption had little impact on her overall determinations.[170] Judge Blackburn specifically addressed the presumption in her analysis of six of the challenged provisions.[171] She only applied the presumption to two instances, one governing employment law and the other governing contract law.[172] Judge Blackburn applied a particularly narrow presumption in areas of law enforcement, classified in this Note as Class III provisions, finding that the §12[173] and §18[174] directives related to "[i]dentifying unlawfully present aliens"[175] and fell outside traditional areas of state authority.[176] She also classified the state violation for failure to carry mandatory federal registration documents (§10) as a regulation of "alien registration," outside traditional state authority.[177] Judge Blackburn dismissed the presumption on the state harboring provision (§13) without any discussion on the powers implicated.[178]

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168. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

169. As noted elsewhere in the Note, the Court does not consider directly whether the statute implicates a traditional state function for purposes of 11th Amendment immunity or the Commerce Clause itself. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 537–538, 546 (1985); *see also* U.S. v. Lopez, 514 U.S. 549, 556–57 (1995). However, the preemption analysis directly applies a presumption against preemption when Congress regulates an area that states have traditionally controlled. *Wyeth*, 555 U.S. at 565. Although the traditional state sovereignty issue is not dispositive in Commerce Clause cases, the Court has provided a number of explanations of the traditional state function, which can be quite helpful in adding clarity to the presumption against preemption. *Lopez*, 514 U.S. at 564.

170. United States v. Alabama, 813 F. Supp. 2d 1282, 1299–1301 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, *dismissed in part*, *remanded in part*, 691 F.3d 1269 (11th Cir. 2012).

171. *Id*.

172. Judge Blackburn characterized § 11 of the ATCPA (making it a crime for aliens to seek work) as a regulation of "employment of aliens not authorized to work," and this area of employment law was a traditional area of state power. *Id*. at 1311. She also characterized § 27 (bar on enforcement of contracts with illegal aliens) as a regulation of the "capacity to contract." *Id*. at 1344.

173. Section 12 directs law enforcement to determine the citizenship of a person detained if there is a reasonable suspicion that the person is illegally in the United States.

174. Section 18 specifies procedures for those arrested for driving without a license to verify their legal status in the United States.

175. United States v. Alabama, 813 F. Supp. 2d at 1321, 1343.

176. *Id*.

177. *Id*. at 1303.

178. *See id*. at 1329.

Other courts have struggled with inconsistent applications of the presumption. In *Lozano v. City of Hazleton*, the Third Circuit applied the presumption broadly toward a municipal business licensing scheme, noting that "until the passage of IRCA, the federal government played at most a very small role in regulating the employment of persons without lawful immigration status."[179] However, this presumption did not stop the court from finding that the provisions posed a conflict with "the accomplishment and execution of federal law" and rebutted the presumption.[180] In a similar immigration case in the Tenth Circuit, that court did not appear to consider the presumption against preemption.[181] The Ninth Circuit applied the presumption more narrowly, defining the Arizona statutes in terms of "identifying immigration violations."[182]

Courts have been unable to agree both on the meaning and effect of the presumption, and as such, the presumption has failed to serve its actual purpose of predicting the frequent outcome of a case.[183] Both Judge Blackburn and the Ninth Circuit applied the presumption narrowly but reached different conclusions. The Third Circuit in *Lozano* applied the presumption broadly but struck down the law.[184]

It is here where the Commerce Clause jurisprudence is most helpful, in part because it closely mirrors the federal presumption in the Supremacy

179. Lozano v. City of Hazleton, 620 F.3d 170, 207 (3d Cir. 2010), *vacated and remanded*,131 S. Ct. 2958 (2011) (mem.).

180. *Id*. at 210. The *Lozano* court rebutted the presumption based on two concerns. The first involved the possibility of discrimination. *Id*. at 211–12. The second involved concerns that a business "must worry about two separate systems of complaints, investigations, prosecutions, and adjudications." *Id*. at 213. Although the court cited these concerns, it did not engage in advanced weighing about how these concerns specifically outweighed the presumption. The court also failed to note how the possibility of two separate regimes differs from any other aspect where state and federal governments are both interested, which is not in keeping with the nature of a strong presumption against preemption in traditional areas of state authority. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009).

