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SECTION 434 OF THE WELFARE ACT: DOES THE FEDERAL IMMIGRATION POWER COLLIDE WITH THE TENTH AMENDMENT?

INTRODUCTION

On August 22, 1996, fulfilling his campaign promise "to end welfare as we know it,"¹ President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("Welfare Act").² This legislation marks the most comprehensive change to federal welfare assistance since it was established during the Great Depression.³ The Welfare Act represents a move away from a centralized federal system to one that gives states more control.⁴ This change has been hailed by many state officials as a positive step towards reducing welfare spending.⁵

¹ 142 CONG. REC. S9352-01, S9359 (daily ed. Aug. 1, 1996) (statement of President Clinton). See also, Statement by President William J. Clinton upon signing H.R. 3734, 1996 U.S.C.C.A.N. 2891 (Aug. 26, 1996).

² Pub. L. No. 104-193, 110 Stat. 2105 (1996).

³ See, e.g., Robert Pear, *State Officials Conclude Some Provisions of the Welfare Law May be Unconstitutional*, N.Y. TIMES, Oct. 6, 1996, at 30 (noting the termination of the 61 year-old guaranteed cash assistance for the country's poor).

⁴ The primary method of accomplishing this is by a system of block grants to be used by states for welfare spending. See Pub. L. No. 104-193, § 103, to be codified at 42 U.S.C. § 601. Ironically, the grants are subject to a host of restrictions that facially do not seem to give the states any control over welfare spending at all. However, such a discussion is outside the scope of this note.

⁵ See David Firestone, *Giuliani to Sue Over Provision on Welfare*, N.Y. TIMES, Sept. 12, 1996, at B1. See also Robert Pear, *State Welfare Chiefs Ask for More U.S. Guidance*, N.Y. TIMES, Sept. 10, 1996, at A16. Not to say that the Welfare Act has been without its critics. The Welfare Act has frequently been characterized as mean spirited and especially cruel to children. In fact, several key officials with the Department of Health and Human Services resigned because they refused to administer the new legislation calling it mean spirited. See Alison Mitchell, *Two Clinton Aides Resign to Protest New Welfare Law*, N.Y. TIMES, Sept. 12, 1996, at A6.

The Welfare Act has also provoked controversies.⁶ Nestled within its provisions is an amendment to the Immigration and Naturalization Act. The provision, section 434, provides that "no State, or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."⁷ This provision effectively repeals inconsistent state and local laws on this subject. For example, New York City's Executive Order 124 ("E.O. 124"), in effect since 1989, directly prohibits certain city employees from reporting an individual's alien status.⁸ Los Angeles, San Francisco and Chi-

⁶ See, e.g., *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997); Pear, *supra* note 3; Richard C. Reuben, *The Welfare Challenge: States Face Tough Choices and Lawsuits Under the New Act*, A.B.A. J., Jan. 1997, at 34, 35 (discussing that the "charitable-choice" provision which allows for states to contract with religious organizations to provide publicly-funded welfare programs conflicts with earlier Supreme Court decisions that prohibit the use of religious organizations to provide government services).

⁷ 8 U.S.C.A. § 1644 (1996).

⁸ Executive Order 124 provides:

Section 2. Confidentiality of Information Respecting Aliens.

a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) such officer's or employee's agency is required by law to disclose information respecting such alien, or (2) such agency has been authorized, in writing signed by such alien, to verify such alien's immigration status, or (3) such alien is suspected by such agency of engaging in criminal activity, including any attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency's line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligibility by law.

cago have similar regulations.⁹ Thus, Congress' enactment of section 434 raises issues of federalism and state sovereignty; these issues led New York City to file a lawsuit which was subsequently dismissed in *City of New York v. United States*.¹⁰

New York City's challenge to section 434 once again focuses on ascertaining the limits of federal power vis-à-vis state sovereignty under the Tenth Amendment. The Supreme Court has addressed this question under various constitutional provisions with increasing frequency over the past decade.¹¹ However, the limits to Congress' control over immigration and alienage has yet to be fully delineated.

The key issue in *City of New York* is whether section 434 violates the Tenth Amendment's reservation of power to the states despite the established broad and exclusive federal power to regulate immigration and alienage.¹² On the one hand, Congress' plenary authority over immigration is so broad and exclusive that once invoked, it preempts any state law that regulates immigration or interferes with federal immigration policy.¹³ On the other hand, the Supreme Court has held that the Tenth Amendment prohibits the federal government from directly imposing regulations upon states unless that regulation is generally applicable to all citizens.¹⁴ The Court has also held that the federal government may not commandeer a state's legislative process so as to turn it into a regulatory arm

43 N.Y.C.R.R. §§ 3-01, 3-02 (1995).

⁹ Patrick McDonnell, *Welfare Law May Affect Police Role, Immigrants Border Measure Would Allow Public Employees to Report Suspects to I.N.S.: Foes Vow to Fight Provision*, L.A. TIMES, Sept. 30, 1996, at A1. These laws have also been referred to as sanctuary declarations. See, e.g., Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates*, 16 PEPP. L. REV. 299 (1989).

¹⁰ 971 F. Supp. 789 (S.D.N.Y. 1997). Since New York City filed suit, Jersey City, New Jersey has passed a resolution not to cooperate with the federal government on this issue. Miguel Perez, *Immigrants' Safe Haven*, THE RECORD, NORTHERN N.J., Oct. 16, 1996, at A03, available in 1996 WL 6112978.

¹¹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, (1987) (Spending Power); *U.S. v. Lopez*, 115 S. Ct. 1624 (1995) (Commerce Power); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (Commerce Power); *New York v. United States*, 505 U.S. 144 (1992) (Spending and Commerce Powers), *Printz v. United States*, 117 S. Ct. 2365 (1997).

¹² *City of New York*, 971 F. Supp. at 793-94.

¹³ See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354-55 (1976).

¹⁴ *Garcia*, 469 U.S. at 554. But see *infra* note 132.

of the federal government.¹⁵ Thus, at the heart of New York City's lawsuit is the uneasy juxtaposition of these doctrines and the resulting question of whether section 434 usurps the functions of local legislatures, or merely codifies a pre-existing federal power. While *City of New York* court found no Tenth Amendment violation, the opinion failed to square the federal immigration power with the Tenth Amendment.¹⁶ Thus, the conflict between the two doctrines remains unresolved.

This Note will focus on whether Congress, in enacting section 434, has overextended its power to regulate immigration and alienage and consequently violated the Tenth Amendment. Part I will analyze whether section 434 is an example of federal preemption or federal commandeering in light of immigration jurisprudence and Tenth Amendment case law. Part II will discuss why section 434, while arguably commandeering states' legislative processes, should be sustained as a valid exercise of the federal immigration power.

I. SECTION 434: FEDERAL PREEMPTION OR FEDERAL COMMANDEERING?

The issues in New York City's lawsuit are whether section 434 is a case of valid federal preemption or invalid federal commandeering. When analyzed in light of Tenth Amendment case law, section 434 does appear to violate state sovereignty. However, given the breadth of the federal immigration power and the necessity for that power to be exclusively vested in the federal government, the applicability of the Tenth Amendment is questionable. This is because the federal government's exercise of its immigration power precludes state interference with, or regulation of, immigration. This is essentially what E. O. 124 does. Even if section 434 facially usurps New York City's legislative process, the broader principles of national sovereignty inherent in the federal immigration power require that E.O. 124 cede to federal authority.

