Men Made It, but They Can't Control It: Immigration Policy during the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision on Chamber of Commerce v. Whiting Commentary: Critical Race Theory: A Commemoration: Note

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Note

"MEN MADE IT, BUT THEY CAN’T CONTROL IT": IMMIGRATION POLICY DURING THE GREAT DEPRESSION, ITS PARALLELS TO POLICY TODAY, AND THE FUTURE IMPLICATIONS OF THE SUPREME COURT’S DECISION IN CHAMBER OF COMMERCE v. WHITING

ABIGAIL E. LANGER

In its landmark 1941 decision, Edwards v. California, the Supreme Court held that people are themselves instruments of commerce. The Court’s decision not only signaled a dramatic shift in immigration policy, but also reflected the federal government’s desire to control the social and economic strife during and after the Great Depression. In May 2011, the Court again decided on issues impacting immigration and economics in Chamber of Commerce v. Whiting. Rather than using the Commerce Clause as they had in past cases, however, the Court decided Whiting based solely on the statutory language of the Immigration Reform Control Act and the Legal Arizona Workers Act. Unlike Edwards, where the Court could not ignore the socio-economic implications of its decision, the Whiting decision showed the Court’s current reluctance to address its ruling’s broader implications. This Note will discuss the social and economic climates that led to both the Edwards and the Whiting decisions. It will attempt to contrast the nuances of economic legal reasoning in post-Depression America with those at present, and show that, because of the similarities, as well as the differences, between the two periods, the Court’s decision in Whiting may have serious detrimental effects on immigration law, hiring of immigrants in the Southwest, and the American economy in general.
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ABIGAIL E. LANGER*

PROLOGUE

It is 2008, a Monday morning, just when the sun is starting to come up but nothing is fully lit. You have arrived at the construction site. For the last six months, you have been at the same site, at the same time, and every morning, you look at the fourteen-hour day ahead with a mix of frustration and appreciation. Though the hours are long, and you make what you know is just barely minimum wage, your pay covers the apartment you share with other workers with enough left over to send some money home. You know that every other week, when your foreman hands out the pay envelopes, everything that you do not need to survive will be sent to your parents, your brothers and sisters, your wife and your children so they can eat and sleep for the next two weeks. It is expected that you will send it; it is necessary that you do. After all, that is why you have come to Arizona, why you paid the smuggler, in advance and on credit, to take you across the border in the middle of the night six months ago. Your friends, many of whom came with you or right before you from the same village in southwestern Mexico, carry the same burden and share the same unspoken but palpable fear of what would happen if you ever had to leave.

On Wednesday that same week, your foreman comes over as everyone unpacks and tells you to stop. He explains that the company for which you were building new headquarters has declared bankruptcy because of the subprime mortgage crisis, and that it does not need a brand new high-rise it cannot afford. The project is over. You will be paid for your work through today but nothing more. You never had benefits or an unemployment package—like almost everyone else on site, you were employed as an undocumented worker. Your foreman wants you off the site immediately, and without the company’s financing, there will not be another project anytime soon, if ever. So what now? You cannot use this job as experience to get another job. After the state passed Section 23-212,

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employers who knowingly hire undocumented workers can be fined and shut down. Your last employer does not want anyone to know you or your coworkers ever lifted a hammer. You do not speak English. Other than the farming skills you learned in Mexico, you have no specific skills beyond what you have learned on-site. You have no papers. Without this job, you have no money to support yourself and your family, not to mention to pay off the smuggler who you still owe. This job was the reason you came here in the first place.

Now you find yourself between the proverbial rock and hard place. You cannot support your family in Mexico if you return, and if you get caught crossing the border after having worked illegally you could face time in a U.S. prison. You cannot get rehired here without exposing yourself and your employer. So you wait, hoping that the job will start up again or that your employer finds a new project. But it does not get better. The economy only gets worse and even the Americans you knew from the site cannot get work.

What do you do now?

I. INTRODUCTION

According to the leading economic sources, the recession that threatened the American economy for almost two years is ending. What started almost ten years ago with pictures of paper shreds flying through the air in Enron offices led, in 2007, to the unthinkable: stocks plummeted; companies collapsed; tens of thousands of American citizens lost not only their jobs but also their savings and plans for the future. Scandals covered the front pages of newspapers. As the American economy collapsed, so did those of countries around the globe. The words on everyone’s lips were “subprime mortgage,” a term soon exclusively acquainted with the death of the housing and real estate markets. The ripple effect of the housing crash extended to businesses well beyond Wall Street banks and urban hedge funds; without financing, suburban and rural construction companies halted jobs in progress and abandoned future projects. Unfinished buildings across the United States stood as testaments to companies’ rapid desertion. The workers who depended on such projects were left jobless and without prospects.

But the wasteland of joblessness that construction workers in the...
United States faced after the 2007 collapse was not a new phenomenon to many Americans. In 1929, the stock market collapsed and led to the Great Depression of the 1930s—an era of bread lines, railroad car hopping, and squatters’ camps. Some of the most poignant images of the Great Depression come from John Steinbeck’s now-iconic novel, The Grapes of Wrath. Steinbeck’s tale of a family’s journey from their failed Midwestern farm to California’s promised land mirrored the stories of many Americans. Farmers in the Southwest faced a double threat: from the banks that they were indebted to for seed, machinery and livestock, and from nature itself. As credit collapsed and local banks felt the economic strain, farms were foreclosed, and, as Steinbeck explained, farmers and their families were forced west, hoping to find work in California.

The migration of the 1930s farmer to find work created a legal dilemma virtually unknown in the United States: what should be done with the migrating citizen worker? States, concerned that their own citizens would be overtaken by the influx of jobless outsiders, passed legislation that excluded indigent persons from crossing their borders. Such laws were enacted as a response to what the Attorney General of California described as a time of “near crisis in the migrant problem.” Legislation, such as California’s Health and Welfare Code Section 2615, sought to check the growing populations of indigents by criminalizing the process of bringing them across state lines. Arguments against such laws culminated in the landmark Supreme Court decision Edwards v. California, which ultimately determined that movement of people constituted interstate commerce and that no state could regulate citizens’ free movement within

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3 Id. at 3 (“The surface of the earth crusted, a thin hard crust, and as the sky became pale, so the earth became pale, pink in the red country and white in the grey country.”).
4 In Steinbeck’s novel, owners and farmers alike faced grim prospects:
   “We’re sorry” said the owner men. “The bank, the fifty-thousand-acre landowner, can’t be responsible. You’re on land that isn’t yours. Once over the line may you can pick cotton in the fall. Maybe you can go on relief. Why don’t you go on west to California? There’s work there, and it never gets cold. Why, you can reach out anywhere and pick an orange. Why, there’s always some kind of crop to work in. Why don’t you go there?” And the owner men started their cars and rolled away.
5 Id. at 34.
6 Connecticut, New York, Vermont, Michigan, New Hampshire, and Ohio all passed anti-migrant legislation, which was called into question at the same time as California’s law was questioned in Edwards v. California. Brief of the Attorney General for the State of California as Amicus Curiae Supporting Petitioner at 16, Edwards v. California, 314 U.S. 160 (1941) (No. 17), 1941 WL 52965, at *33–34.
7 1937 Cal. Stat. 1102 (“Every person, firm, or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor.”).
8 314 U.S. 160 (1941).
the United States.9

*Edwards* declared state regulation of citizen migrants unconstitutional, but neither the question presented in the case nor the decision addressed the issue, as present in the 1930s as it is today, of whether a state could regulate incoming non-citizen migrants. Throughout the twentieth century, the United States has reformed and re-reformed immigration policy, but neither the Supreme Court nor the government agencies in charge of immigration (at present, the Department of Homeland Security and the Executive Office for Immigration Review) have declared a bright line on states' ability to regulate the movement of non-citizen immigrants as the Court did in *Edwards*. Created in 1952, the Immigration and Nationality Act ("the Act")—as enforced today by Executive agencies—attempts to prevent undocumented migration into the United States.10 The Act explicitly details the admissibility ramifications of working in the United States as an undocumented immigrant.11 Further, in 1986, Congress passed the Immigration Reform and Control Act ("IRCA").12 Amending the Act, IRCA places the power to regulate undocumented workers squarely with the federal government.13 Yet, even with seemingly explicit direction from the federal government, regulation of migrant workers is consistently challenged by states attempting, as California did in the 1930s, to tailor such regulation to their specific needs.