181. *See* Chamber of Commerce v. Edmondson, 594 F.3d 742, 765–67 (10th Cir. 2010).

182. *See*, *e.g*., United States v. Arizona, 641 F.3d 339, 348 (9th Cir. 2011), *aff'd in part*, *rev'd in part*, *remanded*, Arizona v. U.S., 132 S. Ct. 2492 (2012) *and aff'd in part*, *rev'd in part*, 689 F.3d 1132 (9th Cir. 2012). Justice Bea's dissent challenges the majority on this point, classifying many of the provisions as part of an "inherent state arrest authority." *Id*. at 387 (Bea, J., concurring in part and dissenting in part). The advocates for Arizona have also challenged the Ninth Circuit's reading of state power in its petition for certiorari with the U.S. Supreme Court. *See* Petition for Writ of Certiorari, *supra* note 122, at 29.

183. There are different types of presumptions that must be overcome by the weight of evidence. *Excerpt* at NICHOLAS RESCHER, PRESUMPTION AND THE PRACTICES OF TENTATIVE COGNITION 6 (2006), *available at* http://assets.cambridge.org/97805218/64749/excerpt/9780521864749_excerpt.pdf. All presumptions are "defeasible," or subject to being overcome. *Id*. at 5. However, presumptions still carry weight as "a provisional surrogate for outright claims to the actual truth." *Id*. at 4. This Note contends that courts need to take a clearer approach in attaching weight to the presumption against preemption.

184. *Lozano*, 620 F.3d at 196, 207. In rebutting the presumption, the *Lozano* court may have failed to consider the "high threshold" necessary to show a conflict with the purposes of a federal act. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985 (2011).

Clause context.[185] The early Commerce Clause cases evaluated the federal power in part by analyzing how to define areas of state power.[186] This trend continued in *Lopez*, where the Court considered the scope of an admittedly federal power (regulating commerce) with reference to that power's possible encroachment on traditional state powers if over-read.[187] In *Morrison*, the Court continued this analysis, rejecting reasoning that "may . . . be applied equally as well to family law and other areas of traditional state regulation."[188] The courts are instead required to make a "distinction between what is truly national and what is truly local."[189] The Court reasserted the principle that states should have primacy in criminal law enforcement activities.[190] Thus, the Court's decisions demonstrate that traditional state power both continues to exist and may be expressed through a number of activities.

Applied to the series of provisions of the Alabama immigration law, the provisions should begin with at least a strong presumption of validity. The Class I provisions provide directives to state officials to communicate with their federal counterparts and develop strategies for mutually enforcing the federal laws.[191] It is common for state officials, such as the Governor, to have a broad authority to direct state officers and officials.[192] In other circumstances, the Court has explicitly rejected that federal law can direct state officials.[193] This is not a case that involves federal "commandeering" of state officials, but the commandeering cases demonstrate that the Court is unlikely to intrude on the direction of state officials.[194] These provisions were not specifically challenged for injunction, but they warrant at least some consideration.[195]

Both the Class II and Class III provisions relate to "criminal law enforcement," referenced as a traditional power in *Lopez*.[196] The Class II

185. *See Lozano*, 620 F.3d at 206–07; *see also Whiting*, 131 S. Ct. at 1983; *cf.* United States v. Lopez, 514 U.S. 549, 564 (1995).

186. *See, e.g.*, Willson v. Blackbird Creek Marsh Co., 27 U.S. 245, 251–52 (1829); *see also* New York v. Miln, 36 U.S. 102, 132–43 (1837).

187. *See supra* notes 146–152.

188. United States v. Morrison, 529 U.S. 598, 615 (2000).

189. *Id*. at 617–18.

190. *Id*. at 618.

191. *See supra* notes 10–11.

192. *See, e.g.*, ALA. CODE § 36-13-9 (1945).

193. Printz v. United States, 521 U.S. 898, 915 (1997) ("If it was indeed Hamilton's view that the Federal Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere.").

194. *Id*.