¹⁵ *New York*, 505 U.S. at 166.

¹⁶ See *City of New York*, 971 F. Supp. at 794.

A. Preemption of E. O. 124

1. The Broad Federal Power to Regulate Immigration

For well over a century, the Supreme Court has resolved issues concerning immigration, on the grounds that the power to regulate immigration and alienage belongs to the federal government and not the states.¹⁷ The Court has repeatedly stated that "the authority to control immigration—to admit or exclude aliens—is vested solely in the federal government,"¹⁸ and has concluded that congressional power to regulate in this field is plenary.¹⁹ Congress, therefore, has the exclusive power to exclude²⁰ and remove²¹ aliens, to set conditions for their residence in this country²² and to restrict or deny benefits to them.²³ When viewed in light of this broad federal immigration power, New York City's enactment of E.O. 124 seems difficult to justify regardless of the passage of section 434.

In defining the federal power in this field, the Court has sustained congressional action by citing authority directly from within as well as outside the text of the Constitution.²⁴ The Constitution expressly states that Congress has the power to regulate foreign commerce;²⁵ this power has been interpreted to include the "bringing of persons into the ports of the United

¹⁷ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹⁸ *Truax v. Raich*, 239 U.S. 33, 42 (1915); see also *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Galvan v. Press*, 347 U.S. 522 (1954). The Supreme Court "has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotes omitted).

¹⁹ *Fiallo*, 430 U.S. at 792 (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

²⁰ See *Kleindienst*, 408 U.S. 753 (1972).

²¹ See *Galvan*, 347 U.S. 522 (1954).

²² See *Fong Yue Ting v. United States*, 149 U.S. 698 (1892).

²³ See *Mathews v. Diaz*, 426 U.S. 67 (1976).

²⁴ See, e.g., *Toll v. Moreno*, 458 U.S. 1, 10 (1982). It must be noted that the Supreme Court has been criticized for not thoroughly articulating the source of federal power in this area resulting in an inconsistent line of precedents. For an interesting analysis on this theory see, Burt C. Buzan & George M. Derry, *California's Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L.J. 141 (1996).

²⁵ U.S. CONST. art. I, § 8, cl. 3.

States."²⁶ The Constitution also gives Congress the power to "establish a uniform rule of naturalization."²⁷ Additionally, the treaty power has provided a source for federal authority to regulate the admission and exclusion of aliens and set conditions for their residency.²⁸

The Supreme Court also has found that Congress' power over immigration and alienage is not exclusively derived from its enumerated powers and also has relied upon the international legal principle that each country is an independent sovereign.²⁹ Thus, the Court has found that the federal government's power to regulate immigration is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers."³⁰ Finally, the Court has determined that congressional legislation in this field is a political question rather than one for which judicial determination is proper.³¹

The earliest challenges to the exclusive federal power over immigration were decided on Commerce Clause grounds. The Commerce Clause gives the federal government the power to regulate commerce with foreign nations,³² and this includes the regulation of foreign passengers.³³ Cases such as *Smith v.*

²⁶ *Fong Yue Ting*, 149 U.S. at 712.

²⁷ U.S. CONST. art. I, § 8, cl. 4.

²⁸ See generally *Chy Lung v. Freeman*, 92 U.S. 275 (1875). The U.S. Constitution provides that the President has the power to make all treaties with the advice and consent of the Senate. U.S. CONST. art. II, cl. 2. While cases mention both the Naturalization Clause and treaty power as sources of the federal immigration power, they have not been stressed by the Court as the primary reason why the federal authority should be broad. Thus they will not be explored in this Note as sources of federal power. It is enough to mention here that the existence of these powers serves to bolster the belief that the power to regulate immigration and alienage should be vested exclusively in the federal government.

²⁹ See, e.g., *Kleindienst*, 408 U.S. at 767; *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

³⁰ *Kleindienst*, 408 U.S. at 765. See also *Fong Yue Ting*, 149 U.S. at 711 (holding that "the right to exclude or expel all aliens or any class of aliens, absolutely or upon certain conditions . . . [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . .").

³¹ *Galvan v. Press*, 347 U.S. 522, 531 (1954).

³² U.S. CONST. art. I, § 8, cl. 3, which gives Congress the power to "regulate Commerce with foreign Nations" *Id.*

³³ *Fong Yue Ting*, 149 U.S. at 712.

*Turner and Norris v. The City of Boston*³⁴ (commonly referred to as *The Passenger Cases*) and *Henderson v. Mayor of the City of New York*³⁵ struck down state laws because the Supreme Court found them to intrude upon the federal power over foreign commerce. In *The Passenger Cases*, the Court declared unconstitutional head taxes imposed by New York City and Boston on alien passengers who disembarked in those cities.³⁶ In a plurality opinion, the majority of the Justices agreed that transporting alien passengers was foreign commerce and the taxes were impermissible state regulations thereof.³⁷ A more uniform opinion on the issue was announced in *Henderson* when New York City's attempt to have shipmasters pay a head tax on foreign passengers was invalidated.³⁸ New York City argued that this law, while arguably a regulation of commerce, was within its "police powers."³⁹ The Court rejected this argument⁴⁰ and reaffirmed that regulation of foreign passengers was within the scope of Congress' exclusive power to regulate foreign commerce.⁴¹ The Court held that because the Constitution gives Congress plenary power to regulate immigration the Supremacy Clause required federal policy to supersede contravening state law.⁴²

Over time, however, the Court moved away from focusing on constitutionally enumerated powers to support the federal immigration power and toward the principle of national sovereignty.⁴³ Cases such as *Chy Lung v. Freeman*⁴⁴ and *Chae*

³⁴ 48 U.S. 283 (1848).

³⁵ 92 U.S. 259, 269 (1875).

³⁶ *The Passenger Cases*, 48 U.S. at 392, 409.

³⁷ See, e.g., Justice McLean's opinion stating "[t]hat the transportation of passengers is a part of commerce is not now an open question." McLean relied on *Gibbons v. Ogden*, 22 U.S. 1 (1824), the landmark Commerce Clause case which held that the federal government, not the states, had the right to regulate navigation between local ports. 48 U.S. at 401. A primary difference among the justices was whether federal regulation of commerce, foreign or interstate, was exclusively vested in the federal government.

³⁸ 92 U.S. at 266. This law differed from the ones struck down in the *Passenger Cases* as they operated directly on the shipmaster and were not to be collected from the passengers themselves.

³⁹ *Id.* at 277.

⁴⁰ *Id.* at 271. For the role of state police powers in immigration legislation see *infra* Part I.B.

⁴¹ *Id.* at 270.

⁴² See *id.* at 272.