While *Edwards* remains good law, and, as will be described later in this Note, a significant influence on immigration and Commerce Clause litigation today, its legacy does not include an explicit determination of states' abilities to manage populations of undocumented immigrant workers. In the past five years, growing discontent with the economy and the government's inability to effectively police the southern borders has led states to enact legislation attempting to stem immigration and protect

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9 Id. at 166.
10 8 U.S.C. § 1101(a)(13)(A) (2006) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").
11 8 U.S.C. § 1182(a)(5)(A)(i) (2006) ("Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.").
13 Id. § 101(b)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").
local laborers. The most prominent of such legislation is Arizona Revised Statutes Section 23-212, the Legal Arizona Workers Act. And, just as California’s regulation of movement was challenged in Edwards, so, today, was Arizona’s attempt to police movement across its borders. Importantly, though, both to the subject of this Note and to the general discussion of immigration policy, the challenge to Arizona’s statute in Chamber of Commerce v. Whiting was not decided under the Commerce Clause, as was Edwards, but was rather determined as a preemption issue. From a policy perspective, this is a vital distinction. While the states enacting anti-immigrant legislation cite protection of employment as their predominant interest, the federal government has not attacked such statutes as violations of the Commerce Clause. The question of who should regulate undocumented migrant workers, and the answer that the Supreme Court gave on May 26, 2011, are instead directed at the very heart of federalism. Though decided on seemingly political and statutory lines, the Court’s decision presents an equivalent shift in social policy to that which its decision in Edwards did almost a century ago.

This Note examines the economic and social background behind the challenge to Section 23-212 in Whiting, and attempts to project into the future of immigration policy based on the Court’s recent decision. This Note posits that the holding for the Respondents (declaring the statute constitutional) may have substantially detrimental effects on the ability of both states and the federal government to regulate the movement of undocumented immigrant workers, leading to a panoply of isolationist state policies. Such policies could lead the United States further away from a Depression, but could also, as was strongly argued in Justice Breyer’s and Justice Sotomayor’s respective dissents, disrupt the federalism balance.

This Note does not disregard the weighty effects that an opposite decision from the Court could have engendered. Had the Court decided in favor of the Petitioner, the decision may still have failed to support a successful regeneration of the collapsed construction economy in the American southwest, leaving undocumented, documented, and citizen workers similarly jobless. Yet, this Note takes the position that the

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15 Ariz. Rev. Stat. Ann. § 23-212(A) (2010) (“An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.”).
18 Whiting, 2011 WL 2039365, at *17 (Breyer, J., dissenting); id. at *28 (Sotomayor, J., dissenting).
economic consequences of the majority opinion far outweigh those exposed by the Petitioner's claim, and that it is possible, even in the weeks immediately following the decision, to see the dangerous imbalance that the decision has created in immigration regulation. This Note, with respect for the statutory analysis relied upon by the Justices in the majority, disagrees with the decision, based as it appears to be, in political and textual logic, and not on socio-economic common sense.

II. IMMIGRATION POLICY DURING THE GREAT DEPRESSION

A. Edwards v. California

In order to fully explore the parallels and distinctions between how the United States viewed migration for employment during the Great Depression and how it views it today, it is useful to examine the socio-political background behind California's intentions in enacting Section 2615, the state statute which created the foundation for the constitutional challenge in Edwards.

In December 1939, Fred Edwards left California and traveled to Texas where he picked up his brother-in-law, Frank Duncan, to bring him back to California to live in the Edwards's home. At the time that Edwards arrived to collect him, Duncan was unemployed, and had been working sporadically for New Deal projects, such as the Works Progress Administration. He neither had a job waiting for him in California nor resources, beyond Edwards and his wife, to obtain one. Duncan was not unemployed for long, however; he only stayed with the Edwards for ten days before obtaining financial assistance from another government program, the Farm Security Administration. Yet, for those ten days he was an indigent migrant, and, under California's Welfare and Institutions Code, Edwards was criminally responsible for transporting him into the state. Edwards appealed his conviction under the statute, but it was affirmed by the Superior Court of Yuba County as a legitimate exercise of California's police power.

The superior court's ruling was not surprising, given both the general fear of migrating indigents during the Great Depression and California's legislative history of statutes barring indigents from entering the state.

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20 Id.
21 Id. at 165–66.
22 Id. at 165.
23 CAL. WELF. & INST. CODE § 2615 (enacted 1937) ("Every person, firm or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor.").
24 Edwards, 314 U.S. at 166.
25 Id.
Proponents of the statute argued its place in legislative tradition since 1860, and the overwhelming need to protect the employment of California citizens in a time of economic crisis. The Attorney General, in his \textit{amicus curiae} brief to the Court, explained the statute in terms of preservation, not exclusion, and made an important distinction between the state's barring of those only who were indigent at the time of their entry and barring indigents as a class of residents. The statute, as the Attorney General explained it, was not a fortuneteller; it did not propose to look into the specific futures of those who would become indigent after coming to California. The legislation was not on its face, therefore, explicitly discriminatory; it was designed to apply broadly. But, in effect, it was clearly discriminatory. There were distinct populations coming to California in search of work, and while they were not easily identifiable by race or nationality, the idea of the "Okie" was so strong that Section 2615 was commonly referred to as the "Anti-Okie Law." The Attorney General placed the population of migrant workers, farmers predominantly from the southwestern states, in the category of "cheap, unskilled labor," the migration of whom, he argued, the federal government similarly regulated. The Attorney General continually emphasized that the law was not meant to exclude individuals, but to prevent the intentional bringing of such laborers into an economy already in crisis. While the Attorney General's argument echoed the fears that many Americans harbored as jobs dwindled, California's solution was in practice discriminatory, based, as it was, in the tradition of excluding "inferior" groups, or races. Ultimately, the Court held that California could not regulate the migration of citizens, because people constituted commerce, and states could not interfere with commerce with such blatant discrimination.

Though the holding in \textit{Edwards} was ground-breaking, the debate surrounding immigration and the Commerce Clause was not a new one. Since the Framers discussed commerce in the drafting of the Constitution, federalism and the Commerce Clause have been at the forefront of immigration law.

Immigration into the newly created United States was encouraged in

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\textsuperscript{27} Brief of the Attorney General for the State of California, \textit{supra} note 5, at *24.

\textsuperscript{28} Id. at *26–28.

\textsuperscript{29} Id. at 28 ("The term [indigent] is not limited to persons who are physically or mentally incapacitated but is broad enough to include persons who from any cause are in a destitute condition.").


\textsuperscript{31} Brief of the Attorney General for the State of California, \textit{supra} note 5, at *28.

\textsuperscript{32} See \textit{id.} at *27 ("The statute does not purport to exclude indigent persons from the State. Rather, the offense consists in the act of brining, or assisting in bringing non-resident indigents into the State with knowledge of indigency.").

the late eighteenth century,\textsuperscript{34} and immigration continued to be encouraged as American borders grew and the government wanted American presence in the West to expand with them, but the cases that the Supreme Court handled in the middle of the nineteenth century reflected a backlash against the very people whom America welcomed as a fledgling nation. States passed laws requiring record-keeping,\textsuperscript{35} levying taxes,\textsuperscript{36} and imposing docking restrictions\textsuperscript{37} in attempts to restrict access across their borders. Arguments for such laws were rooted in state police powers and state interests in the health and welfare of the citizenry, but lurking behind each statute was the distrust of foreign nationals, arriving by the boatload throughout the nineteenth century, looking to share the same work as those already settled.