195. United States v. Alabama, 813 F. Supp. 2d 1282, 1292–93 (N.D. Ala. 2011) (enumerating the challenged provisions) *aff'd in part*, *rev'd in part*, *dismissed in part*, *remanded in part*, 691 F.3d 1269 (11th Cir. 2012).

196. United States v. Lopez, 514 U.S. 549, 564 (1995); *see also* RUSSELL, *supra* note 61, at 26.

provisions rely largely on the criminal law to regulate aliens directly.[197] States have traditionally had a wide authority to pass criminal statutes, even when state crimes closely mirror federal counterparts.[198] Similarly, the Class III provisions provide a series of directives to state officials and law enforcement regarding the verification of legal status.[199] Although some of the Arizona provisions dealing with law enforcement were struck down because the federal government has regulated so extensively in immigration enforcement, the key law enforcement directive requiring that law enforcement officials seek to ascertain the legal status of a person if there is a "reasonable suspicion" that they are in the country illegally was upheld.[200] As counsel challenging the Arizona law has noted, defining the state power narrowly, as some courts have done, would render the presumption meaningless.[201] In *Lopez*, Chief Justice Rehnquist defined areas of state power broadly, using terms such as "law enforcement" to describe an area of state power.[202] When this analysis is coupled with the federal savings provision explicitly allowing state law enforcement officers power to ascertain the legal status of persons as part of their duties, a presumption in favor of the state law should apply.[203] When Congress has acted with care to preserve areas of state authority, courts should do the same.

Finally, the Class IV provisions relating to regulation of third parties are directly acknowledged by Chief Justice Roberts in *Whiting* as serving a traditional state function.[204] For reasons noted above, this is consistent with the historical record.[205]

The dissenting opinions in *Arizona* criticized the majority precisely for ignoring this historical record.[206] The majority opinion focused primarily on the scope of the *federal* law and did not consider the pre-existing role of states in regulating immigration.[207] Although Justice Kennedy's majority opinion noted that immigration policy is important to the states, the opinion largely avoided any significant discussion of the role of states in

197. *See supra* notes 12–15.

198. *See, e.g.*, ALA. CODE § 13A-9-91 (1975) (Illegal Possession of Food Stamps); *cf.* 7 U.S.C. § 2024 (2006).

199. *See supra* notes 16–20.

200. *See* Arizona v. United States, 132 S. Ct. 2492, 2501–10 (2012).

201. Petition for Writ of Certiorari, *supra* note 122, at 29.

202. United States v. Lopez, 514 U.S. 549, 564 (1995).

203. *See* 8 U.S.C. § 1357(g)(1) (2006).

204. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1983 (2011).

205. *Supra* notes 146–152.

206. *See* Arizona v. United States, 132 S. Ct. 2492, 2511–22 (2012) (Scalia, J., concurring in part and dissenting in part), *aff'g in part*, *rev'g in part*, 703 F. Supp. 2d 980 (D. Ariz. 2010); *see also id.* at 2524–35 (Alito, J., concurring in part and dissenting in part).

207. *See id.* at 2497–511 (majority opinion).

developing immigration policy.[208] Justice Scalia emphasized the historical role of the states, noting that in light of modern federal regulations, "it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so."[209] Justice Alito more directly referred to the presumption against preemption in these areas where states have traditionally had authority.[210] He stated that "[t]he Court gives short shrift to our presumption *against* pre-emption."[211] He criticized the Court for reaching its decision "from stale legislative history and from the comprehensiveness of the federal scheme."[212] These perspectives suggest that in other areas the Court may be more willing to consider the presumption against preemption.

Although proving that a presumption against preemption is in itself insufficient to validate the law, the Commerce Clause argument can help provide substantive evidence against preemption. If the presumption applies, there is strong evidence that Congress did not attempt to regulate the entire field.[213] By establishing a state presumption, coupled with the argument against express preemption, the ATCPA could survive preemption scrutiny.