⁴³ This is also referred to as the theory of the nation-state. See, e.g., Buzan &

*Chan Ping v. United States (The Chinese Exclusion Case)*⁴⁵ mark this shift. For example, *Chy Lung* invalidated a California law that called for a state official to single out foreign passengers who were deemed "undesirable" and required shipmasters to pay a bond for those who fell into that class.⁴⁶ Justice Marshall, speaking for the Court, was immensely troubled that a state official could decide which passengers were "improper."⁴⁷ The Court declared that such power must belong to Congress because otherwise a single state could "embroil us in disastrous quarrels with other nations."⁴⁸

The *Chinese Exclusion Case* solidified the principle that federal authority over immigration is grounded both within and outside the text of the Constitution. This case dealt with the validity of a congressional act that prohibited Chinese laborers from entering the United States.⁴⁹ The Court concluded that Congress could so exclude classes of aliens.⁵⁰ This power, according to the Court, was a necessary incident of national sovereignty, and was granted "to the government of the United States as a part of those sovereign powers delegated by the Constitution."⁵¹

Nearly a century later, in *Toll v. Moreno*,⁵² the Supreme Court reaffirmed its position that the federal immigration power has its roots in both constitutionally enumerated powers and principles of national sovereignty. In *Toll* it was declared that "federal authority to regulate the status of aliens derives from various sources, including the federal government's power [t]o establish [a] uniform Rule of Naturalization, its power [t]o

Derry, *supra* note 24.

⁴⁴ 92 U.S. 275 (1875).

⁴⁵ 130 U.S. 581 (1889).

⁴⁶ *Chy Lung*, 92 U.S. at 276-77. An immigrant was determined undesirable if perceived to be either a lunatic, lewd, deaf or likely to become a public charge. *Id.*

⁴⁷ *Id.* The tax was struck down on the same grounds as in *Henderson*. *Id.* at 278-79.

⁴⁸ *Id.*

⁴⁹ 130 U.S. at 583.

⁵⁰ *Id.* at 609. The Court, in its opinion, made the blanket statement that "the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy." *Id.* at 603.

⁵¹ *Id.* at 609.

⁵² 458 U.S. 1 (1980).

regulate Commerce with foreign Nations, and its broad authority over foreign affairs."⁵³

Stemming from this principle of national sovereignty is the Supreme Court's posture of limited judicial inquiry into acts carried out under the federal immigration power. As such, the Court has sustained the right of the federal government to establish residency requirements and expel immigrants for noncompliance, as in *Fong Yue Ting*,⁵⁴ to deport a twenty-year resident immigrant because he was once a member of the Communist Party, as in *Galvan v. Press*,⁵⁵ and deny entry to an acknowledged Marxist scholar, as in *Kliendienst v. Mandel*.⁵⁶ These cases were all decided under the theory that such determinations, because they pertain to or affect international relations, are political acts entrusted to Congress.⁵⁷ They have come to stand for the proposition that not only is the federal power over immigration extremely broad but it is also intimately linked to political decision-making and not judicial determination.⁵⁸ Thus, it is established that "[t]he power to exclude aliens is inherent in sovereignty, necessary for maintaining normal international relations and defending the country from foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government."⁵⁹

In contrast to the deference given to federal acts, is the Supreme Court's scrutiny of state legislation in this arena. The distinctive approaches used in analyzing the constitutionality

⁵³ *Id.* at 10 (internal quotes omitted).

⁵⁴ In this case several Chinese immigrants challenged the federal government's right to expel them for not complying with federal residency requirements. 149 U.S. at 702-04.

⁵⁵ 347 U.S. 522, 523 (1954).

⁵⁶ 408 U.S. 753 (1972). See also *Boutilier v. INS*, 387 U.S. 118 (1967) (federal government may exclude homosexuals); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (alien's detention at Ellis Island was within the federal government rights).

⁵⁷ See, e.g., *Galvan*, 347 U.S. at 531. Justice Frankfurter, in his opinion for the Court, concluded with the following thought: "We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens." *Id.* at 531-532; See also *Fong Yue Ting*, 149 U.S. at 713.

⁵⁸ See, e.g., *Fiallo*, 430 U.S. at 792; *Mathews*, 426 U.S. at 84.

⁵⁹ *Kleindienst*, 408 U.S. at 765 (internal quotes omitted).

of federal and state immigration legislation reinforces the exclusivity of the federal regulatory power. For example, in *Fong Yue Ting* the Court declined to apply the reasoning of *Chy Lung*, which invalidated a state immigration regulation, to a federal immigration act.⁶⁰ The Court noted that "the question [in *Chy Lung*] was of the power of a State over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country."⁶¹

However, simply because the Court has drawn a distinction between state and federal acts in this field does not mean states lack authority to legislate. While the Court continually has articulated the principle that the federal government's power over immigration is dominant and extremely broad,⁶² it also has recognized the concomitant need for states to be able to address local problems that may occur as the result of aliens residing within their borders.⁶³ Many states have stressed this recognition in attempts to use their police power to circumvent the broad federal authority over immigration.⁶⁴ While the Court has struck down almost all such state legislation as an impermissible intrusion,⁶⁵ it also has articulated certain instances when a state law can co-exist with a federal law in this arena.⁶⁶ Since the Court has found that some state laws may not interfere with the federal immigration power, it is easy to understand why New York City believes that it has some authority to enact regulations that touch upon the field of immigration and alienage.

Despite the Supreme Court's recognition of some state authority, state immigration legislation in this field has been upheld only under limited circumstances.⁶⁷ Thus, when a state interfered with a non-citizen's ability to be employed,⁶⁸

⁶⁰ 149 U.S. at 724-25.

⁶¹ *Id.*

⁶² See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁶³ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982); *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1982); *Terrace v. Thompson*, 263 U.S. 197, 217 (1923).

⁶⁴ See, e.g., *Truax v. Raich*, 239 U.S. 33 (1915).

⁶⁵ *Id.*

⁶⁶ See *infra* Text, pages 12-13.

⁶⁷ See *De Canas*, 424 U.S. 351 (1976); *Terrace*, 263 U.S. at 217.

⁶⁸ *Truax v. Raich*, 239 U.S. 33 (1915).

or ran a program of alien registration,⁶⁹ or denied aliens a fishing license,⁷⁰ imposed residency or citizenship requirements to obtain welfare benefits,⁷¹ or denied in-state university tuition benefits to resident legal immigrants⁷² the Court found incompatibility with the federal immigration power.⁷³ These state laws were all held to be federally preempted because they stood "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."⁷⁴

The common thread running through these cases is the Court's finding that the states' acts intruded upon the broad federal immigration power by imposing burdens on aliens beyond those imposed by the federal government. Thus, when Arizona tried to deny employment to non-citizens, the Court in *Traux* held this regulation impermissible because it was "tantamount to the assertion of the right to deny them entrance and abode."⁷⁵ Similar reasoning was applied to overturn state laws in *Takahashi* and *Graham*. As the Court stated in *Takahashi*, "[the States] can neither add nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States."⁷⁶ With these decisions the Court broadened the federal power over immigration and alienage to reach intrastate activities.⁷⁷

⁶⁹ *Hines v. Davidowitz*, 312 U.S. 52, (1941).

⁷⁰ *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948).

⁷¹ *Graham v. Richardson*, 403 U.S. 365 (1971). The Arizona law required resident aliens to have lived in the state for fifteen years. *Id.* at 367. Pennsylvania required recipients to be U.S. citizens. *Id.* at 368. *But see Mathews v. Diaz*, 426 U.S. 67 (1976). The *Mathews* Court held that a five-year waiting period for resident aliens to obtain federal welfare benefits was not unconstitutional because it was rationally related to the legislative end of regulating immigration. The Court distinguished *Graham*, declaring that while "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification whereas a comparable classification by the federal government is a routine and normally legitimate part of its business." *Id.* at 85.