The Court debated, both within its chambers and with other courts, the proper method with which to analyze these statutes. Mostly, the Court struggled with the definition of commerce, and the exclusive power that the Framers had created for the federal government to govern it.

In a landmark decision, the Court reasoned in \textit{Gibbons v. Ogden}\textsuperscript{38} that the federal power to regulate commerce was a broad one, and that it extended to "every species of commercial intercourse."\textsuperscript{39} Though not directly dealing with the migration of people in that case, the Court nevertheless established the standard by which later cases, most notably \textit{New York v. Miln}\textsuperscript{40} and \textit{Smith v. Turner},\textsuperscript{41} defined commerce and the power to regulate it. In \textit{Gibbons}, the Court grappled with a New York statute that gave exclusive control of marine navigation between New York and New Jersey to one shipping company.\textsuperscript{42} In determining the invalidity of the statute, the Court reasoned that "[i]f there were no power in the general government to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular."\textsuperscript{43} \textit{Gibbons} stressed the essential nature of unity in governing commerce and established the foundation for Commerce Clause analysis by holding that New York could not create a monopoly for one of its own shipping companies because it interfered with the regulation of instruments used for commerce.\textsuperscript{44}

Just more than a decade later, in \textit{Miln}, the Court re-visited the
Commerce Clause, directly dealing with the movement of foreign individuals into the United States.\textsuperscript{45} The Court faced a more nuanced commercial context in \textit{Miln} than it had in \textit{Gibbons}, but its analysis was firmly grounded in the definitional boundaries of commerce established in \textit{Gibbons}.\textsuperscript{46} The Court reviewed a New York statute that required the master of every vessel entering New York harbor to create a record for each passenger on board.\textsuperscript{47} Arguing that the statute was an extension of the state’s police power, the City of New York explained that every state has an unquestionable right to require a register of names of the persons who cross its borders and who reside therein, whether permanently or temporarily.\textsuperscript{48} The Court agreed, dismissing Miln’s argument that the statute was a ban on immigration as a whole,\textsuperscript{49} and establishing the principle that people are not the subjects of commerce, and that therefore their movement does not fall under federal governance.\textsuperscript{50}

Importantly, the Court in \textit{Miln} also established a definition of pauperism that played an important role in the foundations of immigration law and resonated strongly in \textit{Edwards}-era legal scholarship. The Court reasoned that, by the same logic that allowed states to exclude infected persons or goods that endangered citizens of the states, states could exclude paupers, as they would add to the burden of taxation.\textsuperscript{51} Nothing was more essentially a state function, the Court found, than the regulation of any class of individuals who threaten to endanger the safety or the chargeability of the state’s citizens.\textsuperscript{52} Thus, paupers were singled out in the \textit{Miln} holding. Even though the Court held in favor of states regulating all individuals moving across borders, it specifically noted its acceptance of the regulation of paupers as a dangerous class.\textsuperscript{53}

The progression throughout the nineteenth century of debate surrounding the states’ ability to regulate commerce continued in the Court’s 1849 decision of \textit{Smith v. Turner}.\textsuperscript{54} Unlike \textit{Gibbons} and \textit{Miln}, \textit{Turner} reviewed two statutes, one from New York and one from Massachusetts, both of which levied an actual tax on incoming travelers.\textsuperscript{55} Notably, the Massachusetts statute directly raised the tax (discussed as a “bond”) to one thousand dollars for paupers (“as well as for any lunatic,
idiot, maimed, aged, or infirm person”). The Court, contrary to Miln—although the Petitioners claimed that the case presented the same question as Miln—held that the statutes undermined the Constitution and were void as inappropriate regulation of interstate commerce. While the Court made the distinction between the facts before it in Turner and the situation in Miln without explicitly naming the movement of persons as commerce, the subtext of the decision makes this distinction. The Court reasoned that a state cannot control foreign commerce but that it can affect it through regulation of such state-controlled areas as property taxes and healthcare interests. But the Court found that the transportation of passengers, regardless of purpose, is a federally governed sphere. The Court reasoned that “no one has yet drawn the line clearly, because, perhaps, no one can draw it, between the Commercial power of the union and the municipal power of the states.” This statement cut to the heart of the federalism issue that the Court had attempted to resolve throughout the decades leading to the abolition of slavery in 1865. Though the Court saw specific instances where foreign migrants constituted state-regulated health and financial risks, and recognized more generally where passengers were defined as commercial instruments, the difficulty of defining immigration for the purposes of federalism remained.

Thus, when Edwards arose eighty years after the abolition of slavery and almost a century after Turner was decided, it faced an unresolved issue of defining the interstate migrant. The Court established Edwards’s place in the debate over the Commerce Clause, using Miln as its definitional benchmark. Yet the Court distinguished the California legislation in Edwards from the New York statute in Miln, placing the treatment of migrant workers under federal regulation. The Court dismissed the California Attorney General’s arguments for the economic protection of state workers, and established the new benchmark for federalist analysis of immigration even though it dealt exclusively with citizen migrants.

The decision marked a new era for both commercial and immigration law. It began the legal dehumanization of the migrant worker, even though such workers were U.S. citizens and therefore entitled to constitutional rights. It negated any personal empathy the California Attorney General attempted to solicit for the citizens of California and replaced it with a stark reality: The transport of people constitutes commerce, and as such it

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56 Id. at 285.
57 Id. at 283.
58 Id. at 402.
59 Id. at 405 (“The transportation of passengers is regulated by Congress.”).
60 Id. at 402.
61 U.S. CONST. amend. XIII.
is a federal concern. Steinbeck’s dustbowl farmer, his “Okie,” became a pawn, a member of a faceless mass, and the concept of migrants not only as means of commerce, but also as instruments of commerce themselves, has continued for the last seventy years, despite multiple wholesale revisions of federal immigration law.

B. Edwards in Context

Even had the Court adopted the California Attorney General’s view of migrant workers as an “inferior” class and ruled in favor of state regulation, the social climate of Depression-era California provided little opportunity for a migrant worker to rise above his so-called inferiority to a sustainable standard of living. The period from 1900 to 1920 was the “golden age of American agriculture” in the Midwest, but when the wartime demand for food and government buying ended with the Armistice, American farms felt an early start to the Depression. While urban banks and businesses continued to thrive from the Armistice in 1918 until the stock market crash of 1929, American farms did not share in the prosperity. From 1919 to 1921, farm shares increased from about ten billion dollars to roughly forty-four billion, but then crashed to a devastating seven billion, a rate that remained low until 1929.

After the stock market crash in 1929, prices that Midwestern and Southwestern farmers received for their crops plummeted again, reaching the lowest price seen in the United States since 1899. Wheat dropped from its 1919 high of $2.16 a bushel to a shocking $0.29 in 1931-32, and during the four years following the crash, farm profits as a whole fell fifty-five percent. Combined with droughts, which stripped the loose, glacial topsoil from the Great Plains, the farms that had fed the Allied Forces abroad and America at home during World War I uniformly failed.

