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Comments: The Illegal Immigrant Tax: Evaluating State Remittance Taxes under the Dormant Commerce Clause and the Equal Protection Clause

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THE ILLEGAL IMMIGRANT TAX: EVALUATING STATE REMITTANCE TAXES UNDER THE DORMANT COMMERCE CLAUSE AND THE EQUAL PROTECTION CLAUSE.

I. INTRODUCTION

In 2012, the United States Supreme Court reminded a frustrated public that “[i]mmigration policy shapes the destiny of the Nation.”¹ In *Arizona v. United States*, the Supreme Court addressed the growing frustration between controversial state laws enhancing law enforcement’s ability to deal with illegal immigrants, while in the shadow of the federal government’s failure to reform our broken and paralyzed immigration system. “With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation’s meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse.”² While immigration reform efforts are anticipated in the 113th Congress,³ the lasting impacts of the polarizing national debate on immigration are best viewed from state capitols.⁴

Frustrated by the failure of the federal government to modernize immigration laws, state legislators are enacting or considering diverse proposals dealing with undocumented immigrants.⁵ Although much attention has been focused on legislation empowering state immigration enforcement efforts, state legislatures are also considering measures that would enhance state revenues by taxing

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

2. *Id.*

3. Jonathan Bernstein, *What to Expect From the 113th Congress*, WASH. POST, Jan. 3, 2013, <http://www.washingtonpost.com/blogs/plum-line/wp/2013/01/03/what-to-expect-from-the-113th-congress/>. Motivated by a changing electorate, Congress seemed willing to consider immigration reform in the early half of the 113th Congress. See Seung Min Kim, *Immigration Reform Bill 2013: Senate Passes Legislations 68–32*, POLITICO, June 27, 2013, <http://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-93530.html>. Perhaps the peak of this latest immigration reform pushed happened in June 2013 with the passage of a bi-partisan Senate bill on comprehensive immigration reform. *Id.* Prospects are grim that the House will debate, let alone pass, comprehensive immigration reform in the second half of the 113th session. *Id.*

4. See Nat’l Conf. of State Legis., *NCSL Releases 2011 Report on State Immigration Laws* (Dec. 13, 2011).

5. See *id.*

undocumented, or illegal, immigrants.⁶ Such measures target wire transfers, otherwise known as remittances, which are a primary way for migrants to send money to their families or communities in their home countries.⁷ In 2009, Oklahoma became the first state to enact this “remittance tax” into law.⁸ This tax doubles the cost of wiring money as it is nearly fifty percent of the transaction fee.⁹ Nearly six million households in the United States send remittances each year.¹⁰ As such, proposals to tax remittances may be perceived as an attractive revenue stream for many states. While many legislators are looking to the success of the Oklahoma remittance tax as a potential revenue-generator for their own states,¹¹ the tax proposals already considered may embody potentially fatal flaws under the Dormant Commerce Clause and the Equal Protection Clause of the United States Constitution.

This comment will analyze the constitutionality of remittance taxes under the Dormant Commerce Clause and the Equal Protection Clause. Part II of this comment will provide a summary of remittance tax efforts in state capitols. It will review the various types of proposals and laws that have been considered or enacted, including the motivations behind the proposals. Part III of this comment will analyze the tax proposals through a Dormant Commerce Clause

6. See discussion *infra* Part II.

7. The World Bank estimated in that in 2010, over 440 billion USD in remittances was sent through regulated channels worldwide. Remittances sent from the United States were estimated at 48 million USD. See THE WORLD BANK, MIGRATION AND REMITTANCES FACTBOOK 2011 17, 19 (2d ed. 2011).

8. OKLA. STAT. ANN. tit. 63, § 2-503.1j (West Supp. 2014).

9. The average wire transfer originating in the United States to a destination in Mexico is approximately \$370. See Raúl Hernández-Coss, THE U.S.-MEXICO REMITTANCE CORRIDOR: LESSONS ON SHIFTING FROM INFORMAL TO FORMAL TRANSFER SYSTEMS 9 (2005). The estimated price for sending \$370 from an Oklahoma zip code using Western Union is \$7. See W. UNION, www.westernunion.com (last visited Apr. 1, 2014).

10. ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, WHO IN THE UNITED STATES SENDS AND RECEIVES REMITTANCES? AN INITIAL ANALYSIS OF THE MONETARY TRANSFER DATA FROM THE AUGUST 2008 CPS MIGRATION SUPPLEMENT 18 (Working Paper No. 87, 2010), available at www.census.gov/population/www/documentation/twps0087/twps0087.pdf.

11. Since Oklahoma enacted its remittance tax in 2009, several other states have considered similar remittance tax measures. See A.B. 9462, 2011–2012 Leg., Reg. Sess. (N.Y. 2012); S.B. 2423, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); H.B. 2677, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.B. 2365, 2011 Leg., Reg. Sess. (Kan. 2011); H.F. 343, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011); H. 4174, 2011–2012 Leg., 119th Sess. (S.C. 2011); H.B. 1243, 2009–2010 Leg., Reg. Sess. (Ga. 2010).

perspective. Part IV of this comment will evaluate the tax proposals under the Equal Protection Clause.

II. OVERVIEW OF REMITTANCE TAX PROPOSALS

Although Oklahoma was the first, and thus far the only, state to enact a remittance tax into law, state legislatures have been considering similar measures since at least 2005.¹² The primary attraction to a remittance tax is the ease of which revenue can be generated without having to burden voting constituents.¹³ “This fee does not cost the legal, law-abiding citizens of the state of Oklahoma one red penny,” said Rep. Randy Terrill, sponsor of the Oklahoma remittance tax.¹⁴

The Oklahoma remittance tax imposes a five dollar minimum fee on a consumer making a wire transfer from a non-depository financial institution.¹⁵ For transactions of five-hundred dollars or more, an additional one percent of the amount being sent is also charged.¹⁶ A consumer with tax liability to Oklahoma may claim a credit on their income tax return for the fees paid.¹⁷ Several states have considered measures nearly identical to the Oklahoma tax model including, Kansas, Tennessee, Mississippi, and Texas.¹⁸

Other states have considered remittance tax legislation that would apply the tax only to those consumers who are unable to prove their lawful presence in the United States.¹⁹ For example, a Georgia bill that passed the state house in 2006 would have imposed a five percent tax on the value of a wire transfer sent from a non-depository

12. See A.B. 9462, 2011–2012 Leg., Reg. Sess. (N.Y. 2012); S.B. 2423, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); H.B. 2677, 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.B. 2365, 2011 Leg., Reg. Sess. (Kan. 2011); H.F. 343, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011); S.B. 92, 2009 Leg., Reg. Sess. (Cal. 2009); H.B. 263, 81st Leg., Reg. Sess. (Tex. 2009); L.B. 1071, 100th Leg., 2d Sess. (Neb. 2008); H.B. 1238, 2005–2006 Leg., Reg. Sess. (Ga. 2006); H.B. 2560, 2005–2006 Leg., Reg. Sess. (N.C. 2005).

13. See Paul Monies, *Oklahoma Transfer Fees Draw Criticism*, NEWS OK, Jan. 17, 2010, <http://newsok.com/oklahoma-transfer-fees-draw-criticism/article/3432686>.

14. *Id.*

15. OKLA. STAT. ANN. tit. 63, § 2-503.lj (West Supp. 2014).

16. *Id.*

17. *Id.*

18. See S.B. 2423, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); H.B. 2365, 2011 Leg., Reg. Sess. (Kan. 2011); S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011); H.B. 263, 81st Leg., Reg. Sess. (Tex. 2009).

19. See H.F. 343, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 92, 2009 Leg., Reg. Sess. (Cal. 2009); H.B. 263, 81st Leg., Reg. Sess. (Tex. 2009); H.B. 1238, 2005–2006 Leg., Reg. Sess. (N.C. 2005).

institution if the customer failed to produce specific documentation proving his lawful presence in the United States at the time of the transaction.²⁰ States such as California, Texas, Nebraska, and North Carolina have attempted to pass like measures that would only apply the tax against a remitter who could not prove his lawful presence in the United States.²¹

A key element of nearly every remittance tax proposal considered has been the application of the tax only to customers of non-bank depository institutions.²² Nearly every remittance tax proposal has included an explicit exemption for wire transfers made by banks or credit unions.²³ Yet, banks and credit unions offer competitive remittance, or wire transfer, services to the same targeted market as non-bank money transmitters.²⁴