⁷² *Toll v. Moreno*, 458 U.S. at 3.

⁷³ *See, e.g., Graham*, 403 U.S. at 378; *Truax*, 239 U.S. at 42.

⁷⁴ *Hines*, 312 U.S. at 67.

⁷⁵ *Truax*, 239 U.S. at 42.

⁷⁶ 334 U.S. at 419.

⁷⁷ It is interesting that the Court, while willing to acknowledge that a state law that affected immigration and alienage unconstitutionally interfered with federal regulation as early 1848's *The Passenger Cases*, was reluctant to extend this logic into other areas of federal regulation until decades later. *See, e.g., Hammer v. Dagenhart* which held that the Tenth Amendment prohibits the federal govern-

The states, however, may properly legislate in this field if certain guidelines are met. In the defining decision of *De Canas v. Bica*,⁷⁸ a state law dealing with immigration was sustained as a valid exercise of its police power. There, the Court confronted a California law that penalized employers who hired illegal immigrants in violation of federal standards.⁷⁹ The Court declared that the statute was within the state's police power and was not preempted simply because it dealt with immigrants.⁸⁰ In deciding *De Canas*, the Court laid out a three-prong test for determining federal preemption of a state statute pertaining to immigration.

First, the state law may not regulate immigration.⁸¹ This is "essentially the determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain."⁸² The California law was deemed not regulatory but simply an economy strengthening policy providing criminal sanctions against employers who violated federal standards.⁸³ Second, a permissible state law touching the field of immigration may be preempted by a clear federal directive.⁸⁴ The Court found no explicit federal directive that would preempt the California law.⁸⁵ Finally, the state law may not serve "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁶ This issue was remanded for further determination if the law stood

ment from using the commerce power to regulate intrastate manufacturing. 247 U.S. 251 (1918) (overturned by *U.S. v. Darby*, 312 U.S. 100 (1941)). This divergence further demonstrates the Court's recognition that federal legislation should take precedence in this field.

⁷⁸ 424 U.S. 351 (1976).

⁷⁹ *Id.* at 352-53.

⁸⁰ *Id.* at 355-56. The Court stated that it has never held "that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by [the federal constitutional power to regulate immigration], whether latent or exercised." *Id.* at 355.

⁸¹ *Id.* at 355-63.

⁸² *Id.* at 355.

⁸³ *De Canas*, 424 U.S. at 355. The Court noted that "absent congressional action [the state law] would not be an invalid incursion on federal power." *Id.*

⁸⁴ *Id.* at 356.

⁸⁵ *Id.* at 357. The Court stated that it would not presume that "Congress, in enacting the INA [Immigration and Naturalization Act], intended to oust state authority to regulate the employment relationship . . . in a manner consistent with pertinent federal laws." *Id.*

⁸⁶ *Id.* at 363 (citing *Hines*, 312 U.S. at 67).

as an obstacle to federal legislation.⁸⁷ The *De Canas* three-prong test now serves as the guidepost for determining the states' ability to enact legislation dealing with aliens and immigration.⁸⁸

2. Federal Preemption of E.O. 124

New York City's complaint alleged that section 434 violated the Tenth Amendment because it commands the city to carry out a federal policy.⁸⁹ The difficulty in finding a clear Tenth Amendment violation is that section 434 was enacted under Congress' broad immigration power. The Court has long held that the power to regulate immigration is "necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and national security."⁹⁰ Since it is the exclusive right of the federal government to remove illegal immigrants who have been perceived as invaders violating our national security,⁹¹ is it not also the federal government's prerogative to take the steps necessary to remove those invaders? If so, then section 434 is simply a means reasonably adapted to the legitimate end of regulating immigration. Therefore, E.O. 124 must cede to federal authority as an impermissible regulation or obstruction of immigration policy.

In light of *De Canas*, E.O. 124 appears to be subject to federal preemption as both an impermissible regulation of immigration and as an obstacle to the exercise of the federal authority. Arguably, E.O. 124 does not regulate immigration since it directs its employees *not* to become involved with an alien's residency status. However, no Supreme Court decision limits the proscription of state regulation in immigration law to placing burdens upon aliens. In fact, *Takahashi* held that a

⁸⁷ *Id.* at 364-65.

⁸⁸ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995). See also *Garcia v. Louisiana*, 521 So. 2d 608, 613-14 (La. App. 1988).

⁸⁹ See *City of New York v. United States*, 971 F. Supp. 789, 795 (S.D.N.Y. 1997).

⁹⁰ *Galvan v. Press*, 347 U.S. 522, 530 (1954).

⁹¹ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (quoting Appellant's Brief at 20).

state may neither add to, *nor reduce*, those conditions placed on aliens by the federal government.⁹² The city regulation, by easing the burden on illegal immigrants to avoid deportation, lessens the conditions imposed on them by the federal government.

Furthermore, *De Canas* also forbids local regulations to stand as an obstacle to federal goals in regulating immigration.⁹³ The federal government's policies are to remove incentives for undocumented persons to remain in this country,⁹⁴ and "bar undesirable aliens from our shores."⁹⁵ Despite such policies, many illegal immigrants have taken up residence creating a "shadow population" of illegal migrants.⁹⁶ Section 434 promotes the federal goal of deterring illegal migration, where E.O. 124 frustrates this goal by making it more difficult for Immigration and Naturalization Service ("INS") agents to locate illegal immigrants. Thus, section 434 may be regarded as an expression of direct federal preemption, because it aims to eliminate this obstacle.

Nevertheless, New York City attempts to circumvent the federal immigration power by alleging that section 434 undermines its policy to protect its residents by allowing illegal immigrants to obtain vital services.⁹⁷ For example, E. O. 124

⁹² 334 U.S. at 419. Of course, the Court was passing on the issue of legal immigrants. However, the Court has decided that a state may not take away certain rights from those illegally present in this country. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a state may not prohibit the children of *illegal* immigrants from obtaining a public education). Whether the Court would strike down a regulation such as E.O. 124, which includes in its purpose the desire to ensure that illegal immigrant parents send their children to school without fear of being reported to the INS does pose an interesting question.

⁹³ *De Canas v. Bica*, 424 U.S. 351, 362 (1976).

⁹⁴ This federal policy is clearly stated in the amendments to the INA passed in the Welfare Act. Congress has stated that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C.A. § 1601(6) (1996). *See also* 8 U.S.C.A. § 1621 (1996) (prohibiting illegal immigrants to obtain welfare assistance); 8 U.S.C.A. § 1324a(a)(1)(A) and (B) (making the employment and continued employment of illegal aliens a federal crime); 8 U.S.C.A. § 1251(a)(1)(B) (1996) (including undocumented aliens in the group of deportable aliens).

⁹⁵ *Lennon v. INS*, 527 F.2d 187, 194 (2d Cir. 1975) (prominent musician facing deportation because of drug possession conviction in country of origin).

⁹⁶ *Plyler*, 457 U.S. at 218.