The great Midwestern farm failures, in addition to the lack of credit offered by eastern banks, forced white citizen farmers into the labor-markets of the Southwest and West, which had, prior to the Great Depression, been predominantly filled with migrant farm laborers from Mexico. As an example, the lemon and orange orchards of Ventura and

64 STEINBECK, supra note 2, at 280 (“‘You gonna see in people’s face how they hate you. An— I’ll tell you somepin. They hate you ‘cause they’re scart . . . You never been called ‘Okie’ yet? . . . Okie used ‘ta mean you was from Oklahoma. Now it means you’re a dirty son-of-a-bitch. Okie means you’re scum.’”.
66 Id.
67 Id.
68 Id.
69 Id. at 9.
70 Id.
Santa Barbara counties were traditionally tended by migrant harvesters who moved around California following the seasons. In those counties, and elsewhere, the delicate homeostasis between the Mexican worker and the California farmer was an established one. Prior to the Depression, Mexicans such as Augustus Martinez, a laborer who moved to California when he was nine years old, were not concerned about the loss of their jobs. As the seasons came and went, they had fruit to pick across the state. The mechanization of farm machinery, which reduced the need for manpower in the Midwest, had not yet reached them. Many such laborers lived on credit and did not own their housing or transportation. Farmers whose fields the laborers worked on provided adequate, albeit sparse, housing and transported laborers to and from the orchards. The laborers, many of whom considered themselves Americans (regardless of whether they were naturalized), lived similarly to the Midwestern farmers, subsisting from season to season. The credit they relied upon, however, was that of the farmers, not the banks. Thus, when the banks failed and western farmers lost capital, the trickle-down effect impacted the migrant laborers immediately. And then the Dust Bowl farmers arrived.

While so-called “Okies” faced discrimination from Californian farmers and exclusion by California legislators because of their new position in the already-flooded markets, Mexicans faced similar, and sometimes far greater, discrimination despite their already-established position in the Californian agricultural economy. In federally-funded labor camps, separate schools were established for Americans and Mexicans. Mexicans were not allowed to sit in the same rows at movie theaters. Orchard foremen freely harassed Mexican workers. The crops were as consistent as they had been prior to 1929, but, after white workers flooded the Californian market, Mexicans could not move between fields and orchards and be assured that their credit would be stable from farm to farm. Unlike the farmers from the Midwest, Mexican migrants did not usually have their own cars, and therefore could not travel extensive distances from labor camps to find work.

As their jobs were overtaken or dismissed completely, Mexican

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71 Interview by Charles L. Todd & Robert Sonkin with Augustus Martinez, in Farm Security Administration Labor Camp, California (1940), http://memory.loc.gov/cgi-bin/query/S?ammem/toddbib:@field(DOCID(5146a1+5146b1)) (last visited June 5, 2011).
72 Id.
73 Id.
74 Id.
75 Id.
76 Id.; Interview by Charles L. Todd & Robert Sonkin with Jose Flores, in Farm Security Administration Labor Camp (1940), http://memory.loc.gov/cgi-bin/query/S?ammem/toddbib:@field(DOCID(5145a1+5145b1)) (last visited June 5, 2011).
77 Interview with Jose Flores, supra note 76.
78 Interview with Jose Flores, supra note 76.
79 Id.
laborers faced a once-seemingly impossible option: return to Mexico. Without work, and without the prospect of either keeping their agricultural jobs or receiving the benefits of federal programs, immigrants left the United States by the tens of thousands. This phenomenon had never occurred on such a massive scale in U.S. history. In 1932 alone, the United States admitted less than thirty-six thousand immigrants while one hundred thousand left.

After nearly eleven thousand bank failures, in 1933 President Franklin Delano Roosevelt passed several New Deal programs aimed at resurrecting the agricultural economy: the Federal Farm Loan Act consolidated farm credit programs to make low-interest loans; the Commodity Credit Corporation made loans to corn and cotton farmers against their crops so they could hold the crops for higher prices; and, importantly, the Farm Bankruptcy Act allowed farmers to defer foreclosure while obtaining new financing. Ultimately, such reduction and consolidation programs did result in increased crop prices and reduced foreclosure rates, but tenants, sharecroppers, and migrant laborers had been irrevocably displaced, creating an imbalance in the agricultural workforce that was not corrected until World War II, when farmers and sharecroppers migrated to cities to work in war-centered industrial jobs.

Thus the Court’s 1941 decision in Edwards rebutted the state-level fear of migrant workers entering markets already at capacity while supporting the federal need to resurrect agricultural stability through establishment and regulation of government programs. It is not difficult to see the parallel between the overwhelmed workers of the 1930s and those of today, while also recognizing the similar fear of foreign workers that states today have used to establish legislation regulating their economies in much the same way as California’s Section 2615.

III. IMMIGRATION POLICY IN PRESENT-DAY UNITED STATES

A. Unemployment and the Change in Workforce Demographics

With the causes and effects of the Great Depression on early twentieth-century immigration policies in mind, a comparison with the current economic and social climates must involve three primary issues: first, the type of work in which migrant workers are engaged has changed since the

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80 When asked if he felt that Mexicans received an equal benefit from government programs aimed at restarting the economy, Jose Flores stated that he felt that Mexicans, even though they wanted to be and were good citizens, did not receive the same benefits as white, unemployed migrants. Interview with Jose Flores, supra note 76.


82 U.S. DEP’T OF AGRIC., supra note 65, at 10.

83 Id. at 11.
second, that work is disappearing for immigrants and citizens alike; and, third, unlike the period during and immediately after the Great Depression, rather than returning to their countries of origin, unauthorized immigrants are remaining in the United States, causing remittance rates to not only remain high, but to actually increase. The combination of a high unemployment rate with a high remittance rate is paradoxical. It seems unlikely that even when immigrants are not working they can continue to generate profit substantial enough to send back to their countries of origin. Yet this is exactly the scenario today. This paradox is at the heart of the debate surrounding present legislation in favor of tracking undocumented workers and punishing employers who “knowingly seek out” undocumented workers in order to avoid hiring either legal immigrants or U.S. citizens.

High remittance rates are due in part to the type of work in which immigrants participate. The shift away from agriculture toward industry, construction specifically, is an indication of what analysts refer to as “selective amnesty,” the self-selection of immigrants seeking workers’ visas who had already entered the American workforce undocumented. In the 1980s, predictions looking toward a period of economic boom foresaw the rise of an underclass of workers whose alien status was the primary reason for their hiring and whose presence would be restricted to limited professional opportunities. Those opportunities, in light of the late twentieth-century housing boom, were significantly weighted toward construction and service. Analysts’ predictions have only partially come true, and the restrictions on types of work for unauthorized immigrants have a very different relationship to the economy than originally foreseen. Unauthorized immigrants today dominate southwestern construction and service industries, areas that, like agrarian markets, have fluctuating seasonal needs, but that, unlike agrarian markets, are quickly and easily dispensed with in a recession. The “underclass” exists, but federal laws barricade unregulated hiring of individuals solely for their undocumented status, or, at the very least, they attempt to do so.

The most important difference between actual unauthorized migrant
workers in the present and those predicted by 1980s analysts is that the industries in which unauthorized migrant populations dominate are less local and more dependent on intangible financial support, such as venture capital. Credit-fueled building booms, such as those which occurred in the late 1990s and early 2000s, provided a substantial need for construction workers, but tightened credit and falling housing prices in the mid-2000s stalled building projects across the country and sent unemployment skyrocketing. From January 2007 to January 2009, the unemployment rate for construction jobs alone rose from nine percent to twenty-two percent. In light of the dramatic change in employment opportunity, the unauthorized immigrant was increasingly perceived as a threat to jobs which American citizens themselves wanted.

B. Construction over Farming

As previously noted, the work done by undocumented migrant workers today has shifted as dramatically as the demographics of the workers themselves. According to a 2009 study, one in ten workers in traditionally immigrant-heavy states such as California and Arizona is an unauthorized immigrant. In Utah, Colorado, and New Mexico the percentage of unauthorized immigrant workers reaches as high as 8.9 percent. The changing trend showing higher unemployment rates for undocumented immigrants results from the overrepresentation of undocumented immigrants in certain work categories, notably construction, leisure/service, and agriculture. While this Note focuses on the impact of workers in the construction field because their statistics best represent the dramatic changes in the last century of immigration, it should not be overlooked that the seasonal service and agricultural industries continue as traditional areas that draw high immigrant worker populations. Twenty-one percent of undocumented workers are in the construction industry, but this has only developed in the last twenty to twenty-five years.