The remittance tax proposals advanced throughout the states vary by the amount of the fee or tax to be collected.²⁵ Some states, such as New York, have considered a fee as low as .5 percent of the transaction value,²⁶ whereas Tennessee considered a proposal that would impose a flat twenty-five dollar fee on all transfers.²⁷

Another key distinction between the models is the appropriation of revenue generated by the tax. In Oklahoma, the Tax Commission

20. H.B. 1238, 2005-2006 Leg., Reg. Sess. (Ga. 2006).

21. See H.F. 343, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 92, 2009 Leg., Reg. Sess. (Cal. 2009); H.B. 263, 81st Leg., Reg. Sess. (Tex. 2009); H.B. 2560, 2005-2006 Leg., Reg. Sess. (N.C. 2005).

22. See sources cited *supra*, note 12. Non-bank depository institutions, otherwise known as money services businesses, are dominant players in the remittance sending industry. Traditionally, companies like Western Union and MoneyGram have been the primary companies through which remittances are sent from the United States. Depository institutions such as banks and credit unions offer similar, competitive remittance services. However, it has only been in the last few years that these financial institutions have been involved in the personal remittance market. See CONSUMER FIN. PROT. BUREAU, REPORT ON REMITTANCE TRANSFERS TO THE UNITED STATES CONGRESS 5-8 (2011).

23. See *supra* note 12.

24. Surveys of migrants in the United States indicate that a majority of the survey participants reported prefer sending money through banks, credit unions, or non-depository money transfer companies, rather than through friends, couriers, or other informal methods or channels. MANUEL OROZCO ET AL., IS THERE A MATCH AMONG MIGRANTS, REMITTANCES, AND TECHNOLOGY? 18 (Sept. 30, 2010) available at www.thedialogue.org/PublicationFiles/a%20match%20in%20migrants%20remittances%20and%20technology%20MO_FINAL_11.4.101.pdf.

25. Compare H.B. 2845, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012) (proposing a twenty-five dollar fee on wire transfers), with A.B. 9462, 2011-2012 Leg., Reg. Sess. (N.Y. 2012) (proposing a fee of .5 percent of the principal of the transaction).

26. A.B. 9462, 2011-2012 Leg., Reg. Sess. (N.Y. 2012).

27. H.B. 2845, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

receives all of the revenues generated by the tax and distributes the revenue into a law enforcement fund to help combat drug trafficking and money laundering.²⁸ A Georgia proposal would have appropriated the revenue for indigent healthcare services.²⁹ A Mississippi bill would have created a fund to be to assist in building the United States-Mexico border fence.³⁰ Regardless of the nuances of the various measures, there are common elements of remittance tax proposals that may be flawed under the Dormant Commerce Clause and the Equal Protection Clause of the United States Constitution.

III. ANALYZING REMITTANCE TAXES UNDER THE DORMANT COMMERCE CLAUSE

A. *Overview of Dormant Commerce Clause Jurisprudence*

State regulation interfering with interstate commerce has been the subject of judicial scrutiny since the earliest days of the Supreme Court.³¹ Recognizing the failure of the Articles of Confederation to centralize the power to regulate interstate commerce³², the founding framers explicitly vested that power to Congress in the Constitution.³³ By negative implication, the Commerce Clause operates to prohibit state regulatory activities, which unduly burden interstate commerce.³⁴ The Commerce Clause restrictions apply not only where specific federal regulation exists but also in the absence of Congressional action where the affected activity involves national interests requiring the free flow of interstate trade.³⁵

Dormant Commerce Clause jurisprudence is based on the foundation of ensuring economic national unity.³⁶ As Justice

28. OKLA. STAT. ANN. tit. 63, § 2-503.lj (West Supp. 2014).

29. H.B. 1238, 2005-2006 Leg., Reg. Sess. (Ga. 2006).

30. S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011).

31. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-200, 204-05 (1824); see also Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 428-35 (2008) (explaining the Court's early Dormant Commerce Clause jurisprudence).

32. See *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

33. U.S. CONST. art. I, § 8, cl. 3.

34. See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

35. See *id.*

36. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 595 (1977); see also Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 CAL. L. REV.