V. THE DORMANT COMMERCE CLAUSE

State immigration laws have also been challenged on the basis of the dormant Commerce Clause. The DOJ has raised these arguments while challenging both the ATCPA[214] and a relatively similar Arizona immigration law.[215] Like preemption, the dormant Commerce Clause implicates issues of federalism.[216] In *The Federalist*, Alexander Hamilton cited protectionist state laws as a reason for a strong national Commerce Clause.[217] The dormant Commerce Clause has been cited as an attempt to guarantee a "national free trade area" among the states.[218] Various state

208. *Id*.
209. *Id*. at 2514 (Scalia, J., concurring in part and dissenting in part).
210. *Id*.
211. *Id*. at 2530 (Alito, J., concurring in part and dissenting in part).
212. *Id*.
213. *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1983 (2011).
214. Complaint at 44, United States v. Alabama, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746-SLB).
215. United States v. Arizona, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) *and aff'd in part*, *rev'd in part*, *and remanded*, 132 S. Ct. 2492 (U.S. 2012) *and aff'd in part*, *rev'd in part*, 689 F.3d 1132 (9th Cir. 2012).
216. TIMOTHY SANDEFUR, THE RIGHT TO EARN A LIVING 175 (2010).
217. *Id*. at 176.
218. *Id*. at 175.

immigration laws have resulted in tensions, and this warrants dormant Commerce Clause consideration.[219]

However, when the dormant Commerce Clause argument has been raised, it has largely been rejected. In *United States v. Arizona*, a district court in Arizona enjoined significant portions of a restrictive Arizona immigration measure.[220] That same court rejected a dormant Commerce Clause challenge, finding that the DOJ failed to provide sufficient evidence to show that creating "parallel state statutory provisions for conduct already prohibited by federal law[] has a substantial effect on interstate commerce."[221] Similarly, Judge Blackburn rejected a dormant Commerce Clause challenge, emphasizing that the government failed to prove either discrimination against out-of-state entities or burdens on interstate commerce.[222]

Despite the reluctance of courts to consider the dormant Commerce Clause, some commentators have urged a "Dormant Commerce Clause-type approach" based on defining key national interests and determining whether those interests have been abrogated.[223] This approach has focused on the differing "conditions for entry" based on the state in which immigrants arrive.[224] This Note goes further and argues that both the Court's historic and contemporary interpretations of the dormant Commerce Clause can be sufficiently broad to cover state immigration regulations as encompassing as the ATCPA. Notably, the Alabama law is unique from prior statutes in that it attempts to limit immigrant activity through many channels of state law, not just through law enforcement. This provides a new framework for a dormant Commerce Clause analysis.

A. The Dormant Commerce Clause and the Movement of Immigrants

Before the Court was confronted with the question of immigration, the Court was confronted generally with concern about freedom in the movement of persons. In *Hall v. Decuir*, the Court struck down a Louisiana Reconstruction-era civil rights statute based on the dormant Commerce

219. *See, e.g.*, *L.A. Approves Boycott of Arizona*, MSNBC, (May 12, 2010, 7:51 P.M.), http://www.msnbc.msn.com/id/37113818/ns/us_news-life/t/la-approves-boycott-arizona/.

220. *See* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011) *and aff'd in part*, *rev'd in part*, *and remanded*, 132 S. Ct. 2492 (U.S. 2012) *and aff'd in part*, *rev'd in part*, 689 F.3d 1132 (9th Cir. 2012).

221. *Id.* at 1003.

222. United States v. Alabama, 813 F. Supp. 2d 1282, 1336 (N.D. Ala. 2011), *aff'd in part*, *rev'd in part*, *dismissed in part*, *remanded in part*, 691 F.3d 1269 (11th Cir. 2012).

223. *See* Erin F. Delaney, Note, *In the Shadow of Article I: Applying a Dormant Commerce Clause Analysis to State Laws Regulating Aliens*, 82 N.Y.U. L. REV. 1821, 1844 (2007).

224. *Id.* at 1844–45.