Immigration rates were unintentionally accelerated by the 1986 immigration reforms, creating a population which not only followed crops and tourists, but which capitalized on the booming American housing and

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92 Martin, supra note 85, at 688.
93 Id. at 671, 676–77.
94 Id. at 671.
95 Id. at 677.
96 Andrew J. Elmore, Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals, 21 GEO. IMMIG. L.J. 521, 525, 567 (2007).
97 PASSEL & COHN, supra note 84, at 13.
98 See id. (showing, in map form, the percentages of unauthorized migrant workers as a share of the labor force).
99 Id. at 14.
100 Id.
construction markets.101 Secondarily, the 1986 reforms eased the process for family-based naturalization, creating a space for undocumented workers to settle where there were already established family members.102 To date, the United States admits primarily members of already settled families, and statistics support the projection that undocumented workers settle primarily in households with at least one naturalized nuclear or extended family member.103 Single-member unauthorized immigrant households make up only thirteen percent of the estimated population.104

Following traditional trends, in 2009, Latinos continued to be the principal source of new labor in the United States, both authorized and unauthorized.105 Even despite the reduction in the aggregate workforce between 2007 and 2009, the native-born Latino workforce increased in number.106 This created a two-fold problem: first, the continued growth in population forced a stalemate in growth opportunities for those immigrants who were already employed; and second, new additions to already established first-generation Latino families were more likely to be unemployed than employed. Accordingly, as the recession reached its first major trough in 2007, the Latino immigrant community’s employment bubble in the American Southwest was already experiencing a self-created burst.

Unlike the agrarian-based populations during the Great Depression, undocumented Latino immigrants in the present are not moving from field to field. While different states have attracted immigrants from the traditionally heavily populated states of Texas, California, and New York,107 immigrants are remaining in the states where either their families reside or where they first find sustainable labor. Not surprisingly, ninety-four percent of undocumented workers live in metropolitan areas,108 which only further separates undocumented migrant populations from their 1930s predecessors. Unauthorized immigrants act as if captive, tied to one city or state and to the industry in which they originally found, or believed they would find, work. As exemplified by legislation such as Arizona’s, U.S. citizen workers seem threatened by such a concentration of undocumented immigrants who will work more for less because they cannot leave.109 But

101 Martin, supra note 85, at 687.
102 Id. at 689.
103 See PASSEL & COHN, supra note 84, at 6, 8 (noting that nearly half of all adult unauthorized immigrants live with their children, in nuclear settings).
104 Id. at 6.
106 Id.
107 Id. at 1–2.
108 Id. at 3.
109 Elmore, supra note 96, at 522.
this perceived threat is hollow, since those same immigrants have, for the past eight years, watched the industries to which they are tied crumble.

Construction workers were some of the first laborers to feel the effect of the 2007–2009 recession. Because of low interest rates and high building rates in the 1970s and 1980s, the United States attracted a large percentage of the more than fifteen percent of global immigrants in construction, a notable departure from the patterns established for immigration into the United States before the Great Depression. But the heavy density of workers in construction created an even larger vacuum for unauthorized immigrants as unemployment rose during the early years of the recession. With the ability and desire to stay in certain locations even without work, population stagnation has become a serious problem in Southwestern states both for immigrants and for citizens.

C. The Legal Arizona Workers Act

It is no secret that legislatures can and have used failing labor markets and population control as rationales for implementing non-explicit immigration policies. In the 1970s, the House Judiciary Committee legitimated its endorsement of the Farm Labor Contractor Registration Act with the logic that the primary reason for the country’s illegal alien problems was the economic imbalance between the United States and the countries from which the aliens were emigrating. This logic, and the subsequent federal bills sanctioning the hiring of known unauthorized immigrants by employers and restricting workforce opportunities for undocumented workers throughout the 1970s, evidenced the growing fear for American workers’ security even in a rising economy. In today’s recession economy, the fear of non-citizen workers usurping jobs is omnipresent, and is only exacerbated by the concentrated, increasingly immobile unauthorized populations in failing industries.

On September 19, 2007, the Legal Arizona Workers Act, Arizona Revised Statutes Section 23-212, went into effect. The statute, similar to
California's Section 2615, focuses on those who transport and employ unauthorized workers, rather than on the workers themselves. While such legislation could appear as a practical approach to immigration regulation, the statute came under attack for two primary reasons. First, as will be discussed later in this Note, the statute's use of the federal definitions in attempting to sanction Arizona employers was challenged as being preempted by IRCA, and, second, a hotly contested issue in both the majority opinion and dissent in Whiting, the statutory provision is itself discriminatory and violates the Fourteenth Amendment's Due Process Clause.

Section 23-212 is an amalgam of federal and state powers, which together create a system of employer regulation. The statute outlines ways an employer can "knowingly" employ unauthorized aliens, and gives discretion to the state Attorney General to both prescribe a complaint form on which a person can allege a knowing employment of unauthorized aliens and verify the work authorization of an alleged unauthorized alien. While it is under the state Attorney General's discretion to determine the authorization of an immigrant, the determination is made in a federal framework. In investigating a complaint, the state Attorney General verifies authorization pursuant to the process in the United States Code. Under the Arizona statute, courts may only consider the federal determination of whether an employee is an unauthorized alien pursuant to the Code. Notification of the employment of an unauthorized alien is then distributed to both local and federal authorities, and the federal government's determination creates a rebuttable presumption of an employee's lawful status. Thus, the statute attempts to balance the federal definitions and procedures established under IRCA with its own

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119 ARIZ. REV. STAT. ANN. §§ 23-212(B)-(C).
120 8 U.S.C. § 1324a(b)(1)(A) ("The person or entity must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining: (i) a document described in subparagraph (B), or (ii) a document described in subparagraph (C) and a document described in subparagraph (D). Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to produce such another document.").
121 8 U.S.C. § 1373(c) (2006) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.").
122 ARIZ. REV. STAT. ANN. § 23-212(H).
desire to keep unauthorized workers from establishing a powerful presence in the Arizona workforce.

The statute, however, faces both theoretical and practical problems. Though it explicitly states that the Attorney General or county attorney shall not investigate complaints that are based "solely on race, color or national origin," the statute was created to control a population that is defined by race, color, and national origin. There are up to 575,000 unauthorized immigrants in Arizona, and men aged eighteen to thirty-nine make up thirty-five percent of the undocumented immigrant population. Mexicans constitute about fifty-five percent of the unauthorized population in the United States, and in the construction industry alone, from the period of 2007 to 2009, Latinos lost almost two hundred and fifty thousand jobs. These statistics show how impossible blindness to race and nationality is in a statute meant to restrict predominantly male, working-age Latinos. The statute is intended to create uniformity in the workforce and to allow for accurate record keeping and wage distribution, but practically it excludes a population already struggling to find work in an increasingly narrow job market.

Far from presenting unbiased legislation, Section 23-212 represents Arizona's interest in criminalizing employers who hire undocumented workers. This is an interest which is not out of the ordinary in many states' recent legislation and which is indicative of the common "solution" these states see to the issue of undocumented workers. This is a remarkable shift from the individual-oriented attack strategy of the 1930s, especially at the state level. Targeting and sanctioning employers on the federal level has led to some of the largest mass arrests of unauthorized workers in American history, but it has, almost exclusively, remained a federal action. For the states to take the sanctioning of employers into their own hands evidences the strong local anti-immigrant sentiments which have resurfaced in the last decade.