Cardozo explained, the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."³⁷ The interest of national unity is often framed around concerns of economic protectionism and isolationism.³⁸ State regulations created to protect local economic interests at the expense or burden of out-of-state interests constitute economic protectionism.

Although the Supreme Court has modified the judicial application of the Dormant Commerce Clause, the contemporary approach to the doctrine is well-articulated.³⁹ Facially discriminatory state laws interfering with interstate commerce are virtually always *per se* invalid.⁴⁰ Likewise, state regulations that do not discriminate facially but favor local economic interests at the expense of out-of-state interests are invalidated.⁴¹ State regulations impacting local and interstate commerce equally will be upheld if the state can show that the law's local benefits outweigh the burdens placed on interstate commerce.⁴²

B. State Taxation Under Complete Auto

For over thirty years, state taxation challenges under the Dormant Commerce Clause have been adjudicated using the landmark decision in *Complete Auto Transit, Inc. v. Brady*.⁴³ At issue in this case was a Mississippi tax levied on the plaintiff, who was in the business of transporting automobiles from Michigan to Mississippi and other destinations.⁴⁴ In upholding the tax, the Court established a four-prong test to determine when a tax on an interstate transaction may overcome judicial scrutiny.⁴⁵ The Court held that a state tax is constitutional if it "is applied to an activity with a substantial nexus

1203, 1206-09 (1986) (explaining the Court's primary reasons for invalidating discriminatory state laws).

37. *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935).

38. *See id.* at 522, 524.

39. *See generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-15 to -20 (2d ed. 1988) (discussing the modern Court's jurisprudence surrounding several aspects of the Commerce Clause); Walter Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 *TAX LAW.* 37, 38-50 (1987) (discussing the history and evolution of the Commerce Clause).

40. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

41. *See id.*

42. *See id.*

43. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

44. *Id.* at 276.

45. *Id.* at 279.

with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”⁴⁶ Implicit in this test is the balancing of a state’s right to raise revenue and the national interest of the free flow of commerce between the states.⁴⁷

C. *Evaluating Remittance Taxes Under Complete Auto*

It is under *Complete Auto* that a remittance tax would be reviewed for compliance with the Dormant Commerce Clause. Under the first prong of the *Complete Auto* test, the activity taxed must have a substantial nexus to the taxing state.⁴⁸ In other words, a state must make a connection to a taxpayer’s in-state activities to impose the tax. Remittance tax proposals would tax the consumer at the point-of-sale, as each bill would charge the consumer the tax at the time the transaction is sent.⁴⁹ Thus, the consumer would be charged a tax for using the services of a business located within the state. This is likely sufficient to establish that the state has a connection to the taxpayer’s activity.

The second prong of the *Complete Auto* test requires the tax to be fairly apportioned.⁵⁰ This prong prevents multiple taxation by ensuring “that each State taxes only its fair share of an interstate transaction.”⁵¹ A tax is fairly apportioned if it is internally and externally consistent.⁵² “To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.”⁵³ External consistency ensures that a state does not tax beyond that portion of value that is fairly attributable to economic activity within the taxing state.⁵⁴ Proposals to tax remittances are both internally and externally consistent in how the tax is structured. Because the tax is collected at the time the transaction is made, there is no risk of multiple taxation, even if each state had an identical tax.

46. *Id.*

47. *See id.*

48. *Id.*

49. *See supra* note 11.

50. *Complete Auto Transit*, 430 U.S. at 279.

51. *Goldberg v. Sweet*, 488 U.S. 252, 260–61 (1989).

52. *Id.* at 261.

53. *Id.*

54. *Id.* at 262.

The fourth prong of the *Complete Auto* test requires that the tax be “fairly related to the presence and activities of the taxpayer within the State.”⁵⁵ This prong ensures that those who do not have an opportunity to benefit from the services provided by a state are not taxed for those services.⁵⁶ A taxpayer’s access to the “advantages of civilized society,” such as services provided by the local government, satisfy “the requirement that the tax be fairly related to benefits provided by the State to the taxpayer.”⁵⁷ A consumer seeking to make a wire transfer within a taxing state is already enjoying the privileges and protections of being able to purchase services and products from businesses located in the state. Because the person is seeking to make a wire transaction from a business within the taxing state, the tax is related to the person’s presence and activity within the state.

