

IN THE SHADOW OF ARTICLE I: APPLYING A DORMANT COMMERCE CLAUSE ANALYSIS TO STATE LAWS REGULATING ALIENS

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State laws regulating aliens are increasing in number and scope. Yet the current doctrinal approaches to assessing the constitutionality of these laws fail to provide a predictable or desirable framework for distinguishing between permissible and impermissible state regulation of aliens. This Note, by analogizing to the Dormant Commerce Clause doctrine, aims to offer another approach to reviewing state laws regulating aliens—one that takes into consideration the state-to-state dimension of the national interests at stake in immigration law and policy, and that may provide a better means of addressing animus-based state laws.

INTRODUCTION

For the past few years, immigration reform¹ has been at the top of the American political agenda.² It recently appeared that Congress was set to reach a consensus on a comprehensive review of American immigration law for the first time since the 1950s.³ The moment, how-

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¹ "Immigration reform" includes a variety of policy proposals, from border control to migrant worker programs. For the current administration's official vision of comprehensive immigration reform, see The White House, Comprehensive Immigration Reform, <http://www.whitehouse.gov/infocus/immigration/> (last visited Sept. 29, 2007).

² President Bush campaigned heavily in 2000 on immigration reform, but after September 11, 2001, the country became focused on the war on terror. Congress, however, began to focus on immigration again in December 2005, and President Bush reestablished reform as a priority with his State of the Union address in early 2006. See George W. Bush, State of the Union Address (Jan. 31, 2006) (transcript available at <http://www.whitehouse.gov/stateoftheunion/2006/>) (highlighting need to reform immigration system). The most recent round of reform faltered in Congress in June 2007, though the Bush administration proposed heightened enforcement mechanisms in August. N.C. Aizenman, *Bush Moves to Step Up Immigration Enforcement*, WASH. POST, Aug. 11, 2007, at A1.

³ See Immigration and Nationality Act, Pub. L. No. 82-477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, 22 U.S.C.) (establishing framework of current immigration law). In 1996, Congress passed a variety of laws that affected immigration, but these did not amount to a comprehensive reform of national immigration

ever, has passed; the opportunity has been squandered through a combination of unrealistically hard-line proposals, diplomatic intransigence,⁴ and the sheer magnitude and scope of the issue.⁵ The enduring images created by the national debate on immigration have been of coordinated protests by legal and undocumented immigrants and their sympathizers in scores of cities.⁶ It is in the state legislatures across the country, however, that the lasting effects of the debate have been felt.⁷

Notwithstanding the fact that immigration policy is within the purview of the federal government, the line between regulating immigration and regulating immigrants is unclear.⁸ As a result, states often attempt to solve perceived problems on their own, by legislating to regulate immigrants within their borders.⁹ There were 570 such bills

policy. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-546 to 3009-724 (codified as amended in scattered sections of 7, 8, 15, 18, 20, 22, 28, 32, 42, 50 U.S.C.) (minimizing judicial review of immigration decisions, expanding grounds for deportation and nonadmission of immigrants, and redefining concept of entry); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. IV, 110 Stat. 1214, 1258-81 (codified as amended in scattered sections of 8, 18 U.S.C.) (revising deportation procedures for aliens convicted of certain offenses); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, tit. IV, 110 Stat. 2105, 2260-77, (codified as amended in scattered sections of 8, 26, 42 U.S.C.) (restricting aliens' eligibility for various federal benefit programs).

⁴ Congressman James Sensenbrenner of Wisconsin proposed H.R. 4437 on December 6, 2005, and it was passed by the House ten days later. The bill was radical in its draconian regulation of undocumented immigrants—making an alien's unlawful presence in the United States a felony—and in its criminalization of efforts to provide humanitarian assistance to undocumented immigrants. H.R. 4437, 109th Cong. (2005). Laden with amendments, and stalled by detailed arguments over the intricacies of a guest worker program, the bill—and that round of immigration reform generally—effectively collapsed under its own weight by April of 2006.

⁵ The omnibus nature of the 2007 immigration bill succeeded only in giving everyone something to complain about. *See, e.g.*, Editorial, *The Grand Collapse*, N.Y. TIMES, June 30, 2007, at A16 (referring to immigration proposal as “[a] bloated bill” that “toppled into a ditch like a fat S.U.V. on a curve”).

⁶ *See* Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006, at A1 (describing widespread rallies).

⁷ *See* Anthony Faiola, *States' Immigrant Policies Diverge*, WASH. POST, Oct. 15, 2007, at A1 (describing burgeoning state regulation of aliens in 2007); Darryl Fears, *Illegal Immigrants Targeted States*, WASH. POST, June 25, 2007, at A1 (“Frustrated with Congress's inability to pass an immigration overhaul bill, state legislatures are considering or enacting a record number of strongly worded proposals targeting illegal immigrants.”).

⁸ *See infra* notes 58-60 and accompanying text; *see also* Editorial, *Immigration: No Papers, No Lease?*, BOSTON GLOBE, May 18, 2007, at A14 (describing ordinance in Dallas suburb allowing officials to fine landlords who rent to undocumented immigrants as having “no logical basis other than to harass immigrants”).

⁹ *See, e.g.*, *All Things Considered: Addressing Immigration Issues, State by State* (NPR radio broadcast Mar. 24, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5300338> (discussing independent approaches that states have taken to address undocumented immigration); Mark K. Matthews, *Immigration Bedevils State*

introduced in state legislatures during 2006—a record high, according to the National Conference of State Legislatures¹⁰—and at least 1404 have been introduced in the first half of 2007.¹¹ This unprecedented volume may be due to the national attention given to immigration (and Congress’s failure to act) in the last two years.¹² A larger trend, however, is also clear: Over the past ten to fifteen years, states have been regulating aliens more comprehensively than ever before.¹³

This steady increase in state regulation has stemmed from two concomitant developments. The first is that the alien community has grown and has moved to new states unused to the societal pressures of immigration. Over the past decade, “the most rapid growth in the immigrant population in general and the unauthorized population in particular has taken place in new settlement areas where the foreign-born had previously been a relatively small presence.”¹⁴ The second change is the increased willingness of Congress to devolve the federal power over immigration to the states, allowing them to regulate aliens on their own.¹⁵ As a result, more states are regulating aliens, and

Lawmakers, STATELINE.ORG, Sept. 2, 2005, <http://www.stateline.org/live/printable/story?contentId=51980> (“The broad phenomenon is that states have to grapple with the issue of immigration because of failure on behalf of the federal government The state and localities end up holding the bag.” (quoting Mark Krikorian, Executive Director, Center of Immigration Studies)).

¹⁰ Press Release, Nat’l Conference of State Legislatures, Top 10 Policy Issue Forecast: Heat Is on State Legislatures (Jan. 4, 2007), available at <http://www.ncsl.org/programs/press/pr070104.htm>.

¹¹ DIRK HEGEN, NAT’L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2007), <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm> (tracking state immigration bills through July 2, 2007).

¹² Immigration policy is an area of classic federalism interplay: Actions of the states helped to drive the debate to the national level, and then the failure at the national level returned the debate to the states. For more on how the structure of the law can help to shape the national debate on immigration, see *infra* Part III.

¹³ See Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 132 (1994) (outlining wide variety of laws passed by states regulating aliens).

¹⁴ JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 11 (2005), available at <http://www.pewhispanic.org/files/reports/46.pdf>. New settlement states include Arizona, North Carolina, Georgia, and Tennessee. *Id.* at 12.

¹⁵ Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 N.Y.U. ANN. SURV. AM. L. 283, 287 (2002) (discussing intent of 1996 legislative changes to “encourage state and local law enforcement officials to collaborate in the enforcement of federal immigration laws”); see generally Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002) (critiquing challenges to devolution of federal immigration power).

Congress is giving them more leeway to do so.¹⁶

Although some commentators embrace this trend,¹⁷ many others remain concerned about the intent behind the state statutes in question.¹⁸ The latter group believes that state legislatures are more likely than the federal government to enact legislation inspired by anti-immigrant animus,¹⁹ and they are concerned with such animus for critical normative reasons. There is ample evidence that certain differential treatment of aliens is creating an underclass in the United States²⁰ through policies and practices that contravene the fundamental precept of equality thought to underlie American society.²¹ For example, Michael Wishnie contends that such discrimination offends the “bedrock equality principles and anticaste values embodied in the Fifth and Fourteenth Amendments.”²² Wishnie and

¹⁶ I use the term “alien,” though generally interchangeable with “immigrant,” to differentiate more clearly between state laws regulating *immigration* and state laws regulating *aliens* (or immigrants).

¹⁷ See, e.g., Chang, *supra* note 15, at 358 (“I offer a skeptical view of the ‘nondevolvability principle.’”); Peter H. Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 388–90 (2002) (arguing that devolution of immigration power may ultimately benefit aliens in many states); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628 (1997) (“[D]evolution could in fact work to the net benefit of aliens . . .”).

¹⁸ See, e.g., Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. ANN. SURV. AM. L. 371, 376 (2002) (“Now, states have a far larger role in setting and funding immigration policy, and, as a result, a clear mismatch between our immigration and immigrant policies has developed. While our immigration policy remains liberal and inclusive, our immigrant policy is exclusive and fragmented.”); Ellen M. Yacknin, *Aliessa and Equal Protection for Immigrants*, 58 N.Y.U. ANN. SURV. AM. L. 391, 407 (2002) (“[T]he flexibility that the devolution of immigration authority from the Congress to the states may offer will operate, more likely than not, to the detriment of lawful immigrants, and low-income immigrants in particular.”).

¹⁹ Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1436–37 (1995) (noting that localized anti-alien movements are regular occurrences in American history). *But see* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 297 (2002) (“[C]entralization of immigration power in the hands of the federal government . . . may exacerbate the negative civil rights impacts of the enforcement of the immigration laws.”).

²⁰ See Mark Lange, Op-Ed., *Immigrants’ Labors Lost*, N.Y. TIMES, Sept. 3, 2007, at A13 (arguing that failing to offer illegal immigrants legitimate employment creates underclass).

²¹ See Plyler v. Doe, 457 U.S. 202, 219 (1982) (describing failure of federal government to address immigration as resulting in “an underclass [that] presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law”); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 268 (1987) (“[T]he history of liberalism reflects a tendency to expand both the definition of the public sphere and the requirements of equal treatment.”).

²² Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 528 (2001).

others thus argue for maintaining full control over immigration policy at the federal level²³—reinforcing the so-called plenary power doctrine. They do so, however, not for the given justifications of the doctrine—to advance the national interest in regulating foreign affairs²⁴ or to defend the constitutional provision providing for a “uniform Rule of Naturalization”²⁵—but rather for the possible advantage to aliens from conducting debates over immigration at the national level.²⁶

Ultimately, determining whether state legislatures are actually more likely to impose discriminatory regulations on aliens (and whether removing the debate to the national level would improve the lot of those aliens) demands an empirical analysis that is both difficult to conduct and potentially inconclusive.²⁷ However, the mere possibility of burdensome regulation of aliens at the state level has been enough to encourage academics to assess and reassess the dominant doctrinal avenues for challenging the constitutionality of state laws regulating aliens. This endeavor has led to various attempts to tweak the existing doctrines, both to reinforce federal exclusivity and to achieve results geared toward expanding aliens’ rights.²⁸

²³ *E.g.*, *id.* at 530.

²⁴ *See infra* Part I.A.1.

²⁵ U.S. CONST. art. 1, § 8, cl. 4.

²⁶ Gerald Neuman has suggested that aliens are better represented at the national level in debates over immigration:

Local anti-foreign movements may have difficulty enlisting the national government in their crusades, in part because emotions are not running so high in other states at the moment, and in part because aliens have some virtual representation in Washington by means of the foreign affairs establishment, which knows that the United States will have to answer in the international community for actions taken at home.

Neuman, *supra* note 19, at 1436–37. This articulation has gained some credence in the recent debate over immigration; pressure from the national network of immigrants and widespread protests contributed to the failure of the Sensenbrenner Bill. *See supra* notes 4–6 and accompanying text.

²⁷ For example, ten states have extended in-state tuition privileges at state universities to qualified undocumented immigrants, an example of what could be construed as pro-immigrant sentiment. *See* Migration Policy Inst., State and Local Immigration Regulation, <http://www.migrationinformation.org/integration/regulation.cfm> (last visited Sept. 29, 2007). Efforts to conduct such an empirical analysis have been made, and the “evidence is mixed.” Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. (forthcoming 2008) (manuscript at 3 & n.6), available at <http://ssrn.com/abstract=1006091>.

²⁸ *E.g.*, Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 98–99 (1985) (arguing that preemption lacks independent substantive meaning and that, consequently, equal protection is superior tool for assessing constitutionality of state laws concerning aliens); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1060–65 (1979) (suggesting that Supreme Court has not applied equal protection doctrine faithfully in analyzing state laws regarding aliens but that Court’s analysis is justified by

These attempts have focused on the two established ways that state laws regulating aliens can run afoul of the Constitution. First, such laws may impinge on the federal power over immigration, creating a preemption problem. Second, state regulation of aliens may violate the Equal Protection Clause of the Fourteenth Amendment. This Note contends that both of these methods of challenging discriminatory state laws are insufficiently attentive to the national coordination concerns that lie at the heart of the federal interest in controlling immigration.

Preemption analysis requires distinguishing between federal regulation of immigration and state regulation of aliens. It provides only a blunt tool for difficult situations in which policy concerns may call for a more nuanced approach.²⁹ Equal protection is equally flawed: Because federal immigration lawmaking receives only rational basis review,³⁰ rather than the strict scrutiny given to state statutes, it is insulated “from the norms of equal treatment and due process.”³¹ Therefore, as Congress seeks to use its position under the plenary power doctrine to devolve its power to the states, state statutes are increasingly “immune from close constitutional scrutiny.”³² Furthermore, both of these doctrines are heavily influenced by the plenary power doctrine and the resulting federal-state relationship.

This Note assumes the continued relevance of the plenary power doctrine³³ but recognizes that further efforts to refine the existing doc-

federalism concerns); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070 (1979) (arguing that Supreme Court’s equal protection analysis is unintelligible and that opinions actually reflect “an unarticulated theory of preemption” that should be explicitly embraced); Marisa Ann Tostado, Comment, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A. L. REV. 1033, 1044–45 (1998) (“[A]n equal protection approach is the better method of analysis. If alienage cases are instead based on principles of preemption or federalism, states could constitutionally discriminate against aliens.”).

²⁹ See *infra* Part I.A.

³⁰ See *infra* Part I.B.

³¹ Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1061–62 (1994); see also *infra* Part I.B.

³² Wishnie, *supra* note 15, at 287.

³³ As Victor Romero has noted, “[d]espite calls among many to dismantle it, Congress’s plenary power over immigration, and the Executive’s concomitant authority to enforce it, are likely here to stay.” Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377, 378 (2002). This argument makes sense because of the doctrine’s long heritage and its firm place in constitutional law. Nevertheless, the plenary power doctrine has been challenged by academics on a number of fronts. See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–6, 12 (1998) (arguing that overt discriminatory motives in early immigration cases compel reexamination of plenary power doctrine); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (claiming that plenary

trines are not practical. A new approach to state laws regulating aliens is needed, one that reflects the rationales behind that doctrine but is not based on the federal-state relationship. I suggest, therefore, looking to the doctrinal analysis provided by the Dormant Commerce Clause.³⁴

Although neither an obvious nor traditional source of law for immigration issues,³⁵ the Dormant Commerce Clause can nonetheless provide an important insight into the state-to-state dimension of the national interest that is at stake in the immigration debate. “[T]he standards of the Dormant Commerce Clause flow from a vision about the appropriate relationships among states in our federal system,”³⁶ and doctrinal analysis under it focuses on how one state’s potentially discriminatory regulations affect other states. In certain circumstances, therefore, a Dormant Commerce Clause–type analysis could provide a meaningful avenue for those who are concerned about the motivations of state legislatures to challenge the laws those legislatures pass.³⁷

In Part I, I discuss in more detail the dominant doctrines—preemption and equal protection—used to analyze state laws regulating aliens and outline the problems inherent in each approach. In Part II, I suggest that the Court’s Dormant Commerce Clause jurisprudence, by focusing on whether or not a given law impermissibly exports one

power doctrine “has no foundation in principle”); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1164–65 (2002) (arguing that plenary power doctrine allows federal government to disavow international responsibilities). One commentator has rejected the premise that plenary federal power over immigration exists at all. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 409 (1983) (suggesting that congressional power to create uniform rules of naturalization may merely be “a prohibition of special private bills” and not sweeping grant of power).

³⁴ The Dormant Commerce Clause analysis I suggest can be considered a type of preemption: Where it operates, it preempts state actions in conflict with it. In this Note, however, I will use “preemption” only to describe the current range of doctrines that the Supreme Court uses to assess the compatibility between state and federal law. The Dormant Commerce Clause, in contrast, assesses the extent to which actions taken by individual states prevent other states from achieving both state and federal goals. See *infra* Part II.A.

³⁵ A clear question raised by the analogy is whether concurrent power to regulate immigration exists in the states and the federal government. A response in the affirmative, based on historical and practical considerations, is provided *infra* Part III.A.

³⁶ Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2396 (1996).

³⁷ Although I do not specifically address the problems of congressional devolution in this Note, a Dormant Commerce Clause–type analysis might also provide some needed oversight of congressional devolution of authority in which “national policy” is deemed to be the policy implemented by an individual state.

jurisdiction's internal immigration problems to another, presents another way to assess state laws regulating aliens. I first draw out the analogy, explaining the doctrine and theory behind the Dormant Commerce Clause. I next address how the analysis could work in the immigration context and test this analysis by applying it to *Plyler v. Doe*,³⁸ the most difficult case to reconcile under the current doctrinal approaches. Finally, in Part III, I address some of the challenges posed by importing the Dormant Commerce Clause doctrine into the immigration context. I conclude that this mode of analysis can provide both a mediating constraint on debates over immigration at the state level, as well as a new tool for those concerned about the varying ways in which aliens are regulated by the states.

I

THE CONSTITUTIONALITY OF STATE LAWS REGULATING ALIENS

The current methods of analyzing state laws regulating aliens are tied to the plenary power doctrine, which places responsibility for immigration law at the federal level. The doctrine is based both on the constitutional provision granting Congress the power “to establish an uniform Rule of Naturalization”³⁹ and on the Supreme Court's determination that the foreign affairs power of the federal government supports federal authority over immigration, broadly defined, to the exclusion of the states.⁴⁰ The plenary power doctrine acts as a background norm that influences the ways in which the Court assesses state laws that regulate aliens.⁴¹ In this Part, I examine the challenges presented by the two most prominent methods of analyzing such laws—preemption and equal protection—and demonstrate their respective shortcomings, including how each addresses, or fails to

³⁸ 457 U.S. 202 (1982).

³⁹ U.S. CONST. art. 1, § 8, cl. 4.

⁴⁰ An early articulation of this principle is found in *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889). Justice Field, in upholding a federal law preventing the admission of Chinese immigrants to the United States, wrote: “For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.” *Id.* at 606; see also *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (power to admit or expel aliens is “inherent and inalienable right of every sovereign and independent nation”).

⁴¹ The plenary power doctrine is generally accepted as providing a foundation for both the preemption and equal protection doctrines in the immigration context. See *infra* Part I.A. But see Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 259 (2000) (suggesting that plenary power doctrine, though strongly worded, may function primarily as dicta).

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address properly, the federal-state relationship and the national interest in uniform immigration policy.

A. Preemption Analysis

The plenary power doctrine grants Congress almost unlimited power to regulate a nebulous range of alien activities that are encompassed within the term “immigration.” As state law has sought to regulate aliens in ever-broader spheres, often bumping up against an expanding definition of immigration, the scope and methods of preemption analysis have changed. In response to this evolution of state and federal law, the Supreme Court has looked to broad national interests and express provisions of the Immigration and Naturalization Act (INA) in order to determine whether state laws are preempted. Ultimately, however, these two methods of analysis do little to provide a nuanced approach to state laws regulating aliens. Preemption analysis in this area consequently remains both scatter-shot and overbroad.

1. Broad National Interests

Preemption analysis grounded in the “broad national interests” of the country relies on the federal interest in foreign affairs to override conflicting state laws. In the landmark case of *Chy Lung v. Freeman*,⁴² the Supreme Court explained its understanding of why the foreign affairs power necessitates broad federal control over immigration. The case addressed a California statute that required aliens disembarking at any port in the state to pay a bond. The statute was designed to prevent “lewd and debauched women” and those likely to become public charges from entering the state.⁴³ *Chy Lung*, a Chinese citizen, was thus prevented from landing.⁴⁴ In striking down the statute, the Court focused on the foreign relations problems presented by California’s action:

Upon whom would [a claim for redress] be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? . . . [A] single State

⁴² 92 U.S. 275 (1875).

⁴³ *Id.* at 276–77.