While entire books have been written on the discriminatory effects of IRCA and state employment sanctions, the purpose of this Note is to explain the economic causes and effects of such legislation. While this Note acknowledges social injustices, they are outside its scope. What is pertinent to this Note, however, are the reactions that states had to IRCA.

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123 Id. § 23-212(B).
124 PASSEL & COHN, supra note 84, at 1, 4.
126 See Univ. of Cal., Population, supra note 112.
Many states either echoed or followed Arizona’s codification of what had previously been only federal employer sanctions. But, in contrast, certain traditionally immigrant-heavy states have proposed resolutions as a direct, negative response to Arizona. Of particular note is California’s Senate Concurrent Resolution 113, which urges various state and private entities to actually withhold financial support of Arizona businesses. The resolution was introduced in June 2010, by then State Senator Gil Cedillo, chairman of the Latino Legislative Caucus, in direct response to Sections 23-211 and 23-212. Concerned that the Arizona law is “divisive and unconstitutional” Cedillo’s resolution did not target humanitarian concerns surrounding the statute, but rather focused its attention on economic sanctions. It is particularly relevant that California state senators and political analysts supported the resolution by citing concerns that the Arizona legislation would violate ethnic minorities’ rights, but implemented it by urging economic boycotts by private businesses.

California addresses the very heart of why the Arizona legislature enacted Section 23-212: economic survival. Its reaction seems like an extreme measure that could influence both the Arizona legislature and the federal government in addressing the future implications of the statute. Such a boycott, however, seems to create a similarly circular cause and effect cycle to the statute itself, advantaging neither the state nor the employees. It is undisputed that a good economy and ample jobs are the most significant factors drawing immigrants into the southwestern states. Even during the early years of the recession, the United States economy outpaced the economies of central and South American countries. Thus, the recession did not initially staunch the influx of undocumented workers into the United States. But as California’s senators argued, the goal should not be to promote so-called “plantation politics,” and revert to an owner-worker model, as many argue conglomerate hiring of unauthorized immigrants represents. Yet, withdrawing market stimulants from an already failing economy does nothing to either promote better hiring

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133 See Gerald P. López, Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy, 28 UCLA L. REV. 615, 640 (1981) (“Where there is substantial economic disparity between two adjoining countries and the potential destination country promotes, de jure or de facto, access to its substantially superior minimal wage, that promotion encourages migrants reasonably to rely on the continuing possibility of migration, employment, and residence . . . .”).

134 Ferriss, supra note 132.
practices or to stimulate the economy.

Arizona’s legislation is clearly caused by national, recession-driven unemployment and the desire to preserve work opportunities for those who are citizens of, and pay taxes to, the United States. California’s response is laudable on moral grounds, but potentially harmful to the very groups it seeks to support. While California attempts to set itself apart from Arizona, despite California having the largest immigrant population in the country, its resolution only highlights the inextricable link between the states in their implementation of confrontational immigration policies. It also clarifies the need for a uniform federal policy that balances the country’s economic priorities in a severe recession with the interests of its more than eleven million undocumented immigrants.136

D. Chamber of Commerce v. Whiting

On September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit affirmed the U.S. District Court for the District of Arizona’s decision that Revised Statutes Sections 23-211 through 23-216 were, on their face, constitutional and not preempted by the IRCA savings clause.137 On the same day, the Ninth Circuit decided the same issue in a different case, again holding that the statutes were facially constitutional and not preempted by federal law.138 On June 28, 2010, the U.S. Supreme Court granted certiorari on three issues: (1) whether federal law (IRCA) expressly preempts Arizona’s sanctioning of employers for hiring unauthorized workers; (2) whether Arizona’s sanctioning is impliedly preempted because it requires employers to use the E-Verify system where it is expressly voluntary under federal law; and (3) whether the Arizona statute is impliedly preempted because it undermines the “comprehensive scheme” that Congress created to regulate the employment of aliens.139 The Court consolidated the Ninth Circuit holdings in Candelaria and Chicanos Por La Causa into Chamber of Commerce v. Whiting, looking to answer conclusively the questions brought up during the debates in states such as California following the passage of Sections 23-211 through 23-216.140 After oral arguments on December 8, 2010, the Court took almost five months to deliver its answer. On May 26, 2011, the Court, in a

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135 Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008), amended and superseded by Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2008).


137 Brief for Petitioner, supra note 139, at 11.
5-3 decision written by Chief Justice John Roberts, held in favor of the Respondents and declared that the Legal Arizona Workers Act, as a licensing statute, is within the savings clause of IRCA and therefore constitutional.\textsuperscript{141}

The decision has implications well beyond declaring the statute constitutional. Instead of supporting a uniform federal power over immigration, the decision relegates such power to the fifty states, allowing each—as in the earliest history of immigration control in the United States—to govern their own borders and regulate immigrants who threaten their residents’ safety (convicted criminals) or who threaten the local economy (indigents).\textsuperscript{142} Deciding for the Respondents, as this Note will discuss below, does not concentrate immigration policy within federal powers, solidifying the need, as President Obama noted during his presidential campaign, for “comprehensive immigration reform so local communities do not continue to take matters into their own hands.”\textsuperscript{143} Instead, it allows the states to take advantage of, as the Whiting Petitioner described it, the “gaping loophole”\textsuperscript{144} in IRCA’s savings clause\textsuperscript{145} and to impose their own ideas as to what their economies can withstand and exploit.

IV. THE FUTURE OF IMMIGRATION POLICY

The question of what to do with citizen migrant and non-citizen immigrant workers has been at the forefront of both federal and state legislation for the past century. Legislative emphasis has shifted away from migrants as instruments of commerce toward a view of immigrants as individuals whose documented status supersedes their usefulness to a state economy. Still, questions of federalism—whether the federal government or states should manage and regulate immigration—remain ever-present. Arizona is at the forefront of the controversy surrounding such regulation, but it is not alone in its frustration with the federal government’s 1986 IRCA regulations.\textsuperscript{146} In the first three months of 2009 alone, over one thousand immigration-related bills were passed across all fifty states.\textsuperscript{147} The federal government and the American people have not ignored these bills.

\textsuperscript{144} Brief for Petitioner, \textit{supra} note 139, at 4.
\textsuperscript{146} 8 U.S.C. § 1324(a)–(b).
\textsuperscript{147} Brief for Petitioner, \textit{supra} note 139, at 2.
As discussed above, on April 23, 2010, Arizona Governor Jan Brewer signed Senate Bill 1070 into law, legalizing the strictest state anti-immigration legislation to date.\(^{148}\) It immediately drew controversy; opponents argued against the use of identification cards, quotas, and employment verification.\(^{149}\) While the bill drew criticism on social levels, Section 23-212, the section in controversy before the Court in December 2010, was challenged for an entirely different reason. Section 23-212 sanctions employers who knowingly hire undocumented workers, but uses federal definitions and verification methods.\(^{150}\) Attempting to operate within IRCA’s exclusion for licensing,\(^{151}\) Arizona’s employer sanctions attempt to control the flood of immigrant workers toward low-paying jobs—an influx encouraged by both American employers and consumers. Criticism of the bill for going beyond mere licensing, and therefore being federally preempted, led to *Chamber of Commerce v. Whiting.*\(^{152}\)

Though the IRCA regulations were created primarily to reform agricultural economics throughout the country,\(^{153}\) states retained the ability to impose sanctions and licensing laws despite federal preemption in all areas of economic growth or recession.\(^{154}\) Since states’ dissatisfaction with federal regulation of immigration law is hardly a secret,\(^{155}\) states pushing the envelope on what constitutes “licensing” has remained an issue for the last two decades since IRCA’s inception. The primary issue has been one

\(^{148}\) Ferriss, *supra* note 132.