Clause.[225] In *Hall*, the Court held that restrictions on the travel of persons across state lines should come from Congress alone.[226] The Court was particularly concerned that the law interfered with commerce along the Mississippi River, a major national chain of commerce.[227]

In 1902, the Court considered a case involving the *entry* of persons when it evaluated a Louisiana quarantine decision.[228] A local board had prohibited the entry of 408 individuals through the port of New Orleans, some of whom were U.S. citizens.[229] Although it took the form of a quarantine law, the decision was widely viewed as an attempt to restrict Italian immigrants from entering Louisiana.[230] The quarantine board had made its decision even though there was no evidence of contagious disease.[231] Notably, the Court distinguished legitimate and illegitimate commerce, suggesting a state can regulate the latter.[232]

However, the Court again struck down a state regulation on the movement of persons in *Edwards v. California* in 1941.[233] That case involved a statute "barring indigents from entering" California.[234] Although considered part of the "Anti-Okie" laws meant to keep poor farmers from traveling to other states and burdening their economies, the law in California had a legislative history dating to 1860.[235] The Court acknowledged California's arguments: "The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true."[236] Thus, California's argument fit squarely within the idea of traditional police power upheld by the Court in the past.[237] However, the Court in this instance struck down the law on dormant Commerce Clause grounds, noting that "[t]he burden

225. Hall v. DeCuir, 95 U.S. 485, 488–89 (1877).

226. *Id*. at 489–90.

227. *Id*. ("The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more."). Thus, the Mississippi River factor may have been somewhat unique in this case, as the river was a major source of national commerce. *Id*.

228. Campagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U.S. 380 (1902).

229. *Id*. at 382.

230. *Id*. at 383.

231. *Id*.

232. *Id*. at 391.

233. Edwards v. California, 314 U.S. 160 (1941).

234. Abigail E. Langer, Note, *"Men Made It, But They Can't Control It": Immigration Policy During the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision in* Chamber of Commerce v. Whiting, 43 CONN. L. REV. 1645, 1652 (2011).

235. *Id*. at 1653.

236. *Edwards*, 314 U.S. at 167.

237. Langer, *supra* note 234, at 1655.

upon interstate commerce is intended and immediate; it is the plain and sole function of the statute."[238]

Thus, the Court has considered the movement of persons in the context of the dormant Commerce Clause, and in *Edwards*, it notably asserted the concept of shared national responsibility. These concepts of responsibility can be evaluated under the Court's contemporary discrimination analysis.

B. Discrimination and the Dormant Commerce Clause

Although the dormant Commerce Clause analysis likely does not defeat the entire ATCPA, it raises questions about whether this law could be so severe as to be economically discriminatory. If the purpose of the law is to exclude illegal aliens from Alabama and push them to other states, this shift of the regulatory burdens to other states could raise dormant Commerce Clause problems.

The term "discrimination" has various meanings in law, and it has its own meaning in the dormant Commerce Clause context.[239] The Court has recently provided some explanation for the meaning of discrimination in two cases. In *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, the Court held that a city ordinance requiring trash be transported to a city-operated plant for processing did not violate the dormant Commerce Clause.[240] Chief Justice Roberts, writing for the majority, noted that "[o]ur dormant Commerce Clause cases often find discrimination when a State shifts the *costs of regulation* to other States. . . ."[241] The Court provided additional clarification in its next Term, upholding a Kentucky statute providing tax exemption status for some in-state bonds.[242] Justice Souter considered the purpose of the Commerce Clause, indicating that it reflected "the Framers' distrust of economic Balkanization."[243] Justice Kennedy, in a dissent, went further: "Free trade in the United States, unobstructed by state and local barriers, was indispensable if we were to unite to ensure the liberty and progress of the whole Nation and its people."[244]

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238. *Edwards*, 314 U.S. at 167.

239. Bruce F. Broll, Note, *The Economic Liberty Rationale in the Dormant Commerce Clause*, 49 S.D. L. REV. 824, 830 (2003–2004) (explaining the opinions of the Framers regarding issues such as property rights implicated in dormant Commerce Clause concerns).

240. United Haulers Assoc. v. Oneida–Herkimer Solid Waste Mgmt. Aut., 550 U.S. 330, 334 (2007).

241. *Id*. at 345 (emphasis added).

242. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 341 (2008).

243. *Id*. at 338.

244. *Id*. at 362.