⁴⁴ *Id.* at 276.

can, at her pleasure, embroil us in disastrous quarrels with other nations.⁴⁵

Such action by California, or any single state, would undermine the conception of the nation. And so the Court held, declaring that “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress.”⁴⁶ This articulation foreshadows what is now known as the “one voice” theory of foreign affairs: The nation needs to be represented on the international stage as a unified entity.⁴⁷

Courts undertaking preemption analyses of state laws using the “one voice” rationale must decide, therefore, whether the laws in question will effectively function as acts of foreign policy. In an era when states simply attempted to regulate the entry and exit of individuals, the analysis was straightforward, as there was a clear nexus between the state laws and foreign affairs. Now, with an increasingly broad range of regulatory actions understood to implicate “immigration,” including social welfare and education statutes that are areas of traditional state concern, the nexus has weakened, and striking down laws on foreign affairs grounds has become more complex.⁴⁸

To maintain federal control over “immigration” by using the “one voice” theory, the Supreme Court has therefore been willing to stretch the meaning of “foreign affairs.” For example, in *Zschernig v. Miller*,⁴⁹ an Oregon law provided that personal property left by a decedent in Oregon to a nonresident alien would escheat to the state unless the relevant foreign country maintained reciprocal inheritance

⁴⁵ *Id.* at 279–80; *see also* *Hines v. Davidowitz*, 312 U.S. 52, 65–66 (1941) (“Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one.”).

⁴⁶ *Chy Lung*, 92 U.S. at 280.

⁴⁷ The Supreme Court has often invoked the “one voice” test in its analyses of the foreign affairs power, as distinct from the immigration power. *E.g.*, *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 450–51 (1979) (stating that allowing states to tax foreign instrumentalities would prevent nation from “speaking with one voice” (internal quotation marks omitted)); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) (“[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments”); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 556 (1959) (Frankfurter, J., dissenting) (identifying need for government to speak with “one voice” when engaging in commerce with foreign nations); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1637 & n.85 (1997) (discussing history of “one voice” test).

⁴⁸ *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (“[I]t ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations.”).

⁴⁹ 389 U.S. 429 (1968).

rights for American-citizen heirs.⁵⁰ The Court, in invalidating the law, emphasized the national interest in a unified voice in foreign affairs:

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . The several States . . . have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.⁵¹

In analyzing the case, at least one commentator has questioned the real effect that such a law would have on foreign affairs and has determined that “[n]o one of [the Court’s] conclusions is effectively supported by the facts in the *Zschernig* case.”⁵² It is because of the preemption doctrine’s broad-brush approach that the Court was forced into such tenuous reasoning.

2. *The Immigration and Nationality Act*

The broad foreign affairs articulation of the national interest in a uniform immigration policy continues to underpin all types of preemption analyses in the immigration area. Since the advent of the federal Immigration and Nationality Act,⁵³ however, preemption analysis now turns on whether or not Congress has regulated in the particular area that the state law in question addresses.⁵⁴ In *Hines v. Davidowitz*,⁵⁵ the Court described the “field preemption” at issue:

[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.⁵⁶

The search for congressional action has encouraged courts to conduct detailed analyses of the INA ever since its passage in 1952. These analyses have been effective in overturning state statutes that contradict or deviate from affirmative congressional actions, but they have

⁵⁰ *Id.* at 430–31.

⁵¹ *Id.* at 440.

⁵² Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 836 (1989).

⁵³ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

⁵⁴ For an example of this type of analysis, see *Elkins v. Moreno*, 435 U.S. 647, 664–68 (1978), where the Court found that, in the absence of federal regulation, state law controlled whether certain aliens could become residents of Maryland.

⁵⁵ 312 U.S. 52 (1941).

⁵⁶ *Id.* at 66–67 (internal citation omitted).

not positively defined the ultimate scope of Congress's legislative power over aliens and immigration.⁵⁷

Within the narrow confines of the INA, Congress's decision on how to classify aliens can determine a state's ability to regulate them. For example, in *Toll v. Moreno*,⁵⁸ the Court held that a "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress."⁵⁹ Complicating matters, however, the Court then added that "[t]o be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute."⁶⁰

The extent to which states may regulate undocumented aliens is also unclear even in a straightforward analysis of congressional action: Unless Congress clearly intends to oust state power completely, "harmonious state regulation touching on aliens in general" would not seem to be preempted.⁶¹ This suggests that "state measures against undocumented aliens would almost by definition seem not only consistent with ultimate federal control of immigration (to the extent it comprises the power to admit and exclude) but also in furtherance of its execution to the extent that such measures may encourage unlawful aliens to repatriate."⁶² This articulation of the limits of permissible state regulation seems to conflict directly with the limits implicated by the foreign affairs power in, for example, *Zschernig*: Surely state control of undocumented immigrants could have as dev-

⁵⁷ Delimiting the scope of the federal government's plenary power is a major issue in the immigration literature, similar to determining the scope of the commerce power. *E.g.*, Henkin, *supra* note 33, at 863; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 546–48, 554–60 (1990). This Note accepts, for better or worse, the current limits of the plenary power as given.

⁵⁸ 458 U.S. 1 (1982).

⁵⁹ *Id.* at 12–13 (citing *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976)).

⁶⁰ *Id.* at 13. This language was cited in the Fifth Circuit's decision in *LeClerc v. Webb*, 419 F.3d 405, 424 (5th Cir. 2005), upholding a Louisiana law precluding nonimmigrants from taking that state's bar exam, *id.* at 426. The Immigration and Nationality Act (INA) defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (2000). A "nonimmigrant alien" is a term of art, referring to those aliens who are lawfully admitted and fall within one of the categories listed in 8 U.S.C. § 1101(a)(15)(A)–(V), including diplomats, tourists, students, and others.

⁶¹ *De Canas*, 424 U.S. at 358.

⁶² Spiro, *supra* note 13, at 148 (internal citation omitted). The claim that restrictive state laws can encourage immigrants to repatriate (as opposed to encouraging them to move to another state) is questionable. *See infra* note 133 and accompanying text. Yet Spiro's point about the harmony of federal and state goals is well taken.

astating an effect as inheritance laws on national relations with foreign powers.⁶³

Preemption analysis based on the INA thus not only creates confusion about which aliens a state can regulate but also does little to clarify the extent of the state's regulatory authority. The limits are ultimately driven by a semantic distinction: When a state law regulating "aliens" is, instead, regulating "immigration," it may be preempted either by congressional action or by the national interest in foreign affairs.⁶⁴ To make this determination, substance must be given to the term "regulating immigration." Yet while it appears that the federal power over immigration goes beyond admissions and deportations,⁶⁵ the Court has not articulated how far it extends.

The Justices have said that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted."⁶⁶ In *De Canas v. Bica*, the Court confronted a California statute that expressly regulated undocumented aliens by providing that "no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."⁶⁷ The Court did not invalidate the statute, however, because it characterized it as a state labor law "within the mainstream of [the state's] police power regulation."⁶⁸ This characterization was not inevitable; the law could have been deemed an immigration law analogous to the prohi-

⁶³ For example, Proposition 187, California's 1994 ballot initiative terminating social services to undocumented aliens, provoked protests in Mexico. Spiro, *supra* note 13, at 165–66. All of the substantive portions of Proposition 187 were declared unconstitutional on preemption grounds. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (finding that only sections two, three, and ten were enforceable).

⁶⁴ "Immigration law" used to be concerned solely with the admission and deportation of aliens and thus was solely a matter of federal law. "Alienage law" traditionally addressed the legal status of aliens in other areas and had both federal and state dimensions. Given the expanded understanding of the plenary power over immigration, these two types of law have begun to collapse into one, thus creating difficult questions of line-drawing between the federal and state powers to regulate. See Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202–03 (1994) ("The line between 'immigration' and 'alienage' is elusive. . . . One key reason is functional overlap. 'Alienage' rules may be surrogates for 'immigration' rules. . . . Similarly, 'immigration' rules may be surrogates for 'alienage' rules."); Wishnie, *supra* note 22, at 524 ("[M]any laws regulating immigrants have features of both [immigration and alienage] regimes.").

⁶⁵ See *Mow Sun Wong v. Hampton*, 500 F.2d 1031, 1036–37 (9th Cir. 1974), *aff'd on other grounds*, 426 U.S. 88 (1976) (suggesting that Congress may have power to discriminate against aliens in certain federal jobs).

⁶⁶ *De Canas*, 424 U.S. at 355.

⁶⁷ *Id.* at 352 (quoting CAL. LAB. CODE § 2805(a), repealed by 1988 Cal. Stat. 3025).

⁶⁸ *Id.* at 356.

bition in California's Proposition 187 against the provision of social services to undocumented aliens.⁶⁹ *De Canas* thus demonstrates that the manner in which the Court characterizes a statute does much of the analytical work in determining its constitutionality.⁷⁰

Preemption analysis suffers from the blunt and broad approach inherited from the doctrine's foreign affairs justification, as well as from the incoherence of the Court's varying characterizations of state statutes. At bottom, however, the preemption doctrine lacks "substantive content."⁷¹ It can be used as easily to invalidate state laws that are *more* generous than their federal counterparts as it can to invalidate those that are less generous. Thus, preemption analysis, even assuming that it is effectively and predictably applied, might actually undermine pro-immigrant reform efforts. Critics of restrictive immigration policies, who typically desire greater protection for immigrants at the state level, cannot rely on the doctrine to provide the safeguards they desire.

B. Equal Protection Analysis

As applied to governmental regulation of aliens, the equal protection doctrine fashioned by the Supreme Court has been bifurcated: State regulations receive strict scrutiny (under which a state government must demonstrate that its legislation is narrowly tailored to address a specific and compelling state interest), while federal regulations are reviewed under the far more lenient rational basis standard.⁷² From the perspective of those who favor either expanding or ensuring constitutional protection for aliens, the current doctrinal landscape is troublesome.

Because the Constitution's text recognizes a distinction between citizens and aliens,⁷³ some ability to legislate based on the two classes

⁶⁹ 1994 Cal. Stat. A-317. Substantially all of Proposition 187 was preempted by federal immigration law, implying that the initiative was an "immigration" measure rather than a police power measure. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997) (describing how Proposition 187 was preempted under *De Canas* as well as subsequent federal legislation, leaving California and other states powerless to enact legislative schemes to regulate immigration).

⁷⁰ See Maier, *supra* note 52, at 835 (noting that language in *De Canas*, 424 U.S. at 360 n.8, demonstrates that Court's characterization of statute will determine whether law is preempted).

⁷¹ Koh, *supra* note 28, at 98.

⁷² An intermediate level of scrutiny exists but is not relevant for immigration purposes. See *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (discussing standard of intermediate scrutiny in context of sex discrimination).