\(^{150}\) The statute provides:

For a first violation . . . the court: (a) Shall order the employer to terminate the employment of all unauthorized aliens.

(b) Shall order the employer to be subject to a three-year probationary period for the business location where the unauthorized alien performed work. During the probationary period the employer shall file quarterly reports in the form provided in § 23-722.01 with the county attorney of each new employee who is hired by the employer at the business location where the unauthorized alien performed work.

(c) Shall order the employer to file a signed sworn affidavit with the county attorney within three business days after the order is issued. The affidavit shall state that the employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state . . . . All licenses that are suspended under this subdivision shall remain suspended until the employer files a signed sworn affidavit with the county attorney . . . .

(d) May order the appropriate agencies to suspend all licenses described in subdivision (c) of this paragraph that are held by the employer for not to exceed ten business days . . . .

\(^{151}\) ARIZ. REV. STAT. ANN. § 23-212(F) (2010).

\(^{152}\) 8 U.S.C. § 1324a(h)(2) (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”).


\(^{154}\) No. 09-115, 2010 WL 4974382.

\(^{155}\) Id. at 46.
of uniformity. IRCA’s proposition, and the goal of immigration reform since 1986, has been to create a cohesive front from which to combat illegal entry and employment. States, while controlled by IRCA’s preemption clause, cite the Savings Clause of the Constitution as granting them the power to continue regulating immigration through the giving and revoking of licenses in order to best serve their citizens and economies. These two goals—uniform federal control and local authority to license—are clearly at odds. The federalism loggerhead that the Court faced in December 2010 was different than situations which it had faced before: Instead of solely deciding the constitutionality of one state statute, the Court had to determine the level of control that the federal government should have in the face of widespread state disagreement with federal methods of enforcement.

The federal government’s argument in the case was a clear one: Congress never intended to extend the power it vested with the Department of Labor under IRCA to the states. It claimed that Arizona, and any state enacting similar legislation, was not enforcing federal law, but was rather subsuming the federal definitions of undocumented and unverified immigrants and using federally outlined verification procedures—most notably the E-Verify system—as means to impose its own state sanctions on state employers. The distinction for the purposes of constitutionality, as argued by the federal government, lay in “tracking” federal laws as opposed to “incorporating” them, an action which exceeds the exception for licensing statutes as set out in IRCA’s Section 1324a(h)(2). “Tracking,” as argued by the government, transforms the federal law into a state law, therefore conflicting with IRCA and rendering the state law preempted.

There was another concern imbedded in the federal government’s opposition to Arizona’s legislation: discrimination. As the law stands, it imposes sanctions for knowing or intentional hiring of undocumented workers. While on its face such language may seem clear and reasonable, the government argued that in practice it encouraged widespread discrimination by employers. Rather than risk the possibility of businesses being sanctioned or shut down under the statute, employers could simply not hire anyone that looks or sounds like an immigrant. With

156 U.S. CONST. art. VI, cl. 2.
158 Id. at 19.
159 Id. at 19–20.
160 Ariz. Rev. Stat. Ann. § 23-212(A) (2010) (“An employer shall not knowingly employ an unauthorized alien. If, in the case when an employer uses a contract, subcontract or other independent contractor agreement to obtain the labor of an alien in this state, the employer knowingly contracts with an unauthorized alien or with a person who employs or contracts with an unauthorized alien to perform the labor, the employer violates this subsection.”).
more than five hundred thousand undocumented immigrants in Arizona alone, determining who may or may not be an immigrant based on an assumption is a significant problem, one that, according to the government, the law does nothing to remedy. In fact, the government argued, the Arizona legislation seems to even incentivize such discrimination with its sanctions. Senator Russell Pearce, one of the drafters of Section 23-212, conceded that immigration policy is the “determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,” and argued that the legislation does not change the federal government’s right to regulate such entry and exit. Yet he did not concede that a state’s laws are unbalanced and flawed if they punish an employer for openly discriminating against a significant population in the state but encourage employers to secretly discriminate because they cannot know for certain a person’s immigration status. Though the law says that an enforcement official cannot pursue a complaint of knowing employment based on race alone, it does nothing to account for an employer simply refusing to hire anyone who is not white out of fear of a violation. The argument against such implicit allowance was at the heart of the Petitioner’s challenge.

Arizona’s response spoke to the myriad ways in which a state’s immigration law can function within federal law while maintaining the state’s sovereignty. The state’s strongest argument, which was ultimately upheld by the Court, was that its authority is determined by the nature of the sanction it wishes to impose. A state assumes full accountability in establishing policies to govern the issuing or revocation of licenses. In essence, Arizona’s argument was that the large populations of undocumented workers have a greater local than federal impact, necessitating some local control, and that the state, under IRCA’s savings clause, has been given that control. To further augment its claim for control, Arizona contended that its regulations do not frustrate federal law, but rather enhance it, using its framework to maximize local effectiveness.

Rather than focus on the social and economic ramifications of its decision, the Court decided the case on strict textualist terms. Chief Justice Roberts, writing for the majority, stated clearly that the Court took into

161 PASSEL & COHN, supra note 84, at v.
162 Transcript of Oral Argument, supra note 153, at 32–33.
163 Id. at 33.
165 Id.
166 ARIZ. REV. STAT. ANN. § 23-212(B) (2010) (“The attorney general or county attorney shall not investigate complaints that are based solely on race, color or national origin.”).
168 Id.
169 Id. at 32.
account the plain language of the statute alone, and determined, based on that language, that the statute was a licensing statute within the savings clause of IRCA. Though the government argued against “tracking,” the Court supported what it called “parroting.” Rather than conflict with IRCA, the Court maintained that a state statute that includes and builds on express federal provisions functions in tandem with federal law, remaining constitutional even when creating autonomous state powers. Notably, the Court clearly rejected the government’s argument that “licensing” must be read narrowly, and pertain only to business licenses. Instead, directly rebutting Justice Breyer’s and Justice Sotomayor’s dissents in the majority opinion, Roberts placed the statute “well within” IRCA’s licensing allowance and asked, hypothetically, how the dissenting Justices could read questions into IRCA’s text when Congress had intentionally neglected to narrow the focus of its provisions at the time of its signing. While the Court addressed the issues of discrimination and unfair hiring practices, it dismissed the possibility of their existence, relying on Arizona businesses to take the “most rational path.”

V. CONCLUSION

Though the Court attempted to cleanly refute the arguments that Justices Breyer and Sotomayor made in their dissents, it is difficult to refrain from second-guessing a decision so closely decided and so clearly divided on party lines. This Note does not contend that a decision for the Petitioner would have had any less of an impact on the federalism balance in immigration law than the decision for the Respondents, or any less of a socio-economic impact. While the recession which began in 2007 has since receded and market projections on Wall Street are once again climbing, many businesses have not recovered, and may never. Arizona’s predominantly white middle-class businessmen run many of these businesses. A decision for the Petitioner, the United States Government, would, arguably, have stripped business owners of the ability to directly effect their own hiring practices through state-level politics by firmly placing the authority over regulating undocumented immigration


171 Id. at 10.

172 Id. at 12.

173 Id. at 14–15 n.6.

174 Id. (“If we are asking questions, a more telling one may be why, if Congress had intended such limited exceptions to its prohibition on state sanctions, it did not simply say so, instead of exception ‘licensing and similar laws’ generally?”).

175 Id. at 21.

176 Id.

entirely with federal officials.

The goal of government programs in the Depression, such as those in which Edwards’s brother-in-law and the majority of blue-collar laborers worked, was to stimulate failing markets while keeping workers enthusiastic and occupied. In the wake of the present recession, however, such occupation is simply not possible, and the stimulus needed to regenerate the job market to levels experienced during the housing boom of the 1990s and early 2000s is unlikely to come from banks fighting bailout schemes and continuing to cut mortgage loans. Without additional stimulus, the construction industry cannot hope to regain its former strength, and those workers who relied on the construction boom of the past twenty years have no assurance that the same level of work will ever return. Despite creating a uniform policy to cover all businesses—whether the business is failing or growing—a decision for the Petitioner would have been unlikely to have a purely positive effect.