⁹⁷ New York City avers in its complaint that by prohibiting the city's continued implementation of E.O. 124 the health and safety of all of its residents is greatly endangered. Illegal aliens who witness crimes or are victims of crimes need to be

ensures that undocumented children obtain an education to reduce their risk of becoming criminals or dependent upon public assistance.⁹⁸ The city's complaint also alleges that illegal aliens commingle with legal residents,⁹⁹ and that like all city residents, they may be victims or witnesses of a crime or exposed to a serious disease.¹⁰⁰ E. O. 124 assists the city in investigating and rectifying these situations by providing protection to such illegal immigrants.¹⁰¹

While these allegations may demonstrate New York City's need for enacting E. O. 124, they do not overcome preemption by the federal government's use of its immigration power. The Supreme Court's rationale behind federal preemption acknowledges that a state may have a valid purpose for wanting to avoid federal preemption,¹⁰² however, "even state regulation designed to protect vital state interests must give way to paramount federal legislation."¹⁰³ As stated in *Hines*, a local law that "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress is the hallmark of federal preemption."¹⁰⁴ This is certainly the case with E.O. 124. The federal government's goal is to deter illegal aliens from taking up residency and remove those who have entered illegally.¹⁰⁵ Since E.O. 124 stands as an obstacle to that policy, a forceful argument can be made that E.O. 124 was always unconstitutional and section 434 simply articulates what is already in the federal province.

free to report such activities to the police. The sick must feel free to obtain health services and parents must feel free to send their children to school. If illegal immigrants fear deportation, the city will be unable to fully carry out its duty to protect its residents from crime, disease and indecency. See, Complaint at ¶¶ 18-22.

⁹⁸ *Id.* ¶ 19.

⁹⁹ *Id.* ¶¶ 15-16.

¹⁰⁰ *Id.* ¶¶ 18, 20.

¹⁰¹ *Id.* ¶ 21. For example, the city points out that in order for its health department to adequately identify sources of communicable diseases, such as tuberculosis, it must have cooperation from all city residents, including undocumented aliens. Complaint ¶ 21.

¹⁰² See, e.g., *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230-32 (1947) (state scheme regulating grain while traditionally occupied by states was preempted by federal law).

¹⁰³ *De Canas*, 424 U.S. at 357.

¹⁰⁴ *Hines*, 312 U.S. at 67.

¹⁰⁵ See *supra* note 94.

The recent invalidation of California's Proposition 187 is illustrative of E.O. 124's subjection to federal preemption as an improper regulation of immigration. The California law, a mirror image of New York City's E.O. 124, mandated that local officials investigate individuals' immigration status and report to the INS those suspected to be here illegally.¹⁰⁶ The district court, applying the *De Canas* test, struck down Proposition 187 in *League of United Latin American Citizens v. Wilson*¹⁰⁷ on the ground that the reporting provision effectuates the removal of immigrants and thereby regulates immigration.¹⁰⁸ It was considered an impermissible regulation under *De Canas* because the statute allowed for state officers to, in effect, determine who should remain in this country.¹⁰⁹ The court concluded that the California law created a "comprehensive scheme" to detect and report the presence and effect the removal of illegal aliens and thereby regulated immigration.¹¹⁰

E.O. 124 effectuates a similar end. By prohibiting its employees from cooperating with the INS, New York City has also established a "comprehensive scheme" that essentially makes a determination as to who may stay in this country and under what conditions. Such an act runs afoul of the principles laid out in *De Canas* and the established immigration authority of the federal government. Thus, E.O. 124 may be preempted as an improper regulation of immigration.

B. *Is Section 434 a Case of Federal Commandeering?*

Given the well established, broad federal power to control immigration there would seem to be no basis for New York City's lawsuit. However, in analyzing recent Supreme Court opinions concerning the Tenth Amendment, the City's complaint becomes understandable. Within the past several years the Tenth Amendment has taken a more expansive role as the

¹⁰⁶ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (Cal. D.C. 1995).

¹⁰⁷ *Id.* at 771.

¹⁰⁸ *Id.* at 769.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Supreme Court has curbed federal powers to preserve state sovereignty. The history of Tenth Amendment jurisprudence and recent application of this amendment indicate why New York City may reasonably argue that section 434 is a violation of state sovereignty.

1. Tenth Amendment Principles

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹¹¹ Over fifty years ago, the Supreme Court in *U.S. v. Darby*¹¹² interpreted the Tenth Amendment as "nothing but a truism."¹¹³ As such, the Court has been highly deferential to acts of Congress and permitted regulation of a variety of intrastate activities.¹¹⁴ This includes, in certain instances, regulation of various state government functions.¹¹⁵ This approach remained fairly consistent until the Supreme Court opinion of *New York v. United States*.¹¹⁶

The line of cases leading up to *New York* all wrestled with the concept of whether the Tenth Amendment served as an affirmative limit to use of Congress' enumerated powers vis-à-vis the States.¹¹⁷ Clearly, the rights of the states are not impeded by proper federal regulation of private activity. This proposition was established by the Court when it upheld the constitutionality of federal regulation of private employers' wages and hours in *Darby* on the grounds that the Tenth Amendment did not deprive Congress the authority to regulate intrastate activity if it fell within the exercise of a granted

¹¹¹ U.S. CONST. amend. X.

¹¹² 312 U.S. 100 (1941).

¹¹³ *Id.* at 124.

¹¹⁴ See *New York v. United States*, 505 U.S. 144, 158 (1992) (citing *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurant refusing to serve African-Americans food affects interstate commerce and thus subject to federal regulation) and *Wickard v. Filburn*, 317 U.S. 111 (1942) (farmer's overproduction of wheat affected interstate commerce and subject to federal regulation)).

¹¹⁵ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (commerce power included regulation of state wages).

¹¹⁶ 505 U.S. 144 (1992).

¹¹⁷ *Darby*, 312 U.S. at 123-24; *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976); *New York*, 505 U.S. at 176-78.

power.¹¹⁸ However, while the Court has had little trouble applying Congress' powers to intrastate affairs involving private individuals, it has not been as definitive in deciding how federal powers relate to state activity. This is best exemplified by the Court's shift in its position from *National League of Cities v. Usery*¹¹⁹ to *Garcia v. San Antonio Metropolitan Transit Authority*.¹²⁰ It is also seen in the differences between *Garcia* and *New York v. United States*¹²¹ and, more recently, *Printz v. United States*.¹²²

In *Usery*, the Supreme Court found that the Fair Labor Standards Act ("FLSA") could not be applied to state employees.¹²³ The Court determined that the Tenth Amendment prevented such legislation because it sought to regulate the "states as states"¹²⁴ and thus interfered with "traditional government functions."¹²⁵ The Court held that the FLSA, by requiring states to pay their employees according to federal standards, "significantly alter[ed] or displace[d] the state's ability to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, [and] public health."¹²⁶ These types of activities had long been held to be integral to the function of the state government.¹²⁷ The Court concluded the federal government had no authority to regulate such activities when the federal interest was not strong enough to justify state submission.¹²⁸

However, *Usery's* "traditional government function" approach turned out to be unworkable, because it left too much room for judicial discretion and resulted in an inconsistent line of precedents.¹²⁹ Less than a decade later it was overruled in

¹¹⁸ *Darby*, 312 U.S. at 124. The act in question was the Fair Labor Standard Act (FLSA) which was enacted under the Federal commerce power. *Id.* at 109-111.

¹¹⁹ 426 U.S. 833 (1976).

¹²⁰ 469 U.S. 528 (1985).

¹²¹ 505 U.S. 144 (1992).