⁷³ *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting) ("[T]he Constitution itself recognizes a basic difference between citizens and aliens. That distinc-

must be permissible.⁷⁴ At the state level, that ability is limited by strict scrutiny, based on a determination that aliens constitute a protected class.⁷⁵ Even given this “heightened scrutiny,” however, the power of the equal protection doctrine to protect aliens is far from absolute. It has proven difficult to justify the categorization of aliens as a discrete and insular class, and protections have been noticeably eroded for those aliens working in “government functions.”⁷⁶ In contrast, at the federal level, the Court has determined—based on the plenary power doctrine—that the federal government may discriminate more widely against aliens.⁷⁷ As a result, a decision by Congress to devolve federal power to the states could serve to insulate any resulting state regulations from strict scrutiny analysis. Therefore, relying on equal protection doctrine to provide effective protection of aliens is hampered by the doctrine’s differential and inconsistent use at the state and federal levels.

1. *Equal Protection at the State Level*

Equal protection analysis at the state level is premised on the identification of aliens as a discrete and insular class, a determination that justifies the use of strict scrutiny in reviewing state laws regulating aliens. The Supreme Court first addressed strict scrutiny in the context of aliens in 1971, in *Graham v. Richardson*.⁷⁸ The Court was faced with multiple plaintiffs from Arizona and Pennsylvania who challenged state laws that conditioned the receipt of welfare benefits upon citizenship or legal in-state residence.⁷⁹ The *Graham* Court held

tion is constitutionally important in no less than 11 instances in a political document noted for its brevity.”).

⁷⁴ See Perry, *supra* note 28, at 1061 (“[I]t is difficult to see how laws preferring citizens to aliens implicate the principle of equal protection, since alienage is a morally relevant status—or at least must be so regarded unless one is prepared to abolish the status of citizenship.”). Many theorists, however, have attacked citizenship as an unstable basis for constitutional liberties, suggesting that something deeper—like personhood—should be the benchmark for determining the extent of constitutional rights. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975) (“[Citizenship] is at best something given, and given to some and not to others, and it can be taken away. It has always been easier, it always will be easier, to think of someone as a noncitizen than to decide that he is a non-person.”).

⁷⁵ See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that classifications that single out certain “discrete and insular” groups for disparate treatment may require heightened scrutiny).

⁷⁶ See *infra* notes 91–101 and accompanying text.

⁷⁷ See *Mathews v. Diaz*, 426 U.S. 67, 81–82 (1976) (holding that “narrow standard of review of decisions made by the Congress or the President [is necessary] in the area of immigration and naturalization”).

⁷⁸ 403 U.S. 365 (1971).

⁷⁹ *Id.* at 366–70.

that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority for whom . . . heightened judicial solicitude is appropriate.”⁸⁰ It then conducted a rigorous analysis of the state laws in question, maintaining that “[s]ince an alien as well as a citizen is a ‘person’ for equal protection purposes,”⁸¹ concern for the public fisc—i.e., the State’s “desire to preserve limited welfare benefits for its own citizens”⁸²—was an impermissible justification for withholding benefits from aliens.⁸³ The Court, however, failed to explain *why* aliens should be thought of as a protected class under the “discrete and insular” schema. In fact, later in the opinion, Justice Blackmun emphasized the *similarities* between aliens and citizens,⁸⁴ which suggests that the rationale for protecting the former group may only be justified by the fact of its disenfranchisement.⁸⁵

The most striking aspect of the application of strict scrutiny to state laws regulating aliens has been the Court’s failure to apply the same analysis to laws that target undocumented aliens in particular. The Court has justified this differential treatment on several related grounds. It has noted that undocumented status is not “an absolutely immutable characteristic since it is the product of conscious, indeed

⁸⁰ *Id.* at 372 (internal citations omitted). In referring to a “discrete and insular” minority, the Court referenced the text of the famous footnote four to *Carolene Products*, which outlined the rationale behind heightened equal protection review for certain protected classes:

[W]e [need not] enquire [now] whether . . . considerations [of heightened scrutiny] enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Prods., 304 U.S. at 152 n.4 (citations omitted).

⁸¹ *Graham*, 403 U.S. at 375.

⁸² *Id.* at 374.

⁸³ *Id.*

⁸⁴ *Id.* at 376 (noting that aliens, like citizens, pay taxes, may be called to serve in armed forces, and contribute to economic growth of states). T. Alexander Aleinikoff has noted the inconsistency between this paragraph’s detailing of the similarities between aliens and citizens and the finding that aliens are a discrete and insular class:

Although Blackmun does not appear to recognize the tension this paragraph creates for his opinion, in these lines he actually flips the justification for invalidating discriminatory state laws. The statutes in *Graham* should be invalidated not because aliens are a defenseless group needing judicial protection, but rather because—at least from the state’s perspective—they are indistinguishable from other residents of the state.

T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 24 (1990).

⁸⁵ The inability to vote is at the heart of John Hart Ely’s description of aliens as “discrete and insular.” See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 161 (1980) (“Aliens cannot vote in any state, which means that any representation they receive will be exclusively ‘virtual.’”).

unlawful, action.”⁸⁶ It has further maintained that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”⁸⁷ Finally, “[p]ersuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct.”⁸⁸

These overlapping arguments have been justly criticized.⁸⁹ Certainly, the Court’s basic justification for treating legal aliens as a discrete and insular class—their inability to vote—cuts equally in favor of undocumented aliens. Ultimately, the distinction between the treatment of legal and “illegal” aliens under the Court’s equal protection jurisprudence is not a meaningful one: It rests not on a proper application of the “discrete and insular” formulation but rather solely on the lawfulness of the aliens’ presence.⁹⁰

Beyond these weaknesses in the application of strict scrutiny, equal protection analysis of state laws regulating aliens has also been characterized by a persistent erosion of aliens’ rights in the area of “government functions.” Shortly after its decision in *Graham*, the Court began to back away from its previously capacious understanding of the range of state laws requiring strict scrutiny. It turned instead to the language and practices of early twentieth-century cases, which allowed states to distinguish between aliens and citizens in order to protect “special public interests.”⁹¹ By the late 1970s, the Court had determined that states could deny aliens the right to hold those positions that “lie at the heart of our political institutions,”⁹²

⁸⁶ *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

⁸⁷ *Id.* at 223.

⁸⁸ *Id.* at 219.

⁸⁹ See, e.g., Levi, *supra* note 28, at 1081 (“Illegal aliens probably are not less ‘discrete’ or ‘insular’ than resident aliens, and they are equally politically powerless.”).

⁹⁰ This doctrinal confusion is compounded by the increasing number of statutory “classes” of aliens created by Congress, such as the nonimmigrant class discussed in *LeClerc v. Webb*, 419 F.3d 405, 418–19 (5th Cir. 2005).

⁹¹ E.g., *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 397 (1927) (upholding law preventing aliens from running pool halls on grounds of public morality); *Crane v. New York*, 239 U.S. 195, 198 (1915) (upholding law preventing aliens from working on public works project in order to preserve public fisc for state’s own citizens); *Patsone v. Pennsylvania*, 232 U.S. 138, 145–46 (1914) (upholding law preventing aliens from hunting in order to preserve state’s wildlife for its own citizens). *But see* *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948) (finding no support for “special public interest” in protection of fish for citizens of California, thus invalidating state law prohibiting Japanese nationals living in California from fishing).

⁹² *Foley v. Connelie*, 435 U.S. 291, 296 (1978).

thus prohibiting them from becoming police officers,⁹³ public school teachers,⁹⁴ and deputy probation officers.⁹⁵

The erosion of equal protection for aliens manifests the foundational tension in immigration law: Some distinctions between citizens and aliens *do* seem permissible. As the Court in *Foley* stated, “[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of ‘strict scrutiny,’ because to do so would ‘obliterate all the distinctions between citizens and aliens, and thus depreciate the historical values of citizenship.’”⁹⁶ Nevertheless, the Court’s refusal to extend the protections of strict scrutiny to laws precluding aliens from undertaking “government functions” has been controversial. One commentator has argued that “the states’ desire to exclude aliens from participation in the political community simply because they are aliens is not a justification, but rather a reiteration of the states’ desire to discriminate.”⁹⁷

The limits imposed by the Court have a somewhat questionable historical pedigree. In *Ambach v. Norwick*, the Court said that “[t]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State.”⁹⁸ And, in *Cabell v. Chavez-Salido*, the Court stated that “[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition.”⁹⁹ Yet, for much of this nation’s history, states allowed aliens to vote, hold office, and participate fully in political life.¹⁰⁰ Some political theorists, in fact, maintain that it may be in a state’s best interest to allow aliens to participate in the public sphere.¹⁰¹

⁹³ *Id.* at 300.

⁹⁴ *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979).

⁹⁵ *Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982). Even this “government functions” formulation requires a questionable line-drawing exercise. Among various public officials, notaries public were *not* deemed to be key government functionaries. *Bernal v. Fainter*, 467 U.S. 216, 225 (1984) (describing duties of notaries public as “essentially clerical and ministerial”).

⁹⁶ *Foley*, 435 U.S. at 295 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C.J., dissenting)).

⁹⁷ Levi, *supra* note 28, at 1079.

⁹⁸ *Ambach*, 441 U.S. at 75.

⁹⁹ *Cabell*, 454 U.S. at 439.

¹⁰⁰ See *Perez v. Brownell*, 356 U.S. 44, 77 (1958) (Warren, C.J., dissenting) (“Earlier in our history at least 22 States had extended the franchise to aliens.”); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1401–17 (1993) (outlining history of alien voting and civic participation).

¹⁰¹ See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 148–49 (1996) (suggesting that states may find that

In sum, on the “strict” state level, equal protection has been both weakened in its justification, by virtue of its differential application to legal and undocumented aliens, and narrowed in its scope, specifically in relation to “government functions.” It is, however, the difference in how equal protection is applied on the state and federal levels that truly undermines its effectiveness as either a protective doctrine for aliens or a meaningful approach to identifying the national interests at stake in immigration regulation.

2. *Differential Use of Equal Protection*

The Supreme Court has used the federal government’s plenary power over immigration to justify reviewing the constitutionality of federal laws under a rational basis standard.¹⁰² Applying this lower level of scrutiny to federal laws presents serious questions about how to review state laws that are the result of a devolution of power from Congress to the states. Scholars have argued both about the legitimacy of Congressional devolution of the plenary power and about the desirability of such transfers.¹⁰³ Regardless of the outcome of these debates, the underlying constitutional question remains: Can “Congress . . . approve unconstitutional policy choices in state laws when Congress is not constitutionally prohibited from directly adopting the same policy itself”?¹⁰⁴ In other words, can Congress authorize states to adopt laws that pass rational basis review but would fail under strict scrutiny? In *Aliessa v. Novello*, the New York Court of Appeals said “no,”¹⁰⁵ but the U.S. Supreme Court has yet to

enfranchising aliens creates more benefits than costs, based on “the commitment of [states’] alien residents, their relative number, the disparateness of their national allegiances, and the relative absence of opportunities for a conflict of national interests”).