The Court's definitions are sufficiently broad to encompass a definition provided by Professor Michael E. Smith in 1986.[245] Smith suggested that a number of members, perhaps even a majority of the Court, would be willing to strike down a state regulation seeking to "shift noneconomic burdens, such as health and safety hazards, to the people of other states."[246] Smith specifically cited *Kassel v. Consolidated Freightways Corp.*, a case involving an Iowa statute barring some large trucks from Iowa highways.[247] Smith assumed for his argument that Iowa had a valid safety interest and suggested that the Court may be willing to strike down a statute shifting these safety hazards to other states.[248] However, Smith's definition also suggests that the Court may only hold that this type of burden is discriminatory if "the state continues to enjoy the economic benefits of the activity" while out-of-state interests could not enjoy these benefits.[249]

Commentators have suggested that immigration laws depriving access to resources are "tantamount to denying [immigrants] entrance" and could also interfere with the foreign affairs power.[250] However, Chief Justice Roberts has also noted that a law may be discriminatory if it "*shifts the costs of regulation*."[251] This may be relevant in the context of state immigration laws.

By considering regulatory shifting, the statements of legislators become relevant. The legislature's findings explicitly note that "illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status."[252] Thus, the legislature's findings, by noting that providing benefits encourages immigration, is likely attempting to *discourage* the flow of immigrants into Alabama by passing the ATCPA. This is reinforced by statements by legislators such as Rep. Mike Ball, who has stated that "[t]he purpose of it [the ATCPA] was to cut back on the number of illegal immigrants that we have in Alabama."[253]

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245. Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CALIF. L. REV. 1203 (1986).

246. *Id*. at 1220. Smith considers these "non-economic burdens." *Id*. This Note does not take a position on what exactly is or is not economic, but it accepts his analysis as to a possible form of discrimination that would be acknowledged under the dormant Commerce Clause. The Note does assert that the non-economic burdens can at least have an economic impact on other states, such as through increased costs of regulation. *See United Haulers Assoc*., 550 U.S. at 345.

247. Smith, *supra* note 245, at 1220.

248. *Id*.

249. *Id*. at 1221.

250. Delaney, *supra* note 223, at 1845.

251. *United Haulers Assoc*., 550 U.S. at 345 (emphasis added).

252. ALA. CODE § 31-13-2 (2012).

253. Kelli Dugan, *Alabama Immigration Law Decried, Applauded as Some Flee State*, REUTERS (Oct. 12, 2011), http://www.reuters.com/article/2011/10/12/us-alabama-immigration-idUSTRE79B7GO20111012.

The legislature's findings perhaps prove that Alabama is seeking to expel immigrants from its borders and export national problems. The ATCPA is attempting to keep illegal persons from entering Alabama, and by extension it pushes the burdens associated with the truly national problem of immigration to other states. For instance, a 2007 Congressional Budget Office (CBO) report found that "[s]tate and local governments incur costs for providing services to unauthorized immigrants and have limited options for avoiding or minimizing those costs."[254] The CBO report also noted that immigrants originally congregated in a small number of states, and as the immigrant population has become more dispersed, it has actually mitigated some state problems.[255] Thus, if the ATCPA is upheld and other state laws can be upheld, this may exacerbate the problems of undocumented immigration by concentrating these populations in particular states. This is why some have advocated a dormant Commerce Clause approach to strike down state immigration regulations.[256]

However, this approach has powerful weaknesses. The first is that the concept of "illegitimate commerce" retains some meaning.[257] In the early 20th century, the Court held that "criminals, diseased persons and things, and paupers, *are not legitimate subjects of commerce*."[258] The commerce clause notably makes no distinction between legal and illegal commerce. Congress can pass a legislative scheme to regulate illegal commerce, as it did in the drug laws upheld by the Court in *Raich*.[259] Although purposes of legality and illegality may be irrelevant in scrutinizing congressional legislation, it is probably relevant in considering state laws. For instance, states certainly enact their own criminal codes.[260] Ability for states to act in criminal law is an accepted state power.[261] However, by enacting tough criminal statutes, a state may be reasonably attempting to export the costs of crime to other states. For instance, if Alabama were to enact extremely stringent reporting requirements for businesses to investigate potential fraud, a business could be inclined to relocate to a state with less stringent reporting requirements. This could then export the risks of fraud to other states. In this case, Alabama is seeking to regulate the flow of *illegal* aliens into Alabama—it is difficult to conceive that Alabama would be prohibited from enacting legislation to stop the flow of *illegal* activity into Alabama,

254. CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 3 (December 2007).

255. *Id*. at 5–6.