Remittance taxes are likely to satisfy the substantial nexus, fair apportionment, and the fairly related prongs of the *Complete Auto* test. Where the tax would be challenged is under the third prong of *Complete Auto*: whether the tax discriminates against out-of-state interests.⁵⁸ A remittance tax is likely to fail this prong if it is determined that it discriminates against out-of-state interests or it embodies economic protectionism or isolationism.

1. Discrimination Against Out-of-State Interests

a. Examining the tax credit provision for discriminatory treatment of in-state residents and out-of-state residents

A key feature of remittance tax proposals considered thus far has been the allowance for a remitter with tax liability to the state in which the remittance tax is paid to receive a tax credit if they have tax liability with the taxing state.⁵⁹ For example, the Oklahoma law imposes a five dollar minimum tax on all senders of wire transfers; however, a sender with Oklahoma tax liability can claim a credit for the wire transfer fee on his income tax return.⁶⁰ Consequently, out-of-state residents are barred from receiving the tax credit, while in-state residents, assuming they have tax liability to the state, are eligible to receive the credit.⁶¹ Thus, a resident of any other state or

55. *Id.* at 266.

56. *Id.* at 266–67.

57. *Id.* at 267.

58. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

59. *See supra* notes 17–18 and accompanying text.

60. OKLA. STAT. ANN. tit. 63, § 2-503.lj (West Supp. 2014).

61. *See id.*

country—who may be vacationing in Oklahoma, visiting family in Oklahoma, or traveling within Oklahoma for business—sending a money transfer from Oklahoma would be subjected to the fee, just as a resident of Oklahoma. However, whereas the Oklahoma resident may claim a tax credit for the applied fee, the law affords no similar treatment for out-of-state senders.

Analogous to the remittance tax is the Court's treatment of regulatory schemes that are crafted with exceptions or exemptions. The Court has consistently invalidated state regulatory schemes that have exceptions favoring in-state interests as facially discriminate laws.⁶² For example, in the case of *Camps Newfound/Owatonna v. Town of Harrison*, the Court invalidated a Maine statute that denied a charitable tax exemption to nonprofit organizations operating principally for the benefit of persons who are not residents of Maine.⁶³ Furthermore, a court examining a state tax must look not only at the tax, but also to any credits, exemptions or exclusions associated with that tax.⁶⁴ In *Maryland v. Louisiana*, the Court determined that a state usage tax on natural gas, known as the First Use Tax, was unconstitutional because its elaborate mechanism of credits and exemptions favored local business interests over out-of-state interests.⁶⁵ The Court also noted that the credits and exemptions allowed by the Louisiana statutes undeniably violated the principle of equality.⁶⁶

It may be argued that the allowance of a tax credit is not discriminatory against out-of-state interests because the taxing state does not have the authority to provide a similar credit to those taxpayers who do not have tax liability to the state. However, the tax credit associated with the remittance tax would relieve the burden of the tax from an in-state resident and shift it to an out-of-state resident.⁶⁷ Although a tax may be enacted without the intention of discriminating against out-of-state interests, if the tax on its face does, in fact, facially discriminate, then it is invalid.⁶⁸ "Equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid . . . tax."⁶⁹

62. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 588 (1997).

63. *See id.* 570–71.

64. *See Maryland v. Louisiana*, 451 U.S. 725, 756 (1981).

65. *Id.*

66. *See id.* at 757–58.

67. *See OKLA. STAT. ANN.* tit. 63, § 2-503.lj (West Supp. 2014).

68. *See Maryland*, 451 U.S. at 759.

69. *Id.* (citing *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963)).