¹⁰² E.g., *Mathews v. Diaz*, 426 U.S. 67, 81–84 (1976).

¹⁰³ See Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 596–97 (1994) (arguing that devolving immigration power to states to allow them to avoid strict scrutiny is unconstitutional arrogation of power by Congress); Chang, *supra* note 15, at 363–64 (suggesting that devolution might create “laboratories of generosity,” rather than “laboratories of bigotry”); Spiro, *supra* note 17, at 1627 (advocating system in which states with “intense anti-alien sentiment” can “act on those sentiments at the state level,” instead of seeking to impose their preferences nationally).

¹⁰⁴ Cohen, *supra* note 33 at 388; *see id.* at 400 (“The federal government is permitted to make decisions that are forbidden to the states. To the extent that the Constitution does not ‘outlaw the action taken entirely from our constitutional framework,’ Congress should be able to consent to otherwise unconstitutional state laws.” (citation omitted)).

¹⁰⁵ *Aliessa v. Novello*, 754 N.E.2d 1085, 1098 (N.Y. 2001) (finding that congressional devolution of power confers such broad discretionary power to states that it could not be considered “a uniform rule” and that strict scrutiny must apply to those state laws made pursuant to federal law).

assess the problem.¹⁰⁶ The consequences of answering “yes” demonstrate the weakness of equal protection as a tool for those concerned about protecting aliens from potentially animus-based state laws: Not only is the doctrine flawed on the state level, but its scope on the federal level may allow any state laws that are arguably “authorized” by Congress to escape serious scrutiny altogether. The discrepancy between the application of equal protection analysis at the state and federal levels undermines the theory’s doctrinal force and militates against efforts to expand or perfect the doctrine.

* * *

Neither of the prevailing doctrinal approaches appears to provide a predictable or desirable framework for distinguishing between permissible and impermissible state regulation of aliens. Preemption is an overly broad tool that does not well capture a field that must accommodate both federal and state interests, nor does it account for the intricate interplay between those interests. Equal protection, for its part, invites excessive deference to federal law and unpredictable, and often misplaced, scrutiny of state law.

II

APPLYING A DORMANT COMMERCE CLAUSE ANALYSIS

The Dormant Commerce Clause is a vexed constitutional doctrine.¹⁰⁷ Nonetheless, it long has provided an effective mechanism by which courts can monitor state action: Upon finding that one state’s regulation directly or indirectly affects other states, courts can invoke the federal power over interstate commerce to invalidate the offensive law. Applying, by analogy, aspects of this doctrine to the immigration context can provide courts with other means of determining when

¹⁰⁶ New York State is generally pro-alien, so *Aliessa* is not necessarily reflective of how federal courts would respond to the issue, should it come before them. Some federal courts, in fact, have declined to follow *Aliessa*. See, e.g., *Soskin v. Reinertson*, 353 F.3d 1242, 1255 (10th Cir. 2004) (holding that congressional authorization can reduce level of scrutiny for state laws affecting aliens); *Fahy v. Comm’r, N.H. Dep’t of Safety*, Civil No. 05-CV-97-SM, 2006 WL 827805, at *11 (D.N.H. Mar. 29, 2006) (“[S]tate laws enacted pursuant to congressional authorization—even if those laws impose unequal burdens on non-citizens—are subject to rational basis review.”).

¹⁰⁷ There is no explicit constitutional prohibition on states’ burdening interstate commerce, see Cohen, *supra* note 33, at 387 n.4, and the doctrine has been called weak “[a]s an interpretive matter.” Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 2D 29, 30 (1999). Others claim it is surrounded by “doctrinal confusion.” Revesz, *supra* note 36, at 2398. However, the “multiplicity of approaches taken in the jurisprudence of the Dormant Commerce Clause . . . does not detract from the force of the claim that this provision embodies an important structural principle concerning the permissible relationship among the states in our federal system.” *Id.* at 2396 n.151.

state regulations infringe on the important national interests that underlie the federal power over immigration. As a result, the doctrine may present another avenue by which concerned critics can challenge restrictive state laws.¹⁰⁸

This Part begins by providing an overview of the Dormant Commerce Clause doctrine; it then investigates the possible structure of an analysis that would transpose aspects of the doctrine into the immigration context. This new doctrinal approach may not completely quiet academic and normative concerns about the potential for animus-based state laws, but it should provide a doctrinal tool for reviewing the actual operation of those laws. Compared with the existing doctrines, which require a search for federal exclusivity or a difficult inquiry into the motives underlying state legislation, it should be an improvement. In addition, the doctrine may well afford greater protection to immigrants affected by the laws at issue.

A. *Understanding the Dormant Commerce Clause Doctrine*

Although ringing endorsement may be rare, commentators have described “the Supreme Court’s rules concerning state discrimination against interstate commerce” as “reasonably clear” and resting “on tenable reasons.”¹⁰⁹ The most relevant strand of the doctrine for immigration purposes begins by identifying a state regulation as “discriminatory.” After this critical identification is made, Dormant Commerce Clause analysis provides a three-part test for assessing the law’s constitutionality:

First, the state must prove that it has a legitimate interest to be served by the regulation. Second, it must show that the regulation serves this interest to a substantial extent. Third, it must prove that it has no available alternatives to the regulation that are less discriminatory. Uncertainty in the record on these points . . . is resolved against the state.¹¹⁰

Like the determination that strict scrutiny should be applied in the equal protection context, once a state law is identified as “discriminatory” for the purposes of the Dormant Commerce Clause, the

¹⁰⁸ As one commentator has pointed out, “[d]ormant commerce clause review protects various national interests against damage from state legislation.” Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1100 (1986).

¹⁰⁹ E.g., Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1205 (1986).

¹¹⁰ *Id.* at 1231 (citations omitted).

burden to demonstrate the law's constitutionality is difficult to carry.¹¹¹

In analyzing statutes under the Dormant Commerce Clause, the main challenge is defining the term "discriminatory," which has a different meaning here than in the equal protection context. Effectively, a state statute "discriminates" when it protects that state's economic interests to the detriment of the interests of other states or when it interferes with Congress's power to regulate commerce on a national scale.¹¹² Understanding the term as used in the Dormant Commerce Clause framework therefore requires identifying the national interests that underlie the plenary federal power over commerce and the situations in which states contravene them. There are two main theories that purport to give content to the term "discriminatory" in the commerce context: the antiprotectionism theory, which protects the national interest in a common market, and the *Carolene Products* theory, which focuses on protecting unrepresented (i.e., out-of-state) interests. Both theories support the underlying national interest in assuring that all states are partners in a single national enterprise.

States that "impose costs on out-of-state firms or citizens in order to fulfill the preferences of [their] own citizens"¹¹³ violate the national interest in a common market and thus contravene the "anti-protectionism principle."¹¹⁴ This view of interstate discrimination focuses on the economic benefits to a state of "advantag[ing] locals vis-à-vis foreign competitors."¹¹⁵ It is closely tied to the purpose, identified by the Framers, behind the Dormant Commerce Clause: to address concerns about interstate competition¹¹⁶ and to provide for a unified national economy with free movement of goods and persons.¹¹⁷

Courts have taken varying approaches to identifying when a state law is in fact economically discriminatory. Facially discriminatory

¹¹¹ See *id.* at 1205, 1232 (noting that since 1930s Supreme Court has rejected fourteen of fifteen attempts by states to justify laws found to be discriminatory under Dormant Commerce Clause).

¹¹² See Regan, *supra* note 108, at 1094–95 (arguing that laws are protectionist only if designed to improve competitive position of local interests relative to out-of-state competitors).

¹¹³ Revesz, *supra* note 36, at 2395.

¹¹⁴ Donald Regan provides a hierarchy of variations on this principle. Regan, *supra* note 108, at 1171.

¹¹⁵ *Id.* at 1168.

¹¹⁶ Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988) ("Interstate rivalry was the Convention's greatest concern."); see also CLINTON ROSSITER, 1787: THE GRAND CONVENTION 50 (1966) (quoting Noah Webster's writing that "[s]o long as any individual state has power to defeat the measures of the other twelve, . . . our pretended union is but a name, and our confederation, a cobweb").

¹¹⁷ See Collins, *supra* note 116, at 53 (noting that Framers sought strong national economy to compete with "British trade domination").

laws are “virtually *per se* invalid.”¹¹⁸ Other statutes require an effects analysis, in which courts use economics and market theory as aids in determining whether the laws in question impose costs on unrepresented out-of-state interests or mask hidden protectionist goals. At base, however, these approaches are premised on the assumption that state regulations are impermissible if they jeopardize the national interests that Congress seeks to further through the exercise of its plenary regulatory power under the Commerce Clause. This assumption can also provide a guiding principle for courts looking to apply a Dormant Commerce Clause–type analysis to state laws regulating aliens.

Although antiprotectionism is the theory most relevant to the immigration context,¹¹⁹ another view of the Dormant Commerce Clause—the *Carolene Products* rationale—also exists. This theory is one of political process:¹²⁰ “The doctrine is not concerned with severity of burdens on interstate and international markets in general; its focus is on those kinds of market interference that set state against state or that invade policy choices of other states or of the federal government.”¹²¹ This approach to the Dormant Commerce Clause targets the antidemocratic danger in allowing a legislative body to impose burdens on persons or entities unrepresented in that body’s political process. The paradigmatically disadvantaged group, of course, is the “discrete and insular” minority; in the Dormant Commerce Clause analysis, however, the disadvantaged group is the citizens of each of the states negatively affected by the discriminatory statute of another state.¹²² The incentives that typically spur a state to

¹¹⁸ *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

¹¹⁹ See *infra* Part II.B.1 (discussing antiprotectionism theory in context of national interests at stake in immigration).

¹²⁰ This articulation of the Dormant Commerce Clause is subtly different from the political process theory used in the equal protection context. Here, the political theory is “based on a state-versus-state concept of political rights. . . . [This] limits a state’s ability to exploit other states; it does not give personal rights to every nonresident business harmed by state commercial regulation.” Collins, *supra* note 116, at 67–68. On this view, the underlying theoretical impetus is similar to that behind the structural preemption analysis proposed by Professor Harold Maier, who advocates asking:

- (1) Does the limited constituency of the state provide an appropriate political context in which to make the policy judgment required to reach a decision?
- (2) Is the pertinent information that must be weighed to determine the wisdom of the policy decision available to the state decision maker(s)?
- (3) Will any possible adverse effects of the decision fall upon the entire nation or be localized within the state making the decision?

Maier, *supra* note 52, at 838.

¹²¹ Collins, *supra* note 116, at 64.

¹²² See *S.C. Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 184 n.2 (1938) (“[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within

legislate only heighten this problem of negative externalities: A state will not want to wait and risk letting others take advantage of it, so it will be pressured to act first to protect its own citizens.¹²³ As a result, citizens of other states will end up relatively worse off.