Similarly, bringing all state employer verification processes under IRCA’s umbrella would have taken the power of decision-making away from those whom the decisions affect most. Section 23-212 is not expressly attempting to regulate the coming and going of undocumented immigrants. Its sole purpose, as explained by Respondents’ counsel at oral argument in December 2010 (an explanation with which the Court agreed), is to allow Arizona employers to determine whether their workers are undocumented and to allow law enforcement officials to determine which employers are not requiring documentation. IRCA’s purpose is greater and more general than the state statute’s. While IRCA must account for regulation of immigration at every border in the United States, Section 23-212 only looks to Arizona’s border and its industries. Arizona is a traditionally high immigration state, and is not unfamiliar with the effects of immigration policy since 1986. Putting Arizona, however, exclusively under IRCA’s authority for matters that concern not only immigration policy but also Arizona’s local economic policy could lead to a stifling of independent growth. It is this growth that is exactly the type that could regenerate a failed economy when large-scale capital is not available. IRCA does not have the authority to affect, and was not designed to deal with, economic restructuring. Nonetheless, a decision for the Petitioner would have placed that role squarely on IRCA’s and the federal government’s shoulders. Without the infrastructure to create government programs such as those available to 1930s migrant workers,

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179 See id. at 55 (stating Arizona’s understanding that Congress does have preemption power with IRCA, but that it left discretion of narrow issues to the states).
180 PASSEL & COHN, supra note 84, at 1.
instituting a blanket federal policy might have only further diminished any
opportunity for unemployed construction workers to resume their pre-
recession production, and could have propagated the current stagnation of
unemployed, undocumented immigrants in southwestern states such as
Arizona.

The decision for the Respondents, however, likely will do similarly
little to cure the failing construction economy and the pooling of
unemployed, undocumented workers. It is, of course, impossible to predict
the exact ramifications of the Court’s decision, but the decision represents
a wholesale change in the federalism balance under which states and the
federal government have operated for the past twenty-five years. Allowing
states to regulate immigration independently could create a patchwork of
isolated state regulations. Though the Court clearly stated in Edwards
decades ago that states could not explicitly regulate the movement of
citizens, it has yet to determine how a state can regulate the movement of
non-citizens. The decision for the Respondents will, in practice, authorize
states to passively affect population movement. It is unlikely that any state
will want workers who have limited skills and who are underrepresented in
tax brackets flooding already tight markets. Each attempt to limit such
population movement could further alienate states from each other and
could undermine IRCA’s attempt to unify immigration policy in the United
States. The Court’s decision does not address this concern, and instead
allows states, so long as they do it through the act of licensing, to
independently shape their own (and the country’s) immigration policies
and therefore shape the migration patterns of undocumented workers
across the United States.

The Court’s decision will have a certain but unknown impact on future
state laws and policies surrounding the hiring of undocumented
immigrants, well beyond the Legal Arizona Workers Act. If the
construction or services industries begin to speed up in states where
immigration has not previously been high, movement to those states by
unemployed immigrant workers could result in the enactment of legislation
even more stringent than Arizona’s. A decision for the Respondents gives
any state authority to enact restrictions and impose sanctions similar to
Arizona’s. Until and unless the Court declares such regulations and
sanctions to be preempted by federal law, the boundaries of state authority
to regulate the economic futures of non-citizen immigrants are wide-
ranging and ambiguously defined.

Though the Court declined to address the social issues raised by the
government’s argument and in Justice Breyer’s dissent, the concern over

182 Chamber of Commerce v. Whiting, No. 09-115, 2011 WL 2039365, slip op. at 20–22 (U.S.
May 26, 2011) (“The Chamber and Justice Breyer assert that employers will err on the side of
the impact of the decision on state hiring practices remains. The holding for the Respondents left untouched the implicit endorsement of discrimination that exists in the Legal Arizona Workers Act. As mentioned above, one of the major concerns surrounding Arizona's Section 23-212 is its passive encouragement of discrimination predominantly against Latino men in blue-collar labor positions.\textsuperscript{183} The majority abruptly disregards the possibility in favor of the “rational” decisions it expects businesses to make under the law.\textsuperscript{184} Yet while the decision facially negates the problem, in practice it may sanction such discrimination. While Arizona’s statute may give individual employers more freedom to control their own hiring practices and may allow state law enforcement to manage the hiring of undocumented immigrants in response to local needs, such a decision would put Arizona out of step with what seems to be the stance of other immigration-heavy states.\textsuperscript{185} Such discrepancies could alienate states from each other, and encourage populations to move into states where sanctions are less stringent and employers are more willing to take risks hiring undocumented workers. While the mass migrations that occurred in the 1930s have not yet been repeated, the decision for the Respondents could result in such a movement, forcing states today to emulate California’s “Anti-Okie Law,” with an added allowance for businesses to discriminate in order to avoid sanctions. Faced with the prospect of losing his livelihood, it seems naïve to blindly believe a business owner will always make the “most rational”\textsuperscript{186} decision.

Of final importance, one cannot ignore the positions taken by each Justice when determining the lasting significance of this decision both in terms of \textit{stare decisis} power and of the impact outside of the courtroom. \textit{Whiting} is only one of the first eleven cases from which Justice Kagan recused herself because of her participation as acting Solicitor General.\textsuperscript{187} Due to the government’s position taken in the brief submitted during her tenure (though written by the now-acting Solicitor General, Neal Kumar Katyal), in addition to her own record since joining the bench, it is possible to hypothesize that she would have added her vote to Justices Breyer,
Ginsburg, and Sotomayor's, making the final count 5–4. Her recusal, while not ultimately changing the outcome of the case, adds it to the list of recent cases decided seemingly on close, political lines. A 5–4 outcome would show the instability of the decision, and prominently display the sharp split between those who decided the case on narrow, academic premises and those who wished to expand the decision beyond academia into social policy. But, there is of course the possibility that Justice Kagan might have voted the other way. The Chamber of Commerce, also the Petitioner in this case, did not endorse her during her confirmation process, an almost unprecedented occurrence and a clear statement from an impact-heavy section of the American business leadership. It is inconclusive evidence, but such indecision begs the question of Justice Kagan's position on local businesses and states' power to regulate them. While party lines would seem to dictate that she would rule against them for the government in this case, she has not established a clear-cut stance on business, and it is possible that her decision, like Justice Kennedy's, could have been swayed by the majority's decision to allow states to regulate licenses. Ultimately an academic, Justice Kagan may well have agreed with the limited, textual reading of the statute and favored an intellectual outcome rather than a social one. For the time being, the question is moot, but its answer is not irrelevant. With further challenge to other sections of Arizona's immigration legislation up for certiorari presently, and innumerable other state statutes in the making, she may very well have a chance to assert her position in the near future.

In the end, there were significant downsides to a decision for either Petitioner or Respondents. With the economy, social policy, and federalism itself on the line, can, and more importantly, should the Court be able to limit its discussion to the academic, ignoring the social ramifications of its own pedagogy? It is a valid criticism of both Justice Breyer's and Justice Sotomayor's dissents that they focus on hypothetical future implications rather than on the concrete data offered by the Petitioner and the Respondents, but it is an equally valid criticism of the majority that it ignores future immigration issues because of their hypothetical status, despite the very real possibility of their occurrence. Whiting, for now, stands as a testament to the Court's unwillingness to limit state immigration regulation under IRCA. But, as the economy continues to shift and struggle, and as states react to Arizona's legislation, it is impossible to say just how long that testament will endure.