¹²² 117 S. Ct 2365 (1996).

¹²³ *Usery*, 426 U.S. at 852. (involved an amendment to the FLSA that applied minimum wage and maximum hour requirements to all state employees.).

¹²⁴ *Id.* at 845.

¹²⁵ *Id.* at 852.

¹²⁶ *Id.* at 851.

¹²⁷ *Id.*

¹²⁸ *Usery*, 426 U.S. at 855.

¹²⁹ For example, the Court distinguished the payment of wages and setting hours by a state from state retirement requirements in *EEOC v. Wyoming*, 460

Garcia v. San Antonio Metropolitan Transit Authority when the Court determined that the FLSA could be applied to an arm of a state.¹³⁰ In *Garcia*, the Court held that the Tenth Amendment is not implicated if the federal law applies to state and private entities alike.¹³¹ Once this prerequisite is met, state sovereignty is afforded protection by the very structure of the federal system.¹³²

Of course, when the federal legislature acts solely upon the state, there may be a Tenth Amendment violation. This was the case in *New York v. United States*, where a federal statute required states to either regulate nuclear waste according to federal regulations or take title to the waste and face penalties.¹³³ It held this to be an unconstitutional intrusion into state sovereignty,¹³⁴ because the federal government had enacted legislation that effectively commandeered the state legislatures to implement a federal program.¹³⁵ This "no-commandeering principle" was central to the Supreme Court's decision. The Court stated that the federal government may not directly require states to regulate according to a federal plan.¹³⁶ The Court found the Tenth Amendment violated because such action turns the states into regulatory agencies for the federal government.¹³⁷ It reasoned that if states could be forced to legislate according to federal dictates then voters would be unable to hold the responsible political body account-

U.S. 226 (1983) (finding that Age Discrimination in Employment Act permissibly applied to state employers as it did not violate state sovereignty as much as minimum wage regulation).

¹³⁰ *Garcia*, 469 U.S. at 557.

¹³¹ *Id.* at 554.

¹³² *Id.* at 552. Note, however, that the Court has recently hinted that even in the case of a generally applicable law it might be possible to violate state sovereignty if the law "excessively interfered with the functioning of state governments." *Printz*, 117 S. Ct. at 2382. How excessive is, of course, open to question.

¹³³ *New York*, 505 U.S. at 174-75.

¹³⁴ *Id.* at 175-76.

¹³⁵ *Id.* at 174-76. The Court stated that: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166. Thus, while an "allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *Id.*

¹³⁶ *Id.* at 178.

¹³⁷ *Id.* at 176-78.

able.¹³⁸ Without a clear line of accountability, the Tenth Amendment's protection of citizens was eroded,¹³⁹ because, ultimately citizens can only be protected when authority is properly divided between state and federal governments.¹⁴⁰

Since deciding *New York*, the Supreme Court has further defined the "no commandeering" rule in *Printz v. United States*.¹⁴¹ In *Printz*, a Tenth Amendment challenge was made to the "interim provisions," of the Brady Handgun Violence Protection Act ("Brady Act").¹⁴² It was argued that the Brady Act's requirement that a state's law enforcement officers run background checks on firearm applicants impedes upon state sovereignty.¹⁴³ In resolving this issue the Supreme Court held that the Tenth Amendment is equally violated when the federal government commands a state's officers as when it commands its legislature.¹⁴⁴ The Court reaffirmed its position that any requirement by the federal government that the state carry out a federal regulatory program is an anathema to the Tenth Amendment and federalist principles.¹⁴⁵ This also includes laws that are seemingly ministerial and do not interfere with state policymaking.¹⁴⁶

¹³⁸ *New York*, 505 U.S. at 182-83. The Court found that Act's "take title" provision forced state officials to either select a disposal site or let the federal government select one within the state. This created a situation where a state official would be more likely to turn that decision over to the federal government rather than be made accountable for the location selected. The Court found that "[w]here state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced." *Id.* at 183.

¹³⁹ *Id.* at 182-83.

¹⁴⁰ *Id.* at 181.

¹⁴¹ 117 S. Ct. 2365 (1997).

¹⁴² *Id.* at 2369. The challenged provision of the Brady Act involved an interim provision of the law which requires local law enforcement to determine whether a firearm may be transferred to an applicant. *Id.* at 2368-69.

¹⁴³ *Id.* at 2369-70.

¹⁴⁴ *Id.* at 2372.

¹⁴⁵ *Id.*

¹⁴⁶ *Printz*, 117 S. Ct. at 2372. The Court refused to accept the Government's argument that the interim provision only required a modicum of policymaking assistance from local officers. The Court stated that even if the Brady Act "leaves no 'policymaking' discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than . . . by reduc[ing] [them] to puppets of a ventriloquist Congress." *Printz*, 117 S. Ct. at 2381 (internal quotes omitted).

2. E.O. 124 and Tenth Amendment Principles of State Sovereignty

If the current judicial landscape did not include a leaning of the Court in favor of state sovereignty then the argument of section 434's constitutionality would end with a simple discussion of the federal preemption of state legislation dealing with immigrants. Simply put, the New York City regulation, in light of *De Canas*, would be directly preempted by virtue of the enactment of section 434.¹⁴⁷ However, given the recent Supreme Court interpretations of the Tenth Amendment, such an analysis would fall short of determining section 434's constitutionality. Therefore, section 434 must be analyzed in light of current Tenth Amendment jurisprudence.

In order to determine if section 434 violates the Tenth Amendment it must be determined whether the federal act impermissibly coerces the City to legislate or regulate according to federal dictates.¹⁴⁸ New York City's complaint against the federal government alleges that section 434:

(1) [d]irectly prohibit[s] States and localities from engaging in the central sovereign process of passing laws or otherwise determining policy; and (2) . . . usurp(s) State's and local governments' administration of core functions of government, including the provision of police protection and regulation of their own workforces, in a statute that is not of general applicability.¹⁴⁹

However, these allegations, as was pointed out in *City of New York v. United States*, misinterpret Tenth Amendment jurisprudence and the no commandeering standard.

The basis of the Supreme Court's opinions in *New York* and *Printz* were that the federal mandates at issue resulted in making states regulatory arms of the federal government. At first blush, it seems that section 434 makes New York City a regulatory agency for the federal government. Despite section 434's creation of only a voluntary exchange of information between local and federal officers, there may be a resulting cost to New York City.¹⁵⁰ This is because compliance would

¹⁴⁷ See *supra* text accompanying notes 78-88.

¹⁴⁸ See *supra* text accompanying notes 131-144.

¹⁴⁹ Complaint ¶ 2.