B. Importing the Analysis to the Immigration Context

Applying a Dormant Commerce Clause-type approach to immigration requires two analytical stages. First, the national interests at stake must be identified and the violation of those interests must be accepted as “discriminatory.” Second, a method must be provided, like the economic analysis above, to determine when those national interests have been breached.¹²⁴

1. Identifying Relevant National Interests

The first national interest at stake in the immigration context can be identified by direct analogy to the Dormant Commerce Clause doctrine itself. The immigration equivalent of the antiprotectionist interest in a national common market is the national interest in a uniform system of immigration.¹²⁵ Immigrants should not face varying conditions for entry that depend solely on the laws of the state in which they first happen to arrive. The risk here is that a state interested in avoiding immigration might attempt—by manipulating conditions for entry—to push immigrants into other states,¹²⁶ thereby comparatively advantaging its own citizens.¹²⁷

the state.”); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819) (arguing that citizens of one state would not wish to entrust national political decisions to legislatures of other states).

¹²³ For a discussion of the “first mover advantage,” see generally Marvin B. Lieberman & David B. Montgomery, *First Mover Advantages*, 9 STRATEGIC MGMT. J. 41 (1988).

¹²⁴ As in the Dormant Commerce Clause scenario, regulations that are facially discriminatory would be found per se invalid.

¹²⁵ This national interest is based on the interest in uniform rules governing naturalization, but it is most easily explained in the context of entry and exit requirements.

¹²⁶ Of course, the converse is also possible; an individual state could frustrate rational policies by manipulating its conditions for entry to attract immigrants.

¹²⁷ There is evidence that immigration provides increasing tax revenue to communities. See, e.g., ROBERT GINSBURG, PROGRESSIVE LEADERSHIP ALLIANCE OF NEV., VITAL BEYOND BELIEF, THE DEMOGRAPHIC AND ECONOMIC FACTS ABOUT HISPANIC IMMIGRANTS IN NEVADA 6 (2007), available at <http://www.planevada.org/file/immigrant-hispanic07.pdf>. Whether these types of benefits are offset by costs, in terms of the community or the state’s duty to provide goods and services, is unclear. However, a state may identify noneconomic costs of immigration, such as the risk of tension between new immigrants and long-time residents, or the possibility of the erosion of local culture. Moreover, even if these costs are only imagined, the state’s intent to pass them on would still violate the antiprotectionism principle. The existence of intent to pass costs on to other states is not theoretical—it has recently been documented in Oklahoma. See Emily Bazar, *Illegal Immigrants Moving Out*, USA TODAY, Sept. 27, 2007, at A3 (quoting Oklahoma State

Combating this risk requires creating a mechanism for identifying state regulations that are sufficiently connected to “conditions for entry” to implicate this national interest. Current preemption doctrine already considers the opportunity to earn a living as being connected to entrance because, as the Supreme Court has recognized, aliens “cannot live where they cannot work.”¹²⁸ A Dormant Commerce Clause–type approach would require an expansion of this principle to regulations affecting access to other basic goods¹²⁹—such as housing, education, or health care—the denial of which threatens an immigrant’s ability to survive as a new resident.¹³⁰ Preventing aliens from accessing these types of goods can be considered tantamount to denying them entrance, thus violating the national interest in a uniform system of immigration.

The national interest in foreign affairs may also be best protected by using a Dormant Commerce Clause–type analysis, particularly in relation to undocumented aliens. Under current preemption doctrine, states are largely free to regulate undocumented aliens as they desire.¹³¹ While the limits on the preemption doctrine stem from the fact that the aliens have not been formally “admitted” into the country—and thus state action affecting them does not compromise

Representative Randy Terrill, Republican author of state’s strict immigration policy, as saying that forcing departure of undocumented aliens to other states “was the intended purpose” and that “[i]t would be just fine with me if we exported all illegal aliens to the surrounding states”).

¹²⁸ *Truax v. Raich*, 239 U.S. 33, 42 (1915).

¹²⁹ This expansion of the federal government’s plenary power would require redefining “immigration” to include all that might affect “entrance.” For a response to normative criticism of the expansion of federal power, see *infra* Part III.A.

¹³⁰ Whether or not states affirmatively choose to aid aliens should not affect this analysis. The existence of public services is not the main motivation behind most personal immigration decisions. See Jorge Durand & Douglas S. Massey, *Borderline Sanity*, AM. PROSPECT, Sept. 24–Oct. 8, 2001, at 28, 29 (“[M]ost migrants move in an attempt to solve economic problems at home.”). If new evidence were to suggest that public services do influence immigration decisions, the analogy to the Dormant Commerce Clause would still be instructive. In the Dormant Commerce Clause context, where courts routinely use economic and market analysis to identify discriminatory regulations, the existence of subsidies at the state level has presented problems. Yet, to handle this problem courts have ably devised exceptions to the core doctrine, such as the market participant exception. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (“Nothing . . . prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” (citations omitted)). In addition, the theoretical underpinnings of the doctrine are not threatened by subsidies: “Subsidies do not distort local politics nearly as effectively as do protectionist regulations Subsidy costs are directly borne internally.” Collins, *supra* note 116, at 102.

¹³¹ See *DeCanas v. Bica*, 424 U.S. 351, 361–62 (1976) (holding that state law prohibiting employment of undocumented aliens was not preempted by INA).

uniform immigration policies regarding entry and exit¹³²—the national interest in avoiding foreign policy problems caused by the unilateral actions of states remains particularly pertinent in the context of undocumented aliens. For example, there is little evidence that policies promoting “repatriation” of undocumented aliens work: Many such immigrants would likely move to new states rather than return to their countries of origin.¹³³ Efforts at repatriation that merely shift undocumented immigration to different states could thus create serious foreign policy problems, even though the immediate effects of these actions remain within the United States.¹³⁴

The *Carolene Products* approach to the Dormant Commerce Clause can also prevent undesired interstate shifting of immigrants, though it may rest on weaker ground. Applying this theory to immigration suggests that when State *A* regulates aliens in such a way so as to encourage them to move to State *B*, State *A* has violated the political process in two ways. First, it has externalized its perceived costs of accepting the aliens to State *B*, creating negative externalities and limiting the ability of later-moving states to enact their own policy preferences. Second, State *A* has regulated through a legislative process in which there has been no political voice for the aliens themselves.¹³⁵ In the market for citizens, in contrast to that for goods and

¹³² Another line of argument ties national immigration policy to undocumented immigration, claiming that undocumented immigration is a national problem that states should not be able to export to one another. See *infra* Part III.B (discussing how this idea might create national debate needed to address undocumented immigration).

¹³³ Cf. Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, at A1 (quoting professor who works with migrant workers as saying that, due to new Colorado laws, “[t]here’s a feeling . . . that these laborers won’t be back because it’s safer for them to find work in other states”); Daniel González, *Migrants Fleeing as Hiring Law Nears*, ARIZ. REPUBLIC, Aug. 26, 2007, at A1 (noting that many undocumented aliens have been fleeing Arizona for other states in anticipation of new law that will impose sanctions on employers who hire illegal aliens); Josh Goodman, *Crackdown*, GOVERNING, July 2007, at 28, 35 (suggesting that, in choosing where to settle, undocumented immigrants may weigh relative hospitality of state laws before considering returning to countries of origin).

¹³⁴ Witness, for example, the attention given by Mexico to issues affecting undocumented aliens in states across the country. See, e.g., Oscar Avila, *Fox Presses Visas, Licenses*, CHI. TRIB., June 17, 2004, at 1 (discussing efforts of Mexican president, Vicente Fox, to convince governor of Illinois to back proposal to grant driver’s licenses to undocumented immigrants); T.R. Reid, *Mexico’s Fox Urges Fairness for Immigrants*, WASH. POST, May 25, 2006, at A3 (noting that, in speech, President Vicente Fox of Mexico thanked people of Utah for permitting children of undocumented aliens to attend state colleges and for ensuring that emergency medical care is available to all); Hernan Rozemberg, *Arizona Referendum Spreads*, SAN ANTONIO EXPRESS-NEWS, Nov. 4, 2004, at 16A (reporting that “the Mexican government lamented passage of [a] new measure” designed to “tighten[] Arizona laws to keep undocumented immigrants from voting and from getting welfare and other government help”).

¹³⁵ See *supra* notes 119–23 and accompanying text.

services, it might be said that states gain benefits from interjurisdictional regulatory competition¹³⁶ and that individuals should move to the state where their regulatory preferences are best matched.¹³⁷ The problem with this argument, however, is that without the right to vote, aliens cannot participate in the formation of those preferences, thus making them dependent on the voices of others.¹³⁸

2. *Detecting Breach*

Beyond identifying the national interests that underlie the federal government's plenary power over immigration, a viable Dormant Commerce Clause-type approach also requires a mechanism that allows courts to determine when state legislation has violated these interests. Where discriminatory intent is not clear on the face of the statute, an effects analysis is necessary.¹³⁹

Just as economics and market theory provide useful tools for courts undertaking doctrinal analyses of possible violations of the Dormant Commerce Clause, the movement of immigrants may serve as a useful test in the immigration context. Any regulation affecting aliens' access to critical goods and services that are tied to entry¹⁴⁰ would be considered prima facie discriminatory.¹⁴¹ More general laws could be invalidated upon a showing that they had a disproportionate effect on aliens, causing them to move at higher rates than citizens.

¹³⁶ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423 (1956) ("Policies that promote residential mobility and increase the knowledge of the consumer-voter will improve the allocation of government expenditures . . .").

¹³⁷ *Cf. id.* at 419 (highlighting importance of free movement of consumer-voters as background assumption of model).

¹³⁸ In this sense, aliens would be in the same position as citizens from other states, a comparison that others have made in different contexts. See, e.g., Spiro, *supra* note 13, at 148 n.115 ("[R]equir[ing] the states to treat legal resident aliens as if they were resident-citizens of other states . . . would not be without historical and constitutional support."). It is also possible a regulation with sufficiently wide-sweeping effects—such as an hourly limit for a widely held job—could burden citizens as much as aliens. In this case, an affected alien might be protected by virtual representation, through the affected citizen, in the legislative process.

¹³⁹ See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350–54 (1977) (finding that facially neutral North Carolina statute requiring apples to be U.S. grade imposed costs on Washington and thus violated Dormant Commerce Clause). In *Hunt*, the Court looked to see whether the impact in question was an "unintended byproduct" of the law; in doing so, it took into account the fact that North Carolina apple producers sponsored the bill. *Id.* at 352. Although searching for animus in legislative history is notoriously difficult, it is frequently attempted in a variety of contexts and nothing precludes such searches in the immigration context.