256. Delaney, *supra* note 223, at 1855–56.

257. Campagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U.S. 380, 391 (1902).

258. *Id*. (emphasis in the original).

259. Gonzales v. Raich, 545 U.S. 1 (2005).

260. *See*, *e.g*., ALA. CODE Title 13A (criminal code) (1975).

261. United States v. Lopez, 514 U.S. 549, 564 (1995).

even if so doing would push some of these problems into neighboring states. The notion of legality also successfully distinguishes the immigration cases from *Edwards*, which involved the flow of legal U.S. persons across state lines.[262]

Critics of the state law need not surrender the argument at this point, however. First, to the continued relevance of *Edwards*, the Court could have limited its holding as a matter of equal protection, but it rested instead on the dormant commerce power, meaning that *Edwards* could reach illegal immigrants.[263] Furthermore, both public media and scholars have only begun to study the effects of this law on *legal* immigrants.[264] It is possible that the law will both exclude legal immigrants from Alabama and stop the flow of legal persons through Alabama so substantially as to amount to discrimination.

However, there are problems with such a dormant Commerce Clause analysis. Several sitting Supreme Court Justices openly question the validity of the dormant commerce power altogether.[265] Even those who acknowledge the dormant commerce power tend to argue that it should be advanced with care, particularly since most state laws "have *some* effect on the commerce between states."[266] In recent years, the Court has also looked favorably on laws that fall within the traditional state power.[267] As this Note has described, the modern trend is actually consistent with historic cases upholding a broad state power to regulate the flow of persons in the context of quarantine laws.[268] Quarantine laws have also been recognized as traditional examples of the state police power.[269]

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262. *See* Edwards v. California, 314 U.S. 160 (1941).

263. *Id*. at 178 (Douglas, J., concurring). Justice Douglas would have rested the holding on the Privileges and Immunities Clause of the 14th Amendment.

264. Scholarship outside the popular press is rudimentary. However, some popular press accounts have shown an impact on legal immigrants. *See* Chris Parsons, *Now Even LEGAL Immigrants are Fleeing Alabama over New Immigration Law That's So Tough It's Hurting the Economy*, The Guardian (Oct. 6, 2011), http://www.dailymail.co.uk/news/article-2045936/Now-LEGAL-immigrants-fleeing-Alabama-new-immigration-law-thats-tough-hurting-economy.html.

265. United Haulers Assoc. v. Oneida–Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (applying the dormant Commerce Clause in narrow situations). *See also* Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 361 (2008) (Thomas, J., concurring in the judgment) (discarding the dormant Commerce Clause analysis altogether).

266. SANDEFUR, *supra* note 216, at 177 (emphasis in original).

267. *Davis*, 553 U.S. at 341–42. *See also United Haulers Assoc*., 550 U.S. at 344.

268. *See* Campagnie Francaise de Navigation a Vapeur v. State Board of Health, 186 U.S. 380 (1902).

269. RUSSELL, *supra* note 61, at 26.

C. Other Dormant Commerce Clause Grounds for Invalidating State Laws

The Court has long had the power to strike down a law that burdens interstate commerce, but the state law is presumed to be valid.[270] As an empirical matter, "[s]tate laws frequently survive this . . . scrutiny."[271] Justice Kennedy counters: "The undue burden rule, however, remains an essential safeguard against restrictive laws that might otherwise be in force for decades until Congress can act."[272]

Courts have acknowledged that the prevalence of state immigration laws could burden interstate commerce. In *Lozano*, the Third Circuit noted that if Hazleton could enact immigration regulations, every state and locality could, and this could lead to a "slippery slope" that could undermine federal regulation in the area.[273] These concerns appeared to influence the Court in *Arizona v. U.S.* The majority opinion noted that "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."[274] The reason for placing this single sovereign in control of immigration is due in part to allowing foreign nations "concerned about the status, safety, and security of their nationals in the United States . . . to confer and communicate on this subject with one national sovereign, not the 50 separate states."[275] These passages demonstrate some concern on the Court both about the need for persons to be able to move freely within the U.S. (particularly legal persons who may also be hindered by these laws) and the concern that multiple sovereigns could cause confusion and interfere with the efficiency of a single national process. The dormant Commerce Clause could be responsive to both of these concerns.