¹⁵⁰ The House Conference Report provides, in part, that § 434 "does not require, in and of itself, any government agency or law enforcement official to communicate

result in the city's inability to prevent its employees from spending time and resources supplying answers to federal requests.¹⁵¹ This, the City alleges, interferes with the its ability to regulate its own workforce,¹⁵² and forces the city to become entangled with federal immigration policy. Furthermore, section 434 provides the city with no choice but to respond to federal demands. In responding to that demand the city may be improperly forced to risk accepting the blame for providing misinformation.¹⁵³ This blurring of accountability is precisely what concerned the Supreme Court in *New York and Printz*.¹⁵⁴

However, section 434 does not require any and all city employees to respond to an INS request for information regarding the identity of illegal aliens residing within New York City. Instead, the law simply allows for a voluntary exchange between state/local and federal officials.¹⁵⁵ As the court in *City of New York* concluded, while section 434 "can be characterized as interfering with a City policy that prevents its officials from cooperating with federal immigration authorities except in accordance with certain procedures, that effect on local policy is not the type of intrusion that is sufficient to

with the INS." *City of New York*, 971 F. Supp. at 792. In *Printz*, the Supreme Court hinted that a federal law requiring a voluntary exchange of information between federal and state authorities would not violate the Tenth Amendment. *Printz v. United States*, 117 S. Ct., 2365, 2376 (1996). See also, Justice O'Connor's concurrence noting that "the Court appropriately refrain[ed] from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid." *Id.* at 2385.

¹⁵¹ However, note that a federal law that requires a state to expend funds is not indicative of federal commandeering if it is simply a necessary consequence of a valid federal regulation. See *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

¹⁵² Complaint ¶ 2.

¹⁵³ The court in *City of New York* argued that the City could escape such blame by claiming that it was merely carrying out a federal mandate. 971 F. Supp. at 797. This argument, however, misinterprets the effects of § 434 on local governments. If a New York City employee provides misinformation to the INS, it is not the federal government who will be at risk of blame, but the City itself. If the federal government declines responsibility for being given incorrect information, and the only redress the City has is to claim compliance with § 434, accountability is surely blurred. It is precisely this type of mutual fingerpointing that concerned the Supreme Court in *New York*. See 505 U.S. at 168-69.

¹⁵⁴ 505 U.S. 144, 168-69 (1992); 117 S. Ct. 2365, 2382 (1996).

¹⁵⁵ *City of New York*, 971 F. Supp. at 795.

violate the Tenth Amendment or principles of federalism."¹⁵⁶ Further buttressing this position is the Supreme Court's notable abstention from deciding whether federal laws which merely allow for the exchange of information with the federal government would constitute impermissible commandeering.¹⁵⁷

Nor is a blurring of political accountability on its own a basis for finding a Tenth Amendment violation.¹⁵⁸ Instead, it is the act of the federal government mandating that the state or its officers implement a federal program that gives rise to Tenth Amendment protections. That accountability is blurred is merely an aspect of the Supreme Court's rationale when "concluding that Congress lacks the power to compel states to regulate or to conscript state and local officers in carrying out a federal program."¹⁵⁹ As the court in *City of New York* has artfully pointed out, any allowance of political accountability as a basis for striking down a federal law would lead to challenges of congressional statutes that properly preempt state laws "on 'political accountability' grounds because state officials could be blamed for changing or not implementing their laws."¹⁶⁰

New York City further alleges that section 434 violates the Tenth Amendment, because it prohibits "the City from engaging in the central sovereign process of passing laws or otherwise adopting a policy that prohibits or restricts its officials from sending information to the INS"¹⁶¹ and undermines the City's ability "control its own workforce."¹⁶² A state's sovereignty certainly includes the duty to make decisions and set policy.¹⁶³ However, the Supreme Court no longer holds that the Tenth Amendment is implicated simply because some state policy is displaced.¹⁶⁴ Nor has the Court held that the Tenth

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* note 150.

¹⁵⁸ *City of New York*, 971 F. Supp. at 796-97.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Complaint ¶ 38.

¹⁶² Complaint ¶ 45.

¹⁶³ *See FERC v. Mississippi*, 456 U.S. 742 (1982). The *FERC* Court established that "[w]hatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of government bodies." *Koog v. U.S.*, 79 F.3d 452, 460 (5th Cir. 1996) (citing *FERC*, 456 U.S. at 761).

¹⁶⁴ *See Hodel v. Virginia Surface Mining and Reclamation Ass'n. Inc.*, 452 U.S.

Amendment is trammelled when a state must rewrite policy in order to comply with proper federal legislation.¹⁶⁵

Even if section 434 is an example of impermissible federal commandeering, such a finding would not support the striking down of section 434. This is because the provision directly relates to Congress' control of immigration, a power vested exclusively in the federal government. Concededly, it is understandable why New York City claims that section 434 impermissibly intrudes upon its state sovereignty given recent interpretations of the Tenth Amendment. However, principles of state sovereignty should have a unique place in determining the use of the federal immigration power.¹⁶⁶ This is because the federal immigration power "is subsumed under the general topic[s] of foreign affairs"¹⁶⁷ and national sovereignty and thereby requires that issues of state sovereignty be subordinated.¹⁶⁸

II. THE CONTROLLING POWER

The tension that exists between the federal immigration power and Tenth Amendment principles requires courts to look elsewhere to solve the problems posed by section 434. Ultimately, what must be decided is whether the need to require a broad and exclusive federal immigration power can co-exist with principles of state sovereignty. Interestingly enough, the court in *City of New York v. United States* refrained from addressing the role that the federal immigration power truly plays.¹⁶⁹ This is unfortunate. Rather than look for a resolution using solely Tenth Amendment and federalism principles,

264, 291 (1981) (offering states a regulatory role in fields subject to federal preemption does not violate the Tenth Amendment).

¹⁶⁵ See, e.g., *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988).

¹⁶⁶ See *infra* Part II.

¹⁶⁷ *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980) (state university's policy of denying admission of foreign students whose home government permits the holding of United States' citizens hostage intruded upon the federal immigration power).

¹⁶⁸ See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁶⁹ The court did briefly mention the federal government's plenary power over immigration but concluded that this was not the issue to be decided in this case. 971 F. Supp. 789, 793-94.

the court should have recognized the unique position the federal immigration power occupies in America's federalist system.

The passage of section 434 creates a clash of two strong Constitutional principles. It has long been recognized that the federal government has been "vested by the Constitution with the entire control of international relations,"¹⁷⁰ and this power necessarily includes the "exclusive responsibility for immigration matters."¹⁷¹ The Supreme Court has also acknowledged the need for states to be able to preserve their sovereignty by not being subjected to federal coercion.¹⁷² Paradoxically, the rationale behind preserving both principles is one and the same. Both the development of a strong, unified federal immigration power and a system of dual sovereignties were put into place to better protect individual citizens. Perhaps in dealing with this matter it should be kept in mind the belief expressed by Thomas Jefferson, who on the whole did not favor broad federal powers, "that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern . . . any foreign nation, should be made a part of federal sovereignty."¹⁷³

In vesting the federal government with its various powers, the Framers recognized the necessity to maintain in one unified government all those powers that pertain to foreign relations.¹⁷⁴ The Framers were concerned with the Articles of Confederation lack of any single authority to handle foreign affairs,¹⁷⁵ and thereby adopted a system where such powers would belong exclusively to the federal government.¹⁷⁶ It was believed that in matters pertaining to foreign relations "one general government . . . most favors the safety of the peo-

¹⁷⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1812).

¹⁷¹ *League of Latin American Citizens*, 908 F. Supp. at 769. See also *supra* Part I.A.

¹⁷² See *supra* Part I.A.

¹⁷³ *Hines v. Davidowitz*, 312 U.S. 52, 63 n.11 (1941) (citing a letter from Jefferson to Mr. Wythe).

¹⁷⁴ THE FEDERALIST No. 42 at 279 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁷⁵ See Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 334 (1992).