¹⁴⁰ See *supra* note 130 and accompanying text.

¹⁴¹ In the Dormant Commerce Clause context, "[l]aws that categorically discriminate are seldom justified because their predominant purpose and effect are almost always protectionist." Collins, *supra* note 116, at 75.

There is ample evidence that movement can act as an accurate proxy for the effects of discriminatory regulations targeting aliens:¹⁴² Both theorists and recent events suggest that the denial of certain benefits and a hostile political environment can influence an immigrant's decision on where to locate.¹⁴³ There is also reason to believe that the alien population has a growing ability and willingness to move in order to find more hospitable and profitable environs.¹⁴⁴ How movement is to be measured would require empirical analysis beyond the scope of this Note; any future use of a test such as the one proposed here would have to draw the difficult line between one state's forcing immigrants to leave and another's choosing to draw them in.

C. Applying the Analysis to Plyler v. Doe¹⁴⁵

The difficult case of *Plyler v. Doe* presents many of the normative issues about state regulation of aliens that disquiet scholars: The law

¹⁴² Movement was most famously used by Tiebout to understand how municipalities compete with one another for residents: "The act of moving or failing to move is crucial. Moving or failing to move replaces the usual market test of willingness to buy a good . . ." Tiebout, *supra* note 136, at 420. The weaknesses of using movement of people in Tiebout's context of municipal services include the criticism that consumer mobility is only one way in which consumers express preferences. See Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 514–17 (1991) (describing critiques of Tiebout's theory). This criticism loses some force, however, in the immigration context. The existence of other options available to Tiebout's "general" consumers serves to weaken the relevancy of movement. These options—particularly the ability to use the political process—are not as accessible to noncitizens.

¹⁴³ See Chishti, *supra* note 18, at 375 (noting welfare incentives for interstate migration among immigrants); Spiro, *supra* note 13, at 174 n.203 (explaining that denial of public benefits may influence immigrants' decisions concerning residence). See, for example, the response in Georgia after the enactment of a recent law that severely curtailed benefits to undocumented aliens: "[U]ndocumented workers are afraid they may have to leave the state. 'Immigrants are making sure that they are able to move at a moment's notice.'" Goodman, *supra* note 133, at 35 (quoting Jerry Gonzalez, Executive Director, Georgia Association of Latino Elected Officials). After the implementation of a tough immigration law in Colorado, "consensus among those who follow the subject is that there are fewer illegal immigrants coming to Colorado now than before the law was enacted." *Id.* Colorado's law posed the natural question, "[w]ith 49 states to choose from, why would an immigrant without proper papers want to come to the place with what sponsors were calling 'the toughest piece of legislation in the country?'" *Id.*

¹⁴⁴ For at least the past decade, the alien population has dispersed increasingly throughout the country. See PASSEL, *supra* note 14, at 12 (noting that California's share of undocumented population dropped from forty-five percent to twenty-four percent between 1990 and 2004). This broad dispersal suggests that aliens have increasing flexibility to choose their locations within the country, a decision often driven by family, work, or friendship networks. See *Escape from LA*, ECONOMIST, Mar. 31, 2007, at 40, 40 (describing undocumented migrant who willingly moved from Los Angeles to San Bernadino to find cheaper housing, better schools, and fewer gangs).

¹⁴⁵ 457 U.S. 202 (1982).

in question raised clear equality and anti-caste concerns,¹⁴⁶ but the dominant doctrinal approaches of equal protection and preemption proved to be relatively powerless as remedies. At issue was a Texas statute prohibiting the children of undocumented aliens from attending public school. The Supreme Court faced the following difficulty: Undocumented aliens are not a protected class under the equal protection doctrine,¹⁴⁷ and earlier case law suggested that congressional acts failed to preempt—and may even have tacitly authorized—state regulation of undocumented aliens.¹⁴⁸ *Plyler* thus demonstrated the inadequacy of the dual doctrinal approach to considering the constitutionality of state laws regulating aliens.

In order to surmount these problems, the Supreme Court used a “responsive, results-oriented approach[],”¹⁴⁹ identifying education as a quasi-fundamental right and highlighting the importance to the country of having an educated populace.¹⁵⁰ Given these values, the Court reasoned that, under equal protection analysis, the children of undocumented aliens should have somewhat more protection than their parents, as the children did not choose to enter the country in violation of the law.¹⁵¹ *Plyler*’s legacy rests with its unique circumstances; no court has repeated its flawed mode of analysis.¹⁵²

Application of a Dormant Commerce Clause-type analysis to the law in *Plyler* would lead a court to confront a different, critical, yet

¹⁴⁶ See *id.* at 218–19 (describing failure of federal government to address immigration as resulting in “underclass [that] presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law”).

¹⁴⁷ *Id.* at 223.

¹⁴⁸ See *id.* at 224–26 (noting that Congress failed to authorize explicitly, but also did not prohibit, state law in question).

¹⁴⁹ Recent Case, *Fifth Circuit Holds that Louisiana Can Prevent Non-immigrant Aliens from Sitting for the Bar* — LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005), 119 HARV. L. REV. 669, 675 (2005).

¹⁵⁰ In focusing on this point, the Court seems to have recognized that there was a high likelihood that the children would remain in the United States. The Court noted that the state law

imposes a lifetime hardship on a discrete class of children. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute . . . to the progress of our Nation.

Plyler, 457 U.S. at 223; see also *id.* at 226 (“[T]here is no assurance that a child subject to deportation will ever be deported.”).

¹⁵¹ *Id.* at 219–20 (“[T]hose who elect to enter our territory . . . in violation of our law should be prepared to bear the consequences But the children of those illegal entrants are not comparably situated.”). In other words, children deserve something more than the rational basis-type protection that undocumented aliens, not being members of a protected class, typically receive. See *supra* notes 86–90 and accompanying text. However, the Court did not clearly grant the children doctrinal protection under intermediate or strict scrutiny.

¹⁵² See Spiro, *supra* note 13, at 150 (“The *Plyler* Court developed a zone of equal protection analysis of which it has made no further use.”).

perhaps less unabashedly-normative question: Given the existence of undocumented migration to the United States, how would this particular Texas law affect other states? A court would first determine whether the law was discriminatory on its face. If the law were, for instance, addressed to all alien children, it would be a regulation of education. As education is one of the fundamental goods that affect entry, its regulation would be considered an essential element of a nationally uniform immigration policy. This characterization would make the law *per se* discriminatory.¹⁵³

Since the Texas law was specifically addressed to *undocumented* alien children, however, the focus of a court would more properly be on the other national interests at stake. Both the national foreign policy interest, and the fact that the several states should not undermine each other in pursuit of national goals, are implicated by Texas's law. Regarding the former interest, however, it is clear that a state's singling out of undocumented alien children for discriminatory treatment is at least as likely to carry international ramifications as an obscure provision of Oregon's trust and estate law.¹⁵⁴ More importantly, the presence of undocumented aliens in the United States is the result of past federal immigration law, reflecting choices made at the national level as part of a bargain among the states. This shared national enterprise is threatened by Texas's denial of education to minor aliens, a decision that may encourage parents to move or to send their children to live with relatives or friends in different states.

Having identified the law as discriminatory, a court would still have to apply the remaining elements of the Dormant Commerce Clause-type test. The state would need to show that the challenged law is narrowly tailored to address a legitimate interest. In *Plyler*, Texas referred in this regard to its interest in limiting the burdens on its school financing mechanisms.¹⁵⁵ This line of argument implicated the one kind of state interest that is most clearly illegitimate: the "interest of giving those within the state an economic advantage against people elsewhere."¹⁵⁶ Ultimately, the regulation clearly advantages the citizen and legal alien populations of Texas at the expense of those in neighboring states who would be forced to shoulder the cost of educating Texas's unwanted undocumented alien

¹⁵³ See *supra* notes 125–30 and accompanying text (explaining that state regulations that affect basic goods, and thus "conditions for entry," should be found *per se* discriminatory under analysis borrowed from Dormant Commerce Clause context).

¹⁵⁴ See *supra* notes 49–52 and accompanying text.

¹⁵⁵ *Plyler*, 457 U.S. at 229.

¹⁵⁶ Smith, *supra* note 109, at 1234. This "interest" in an economic advantage could be said to violate the Dormant Commerce Clause directly.

children.¹⁵⁷ The law therefore fails on the first prong of the “breach” analysis suggested by the Dormant Commerce Clause doctrine.¹⁵⁸ As a result, it would have to be invalidated.

As its application to the difficult *Plyler* case demonstrates, the Dormant Commerce Clause–type analysis may provide an additional tool to challenge animus-driven state laws. By focusing on the state-to-state component of the national interests underlying the federal government’s plenary power over immigration, this framework presents a fuller picture than do existing doctrines of the effects and implications of state laws regulating aliens.

III

CHALLENGES AND IMPLICATIONS

The stylized approach in Part II skirts two major challenges to importing a Dormant Commerce Clause–type analysis into the immigration context. The first is largely a historical problem posed by the comparison; the second focuses on policy considerations. In the course of responding to these points, I conclude that a “dormant immigration power” analysis can, in fact, provide a mediating constraint on debates over immigration at the state level and a tool for those concerned about the ways in which aliens are regulated by the states.

A. *Concurrent Regulation*

One claim against importing a Dormant Commerce Clause–type analysis into the immigration context is the historical argument that states do *not* have concurrent power with the federal government to regulate immigration. Concerns about the devolution of congressional power to the states seem to reinforce this point. However, a case can be made that states, in fact, have had and do exercise concurrent power over immigration: They regulate aliens in a variety of direct and indirect ways, many of which influence conditions of entry and exit.

The use of the plenary congressional power over commerce as a starting point for considering immigration policy is bolstered by a reexamination of conditions at the time of the nation’s founding. Both federal powers over commerce and immigration derive from

¹⁵⁷ Texas also suggested that it had an interest in “protect[ing] itself from an influx of illegal immigrants.” *Plyler*, 457 U.S. at 228. The Court responded, however, that there was little evidence “that illegal entrants [actually] impose any significant burden on the State’s economy.” *Id.*

¹⁵⁸ For the three aspects of “breach” analysis under existing Dormant Commerce Clause doctrine, see *supra* note 110 and accompanying text.