It is not difficult to imagine how the ATCPA Class II and Class IV provisions could be invalidated under the dormant Commerce Clause. Both sets of provisions regulate commerce: Class II regulates persons, and Class IV regulates third-party actors, namely businesses.[276] The ATCPA burdens to some extent both persons seeking to enter Alabama and businesses seeking to do business in Alabama. The Alabama statute is very similar to the statute at issue in *Edwards* in that excluding some persons from the state is the express purpose of the statute.[277]

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270. *Davis*, 553 U.S. at 338–39.

271. *Id*. at 339.

272. *Id*. at 365.

273. City of Hazleton v. Lozano, 620 F.3d 170, 213 (2010), *vacated and remanded*,131 S. Ct. 2958 (2011) (mem.).

274. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

275. *Id*. at 2498.

276. *Supra* notes 12–15 (Class II), 21–29 (Class IV).

277. Edwards v. California, 314 U.S. 160, 174 (1941).

The immigration problem is similar to the problem analogized by Justice Kennedy in *Davis*—a state has acted in an area where its law may be in force for a number of years until Congress can act.[278] The Class IV provisions are particularly relevant because they relate largely to employers or renters. Consider the ATCPA prohibition on forming contracts with illegal aliens.[279] A multi-state renter could be required to inquire into an alien's legal status in Alabama and expressly prohibited from doing so in other states. The same could be true of businesses seeking to engage in commerce in all fifty states.

VI. CONCLUSION AND IMPLICATIONS OF STATE IMMIGRATION LEGISLATION

Immigration is an area in particular need of state experimentation. Congress has repeatedly failed to pass comprehensive immigration reform, and there remains a substantial population of undocumented immigrants in the United States.[280] The focus of this Note has been on restrictive immigration laws like Alabama's, but the current atmosphere has created experimentation in a number of directions.

In the months after the controversial ATCPA was passed and signed into law, the city of Dayton, Ohio, took the opposite approach. The city unveiled a "Welcome Dayton" plan involving a city resolution to both fund and develop a plan to encourage immigrants to settle in Dayton.[281] Although this Note does not engage the question of "sanctuary cities," the federalism framework may justify experimentation in immigration from a variety of perspectives.[282] Thus, federalism is not merely a concern for states attempting to pass restrictive laws. It may also be a concern for states that want freedom to develop and enforce their own laws to address a problem to which Congress has turned a deaf ear.

As noted throughout this Note, immigration is too often a source of legislative and judicial confusion. Judicial analysis often turns on

278. Dep't of Revenue of Ky. V. Davis, 553 U.S. 328, 365 (2008).

279. ATCPA § 27.

280. Based on 2002 data, undocumented immigrants in the U.S. consisted of 9.3 million persons, or 26% of the foreign-born population. Jeffrey Passel, et. al., *Undocumented Immigrants: Facts and Figures*, URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM 1 (Jan. 12, 2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf. More recent data from 2005 found that 68% of the unauthorized population lives in only eight states. Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, PEW HISPANIC CENTER 11 (June 14, 2005), http://pewhispanic.org/files/reports/46.pdf. Many of these immigrants have brought families, including 1.6 million children under the age of eighteen. More than 3 million of these families have children who are U.S. citizens as a result of birth in the United States. *Id*. at 18.

281. *See*, CITY OF DAYTON, WELCOME DAYTON PLAN: IMMIGRANT FRIENDLY CITY (Sept. 2011), *available at* http://www.daytonohio.gov/welcomedaytonreport.

282. *See* Pham, *supra* note 84, at 1384.

preemption, but there is no clear framework for evaluating federal statutes or whether something is a traditional state power. After centuries of experimentation, the Court has expounded on these federalism concerns in the Commerce Clause. Although the Commerce Clause may not explain every intricacy of preemption, both sides in the immigration debate should give it a closer examination in arriving at a more consistent analysis of federalism.

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