¹⁷⁶ Justice Black in *Hines*, noted that Alexander Hamilton wrote in *The Federalist* No. 80 that "[t]he peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members." *Hines*, 312 U.S. at 64 n.12.

ple."¹⁷⁷ This is because a unified federal power better "preserve[s] the people in a state of peace with other nations."¹⁷⁸ It is also the reason why the federal government is vested with power to make treaties, send ambassadors, regulate foreign commerce and proscribe uniform rules of naturalization.¹⁷⁹ These powers are by necessity controlled by the federal government because of their connection to foreign affairs.¹⁸⁰

Foreign relations handled by one unified government also best maintains the nation's "absolute independence and security throughout the entire territory."¹⁸¹ To allow the states to enter this field would ignore this long-standing policy. The United States is a union of individual states that is represented to foreign persons and governments by a single authority that "is entrusted with full and exclusive responsibility for the conduct of foreign affairs with foreign sovereignties."¹⁸² The Court has stated that these powers are best left to the federal government so as to "preserve [the country's] independence, and give security against foreign aggression and encroachment . . . and to attain these ends nearly all other considerations are to be subordinated."¹⁸³

The Supreme Court has recognized that there is a delineation between what is constitutionally permissible vis-à-vis internal affairs and vis-à-vis external affairs.¹⁸⁴ In *United States v. Curtiss-Wright Export Corp.*, the Court placed issues of foreign affairs outside the realm of the Tenth Amendment.¹⁸⁵ The Court reasoned that while "the federal government can exercise no powers except those specifically enumerated in the Constitution . . . , [this] is categorically true only in respect of our internal affairs."¹⁸⁶ As to the exercise of exter-

¹⁷⁷ THE FEDERALIST No. 3 at 16 (John Jay) (Jacob E. Cooke ed., 1961).

¹⁷⁸ *Hines*, 312 U.S. at 64 n.13 (citing to THE FEDERALIST No.3 (John Jay)).

¹⁷⁹ THE FEDERALIST No. 42 at 279 (James Madison) (Jacob E. Cooke ed., 1961).

¹⁸⁰ See generally THE FEDERALIST No. 42 *supra* note 170.

¹⁸¹ *The Chinese Exclusion Case*, 130 U.S. at 604.

¹⁸² *Hines*, 312 U.S. at 63.

¹⁸³ *The Chinese Exclusion Case*, 130 U.S. at 606.

¹⁸⁴ See *United States v. Curtis Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁸⁵ *Id.* at 315-16. In *Curtis-Wright*, the Court assumed, without deciding, that a joint resolution delegating legislative authority to the executive branch in the area of internal affairs would be invalid. Nevertheless, because the measure at issue applied to external affairs only, it was upheld. *Id.* at 314.

¹⁸⁶ *Id.*

nal affairs, the states never possessed such powers and therefore it can not be said that federal regulation over the states in this field somehow takes away from the states' independent sovereignty.¹⁸⁷ This separation of roles, taken together with the Court's consistent tying of the federal immigration power to federal control over foreign affairs, logically leads to the conclusion that the Tenth Amendment does not limit the federal government's power over immigration.

It is not, however, accurate to state that the Tenth Amendment should never play a role in determining the federal government's action in the field of immigration regulation. Certainly, if the federal government were to require a state to actively seek out and deport illegal aliens, then the Tenth Amendment would be violated. However, when dealing with issues of immigration, like all issues of foreign affairs, the rights of the states should be balanced against the need to preserve federal unanimity in dealing with foreign affairs. While federal commandeering of a state government is impermissible,¹⁸⁸ the federal immigration power poses unique issues of rights of the nation as a sovereign. Upon determining if the federal government has intruded upon state sovereignty, it must first be ascertained if the federal act best serves the national interest in preserving a unanimous front to deal with foreign entities. This balancing of policies is consistent with both the underlying policies of federal immigration and Tenth Amendment principles.

As already stated, the basis for the exclusive federal immigration power is the allowance for protection of individual rights. The same policy is present in the need to preserve the federalist system. The Framers recognized the need to create and preserve state sovereignty and protect it from federal encroachment.¹⁸⁹ This system of dual sovereignties provides for a "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society," and ensures "the protection of our fundamental liberties."¹⁹⁰

¹⁸⁷ See *id.* at 316-18.

¹⁸⁸ *New York*, 505 U.S. at 178.

¹⁸⁹ See *Garcia*, 469 U.S. at 551-52.

¹⁹⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (holding that the Federal Age Discrimination in Employment Act does not extend to state mandatory retirement of judges).

However, the Tenth Amendment should not impair the federal government's ability to regulate immigration in a uniform fashion. It is a power that is "intimately blended and intertwined with responsibilities of the national government."¹⁹¹ Undoubtedly, the seemingly unending stream of illegal migration burdens the states. However, while the Supreme Court has refused to "conclude that the States are without any power to deter the influx of persons entering . . . against federal law, and . . . might have a discernible impact on traditional state concerns,"¹⁹² the immigration power must supersede the Tenth Amendment's concerns of state sovereignty. Therefore, any attempts by states to circumvent federal dominance in this field must continue to be considered in light of the need to preserve federal authority over immigration.¹⁹³

It is true that "the Tenth Amendment provides a *shield against* the federal exercise of powers reserved to the states."¹⁹⁴ However, in the case of section 434, the federal government is not exercising a power reserved to the states. Instead, it is exercising a power vested exclusively in the federal government; a power vested by the people to ensure their safety.¹⁹⁵ Thus, when it comes to acts under the federal immigration power, the Tenth Amendment shield must be balanced against the need to preserve federal autonomy in the field of foreign affairs.

¹⁹¹ *Hines*, 312 U.S. at 66.

¹⁹² *Plyler*, 457 U.S. at 228 n.23.

¹⁹³ See text accompanying notes 171-180.

¹⁹⁴ *New Jersey v. United States*, 91 F.3d 463, 466 (3d Cir. 1996) (emphasis added). *New Jersey* is one of several cases in which states have charged that the federal government's inability to prevent illegal immigrants from entering the United States has led to a Tenth Amendment violation. The states argue that because of the federal government's failure to control the borders the states are forced to spend a large portion of their resources on welfare funding and facilities such as schools and jails. Not one circuit court opinion has ruled in favor of the states and has interpreted *New York's* "no commandeering" principle to extend only to prohibiting affirmative directives laid out by the federal government. See also *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); and *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

¹⁹⁵ See *supra* note 173.

CONCLUSION

The Supreme Court has characterized issues regarding the scope of federal power and the limits placed by the Tenth Amendment as simply mirror images of one another.¹⁹⁵ Therefore, New York City's lawsuit will permit a forum to determine the breadth of the federal immigration power. However, while section 434 can easily be portrayed as an example of impermissible federal commandeering, this Tenth Amendment principle has a limited role in light of the federal immigration power.

The federal government's power over immigration is just one facet of its exclusive control over all foreign matters. It is a power, however, that is part and parcel of the power over external affairs. To ignore this aspect, and subject this power to the same Tenth Amendment limits as domestic federal powers, is to undermine the basis of our national sovereignty. Thus, while it may at times reduce a state's authority within its borders, federal regulation of immigration must remain in the hands of one unified government.

Allison B. Feld

¹⁹⁶ *New York*, 505 U.S. at 156.