Article I, Section 8 of the Constitution, and both stem from concerns about interstate competition that were relevant at that time.¹⁵⁹ The idea of a unified economy, with free movement of goods and persons, was a driving force behind the drafting of the Constitution,¹⁶⁰ and both commerce and immigration were key components of this nationalization. In the early 1780s, states often attempted to tax other states;¹⁶¹ additionally, each jurisdiction had its own set of distinct naturalization laws.¹⁶²

Moreover, understandings of the federal powers over commerce and immigration have shifted in similar ways over time. In particular, the changing definition of interstate commerce¹⁶³—and the manner in which the commerce power has expanded and contracted over time¹⁶⁴—bear a striking resemblance to the ongoing debate over the extent of the federal government’s power over—and power to define—immigration.¹⁶⁵

The question, however, remains: Do both powers leave concurrent regulatory power in the states sufficient to create a need for dormant federal powers? Some claim that, in this regard, the comparison cannot be made: “[T]he Commerce Clause is not analogous to the Naturalization Clause because the Commerce Clause contemplates

¹⁵⁹ See ROSSITER, *supra* note 116, at 50 (noting that Noah Webster, among others, expressed great concern over power of states to veto national policy choices); COLLINS, *supra* note 116, at 53 (“Interstate rivalry was the [Constitutional] Convention’s greatest concern.”).

¹⁶⁰ See COLLINS, *supra* note 116, at 52 (“Most historians believe that commercial issues galvanized the call for the Convention and were an important incentive for ratification.”).

¹⁶¹ See WILLIAM PETERS, *A MORE PERFECT UNION* 49 (1987) (describing taxes imposed by New York and New Jersey); STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 180–83, 189–90* (1987) (noting that the ideal of federal exclusivity is not consistent with original practice).

¹⁶² JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 219 (1978).

¹⁶³ Compare *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (holding that “commerce” does not include manufacturing), with *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37–40 (1937) (finding that intrastate activities, such as steel manufacturing, may be regulated by Congress under commerce power if they have effects on interstate commerce).

¹⁶⁴ Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546–48 (1935) (using formalist distinction between “direct” and “indirect” effects on interstate commerce to determine whether Congress could regulate intrastate transactions), with *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942) (rejecting reliance on “direct” versus “indirect” effects and finding that transactions affect interstate commerce when they exert “substantial economic effect[s]” on interstate commerce in aggregate), and *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (returning to more limited understanding of commerce power under which there must be “a distinction between what is truly national and what is truly local”).

¹⁶⁵ See sources cited *supra* note 103 (debating feasibility and desirability of Congress’s devolution of immigration power to states).

concurrent state regulation of commerce. . . . [The Naturalization Clause], unlike the Commerce Clause, contemplates no concurrent state regulation of immigration.”¹⁶⁶ This argument, however, should carry little weight. It is true that the Naturalization Clause does not, by its terms,¹⁶⁷ suggest concurrent state regulation.¹⁶⁸ Yet similarly, in the early nineteenth century, lawyers and litigants argued that the commerce power granted to Congress was exclusive of any state power.¹⁶⁹ Given that the existence of exclusive regulation was heavily debated by the founding generation, what the constitutional language contemplates may be a function of its historical evolution. The actual scope of the commerce power has shifted over time,¹⁷⁰ and the evolution of the plenary power over immigration suggests that it allows for some areas of concurrent regulation.¹⁷¹

From a contemporary point of view, the practical need for concurrent regulation is clear. Mark Tushnet notes that although the “exclusivity” argument may have been “distasteful,” its ultimate failure lies in its impracticality: “Congress plainly lacked the resources to develop codes of conduct for every sort of interstate business.”¹⁷² For example, since it lacks a general police power, the federal government must rely on the states to make regulations for health and safety.¹⁷³ The difficulty of identifying when these regulations impermissibly impinge on the federal power to regulate interstate

¹⁶⁶ Carrasco, *supra* note 103, at 620–21.

¹⁶⁷ The Clause begins with the words “[t]o establish a *uniform* Rule of Naturalization,” suggesting preemption of state naturalization laws. U.S. CONST. art. I, § 8 (emphasis added).

¹⁶⁸ Note that even after the federal Naturalization Act of 1790, some states continued to write and follow their own naturalization laws. See KETTNER, *supra* note 162, at 219 (noting that individual states continued to naturalize foreigners into 1790s). In addition, the early understanding of the scope of “naturalization” was much narrower than today’s conception of the term: “In practice, the federal government could determine the terms on which foreigners could be naturalized, but the states determined the extent of the rights and privileges of citizenship.” Colin C. Bonwick, *American Nationalism, American Citizenship, and the Limits of Authority, 1776–1800*, in FEDERALISM, CITIZENSHIP AND COLLECTIVE IDENTITIES IN U.S. HISTORY 29, 36 (Cornelis A. van Minnen & Sylvia L. Hilton eds., 2000).

¹⁶⁹ Collins, *supra* note 116, at 47–48.

¹⁷⁰ See *supra* note 164 and accompanying text.

¹⁷¹ For a recent argument suggesting that the Constitution’s text and structure permit shared authority over immigration, see Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. (forthcoming 2008) (manuscript at 5–6), available at <http://ssrn.com/abstract=968716>.

¹⁷² Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 126.

¹⁷³ The tension between the federal power over interstate commerce and state health and safety regulations was famously at the crux of *Gibbons v. Ogden*. 22 U.S. (9 Wheat.) 1, 203–06 (1824) (noting that although quarantine and health laws flow from state power, “Congress may control the State laws, so far as it may be necessary to control them, for the

commerce is central to the Dormant Commerce Clause doctrine.¹⁷⁴ In the same way, knowing when state regulation of aliens impinges on the federal power over immigration is an imperfect science, and a test has not aptly been delineated by the Court. A type of “dormant immigration power” analysis is therefore well-suited to aid the Court in making these determinations.

B. Policy Considerations

An argument often made in debates about regulating aliens is that immigration, particularly undocumented immigration, is not a “common problem” but one that is geographically limited to key border and port states, thus imposing a disproportionate burden on those states.¹⁷⁵ Border states, the argument goes, *should* be allowed to regulate aliens¹⁷⁶—even to the detriment of other states—thus undermining the relevance of a Dormant Commerce Clause–type approach.

There are two main problems with this reasoning. First, the continued validity of the argument’s basis in fact is questionable, given that “the most rapid growth in the immigrant population in general and the unauthorized population in particular has taken place in new settlement areas where the foreign-born had previously been a relatively small presence.”¹⁷⁷ In addition, forty to fifty percent of unauthorized migrants enter the country legally—the majority with nonimmigrant visas, as tourists, or as business visitors—and thus may pass through any valid port of entry.¹⁷⁸ Second, regardless of the empirical evidence, the argument does not cut in favor of allowing border states to take matters into their own hands by imposing the costs of their perceived problems on other states. A critical aspect of

regulation of commerce”); *see also* *Hines v. Davidowitz*, 312 U.S. 52, 76 (1941) (Stone, J., dissenting) (“The federal government has no general police power over aliens.”).

¹⁷⁴ *See* Collins, *supra* note 116, at 74 (noting, in discussing Dormant Commerce Clause, that “[t]he distinction between protectionist and police-power purposes is clear at the extremes but murky on the margin. . . . Many laws have both protectionist and police-power purposes and effects”).

¹⁷⁵ *See, e.g.*, Spiro, *supra* note 13, at 173–74 (advocating greater state-level discretion over alien regulation in order to achieve more proportionate distribution of “unbalanced burdens now shouldered by some states”).

¹⁷⁶ *See id.* at 174 (“State-level modulation of federal immigration policies could also work to distribute the costs of undocumented aliens more equitably among the states, and to encourage such aliens to relocate to where their presence [is] . . . not such a concentrated perceived harm.” (internal citation omitted)).

¹⁷⁷ PASSEL, *supra* note 14, at 11; *see also* Michael Janofsky, *Burden Grows for Southwest Hospitals*, N.Y. TIMES, Apr. 14, 2003, at A14 (noting that providing aliens with medical care is becoming key issue well beyond Southwestern border states).

¹⁷⁸ PEW HISPANIC CTR., FACT SHEET: MODES OF ENTRY FOR THE UNAUTHORIZED MIGRANT POPULATION 1 (2006), available at <http://pewhispanic.org/files/factsheets/19.pdf>.

the Dormant Commerce Clause is that it forces local legislatures to consider the national effects of their actions.¹⁷⁹ In this way, the analysis may provide a mediating constraint on the often volatile politics of border states and other states with large immigrant populations, forcing their legislatures to consider the broader implications of their laws.

A final advantage of the Dormant Commerce Clause-type analysis is that, should it take hold, it would shift the debate over immigration policy to the national level. In Dormant Commerce Clause cases, courts are typically unwilling to find “implied” congressional acquiescence to discriminatory state laws.¹⁸⁰ Instead, a state that passes such laws must ask Congress for exemptions to maintain its discriminatory rules. Other states, however, are unlikely to allow a state such individualized exemptions, especially if the state laws in question serve to externalize immigration-related problems. Because of the structure of the doctrinal analysis, the policy debate will be nationalized as the question of what Congress will permit is bounced from the courts to Congress itself. The proposed analysis, therefore, may serve as an impetus for discussion about what is, and what should be, the extent and direction of Congress’s power over immigration. What it does not do, however, is guarantee specific political results: Immigration policy is never certain to run in immigrants’ favor, if history serves as a guide.¹⁸¹

CONCLUSION

The constitutionality of state laws regulating aliens currently rests on the dual doctrinal approaches of equal protection and preemption. These doctrines are of limited use, particularly for those concerned with the increasing amount of regulation of aliens by states and the concomitant risk of animus-based legislation. In addition, the two

¹⁷⁹ This aspect of the doctrine has often been implicated by the analysis of state regulations that create across-the-board price increases:

[T]he local legislature may be unconcerned with the real costs of regulation A national viewpoint must be inserted in the process if the real costs are to be fully considered. In a sense, national supervision is designed to guarantee that the external costs of regulation are considered by local legislatures.

Tushnet, *supra* note 172, at 143.

¹⁸⁰ *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (“The fact that the state policy . . . appears to be consistent with federal policy—or even that state policy furthers the goals . . . that Congress had in mind—is an insufficient indicium of congressional intent.”).

¹⁸¹ See SELECT COMM’N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 153–54 (1981) (detailing history of refusal of United States to grant asylum to refugees fleeing persecution in early- to mid-twentieth century based on discriminatory national origin quota system).

doctrines focus solely on the interaction between state and federal rules governing immigration, ignoring the possibility that there is an equally important interaction between the various laws and interests of the several states. By drawing an analogy to the Dormant Commerce Clause doctrine, this Note has attempted to highlight the relevance of an analysis which assesses the state-to-state ramifications of state laws on the national interests underlying the federal plenary power over immigration. By focusing on the effects state laws regulating aliens have on other states, the proposed analysis provides a way to reflect better the myriad national interests at stake in immigration law, through attention to potentially animus-based statutes that might otherwise escape judicial scrutiny. Although imperfect, the analogy to the Dormant Commerce Clause creates a needed conceptual framework to review the actions that states have taken—and are likely to take in the future—with respect to the immigrant populations residing within their borders.