By affording consumers with Oklahoma tax liability a credit for the amount of the tax paid, Oklahoma is imposing a penalty on out-of-state residents. Although this tax may not pose an immediate threat to national economic unity,⁷⁰ the Court reminds us that history “has shown that even the smallest discrimination invites significant inroads on national solidarity.”⁷¹

b. Examining the exemption of remittances taxes to banks and credit unions for discriminatory treatment of in-state interests and out-of-state interests

The Dormant Commerce Clause serves as a limitation against a state’s ability to tax interstate transactions as a means of favoring local businesses over out-of-state businesses.⁷² Thus, the Court has held that state taxation schemes designed intentionally or unintentionally to favor local business may violate the Dormant Commerce Clause.⁷³ For example, the Court determined that a Hawaii statute enacting a twenty percent excise tax on wholesale liquor was invalid under the Dormant Commerce Clause because the tax impermissibly exempted certain locally made alcoholic beverages.⁷⁴ Although the consumer had the duty to pay the tax, the Court determined that the tax had the purpose and effect of discriminating in favor of local interests, and therefore served as a form of economic protectionism.⁷⁵ While conceding a state’s police power to promote local business, the Court reminded the State that this power was limited by the Commerce Clause and that a state may not, “discriminatorily tax the products manufactured or the business operations performed in any other State.”⁷⁶

Likewise, the Court determined that a New York stock-transfer tax that provided reduced rates for certain transfers of stock when the sale was effected through New York brokers offended the Dormant Commerce Clause.⁷⁷ The Court found that the law would be likely to

70. After the Oklahoma tax was enacted and other states attempted to follow suit, the Mexican Congress called upon its government to implement a boycott against states that impose remittance taxes. See Press Release, Members of Congress Mexico, Mexican Congress Urges Mexican Government to Respond and Retaliate Against the Immoral, Abusive and Harmful Remittance Fee Violating the Rights of Immigrants in Oklahoma (Apr. 8, 2010).

71. *Camps Newfound/Owatonna V. Town of Harrison*, 520 U.S. 564, 595 (1997).

72. See *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 329 (1977).

73. See *id.* at 331–32; *Halliburton Oil Well Cementing Co.*, 373 U.S. at 73–74.

74. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272–73 (1984).

75. *Id.*

76. *Id.* at 272.

77. *Boston Stock Exch.*, 429 U.S. at 321–23, 328.

induce a seller to trade through a New York broker to reduce his transfer tax liability.⁷⁸ By providing a tax incentive for sellers to deal with New York rather than out-of-state brokers, the state had, in the Court's eyes, "us[ed] its power to tax an in-state operation as a means of requiring other business operations to be performed in the home State."⁷⁹

States that have considered remittance tax proposals consistently apply the tax to non-bank money transmitters, but explicitly exempt other financial institutions from the statute,⁸⁰ even though such financial institutions offer competitive services to the non-bank entities.⁸¹ Thus, the application of the tax only to non-bank money transmitters, even though other financial institutions offer competitive and similar products,⁸² may prove problematic under the Dormant Commerce Clause because the tax could be interpreted as providing a commercial advantage to local businesses or economic interests.

When examining the implication of exempting banks and credit unions from charging and collecting the remittance tax, it must first be established that wire transfers performed by non-banks are substantially similar to wire transfers performed at banks and credit unions.⁸³ Any notion of discrimination under the Dormant Commerce Clause assumes a comparison of substantially similar entities.⁸⁴ The Court has provided guidance in determining whether entities are similarly situated for this analysis:

[if] the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed . . . eliminating the tax of other regulatory differential would

78. *Id.* at 330–31.

79. *Id.* at 336 (internal quotation marks omitted).

80. *See* A.B. 9462, 2011–2012 Leg., Reg. Sess. (N.Y. 2012); S.B. 2423, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012); H.B. 2365, 2011 Leg., Reg. Sess. (Kan. 2011); S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011); H. 4174, 2011–2012 Leg., 119th Sess. (S.C. 2011); H.B. 2677, 2011 50th Leg., 1st Reg. Sess. (Ariz. 2011); H.F. 343, 87th Leg., Reg. Sess. (Minn. 2011); S.B. 92, 2009 Leg., Reg. Sess. (Cal. 2009); H.B. 263, 81st Leg., Reg. Sess. (Tex. 2009); L.B. 1071, 2008 Leg., 100th Leg., 2d Sess. (Neb. 2008); H.B. 1238, 2005–2006 Leg., Reg. Sess. (Ga. 2006); H.B. 2560, 2005–2006 Leg., Reg. Sess. (N.C. 2005).

81. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 22, at 8.

82. *See id.* at 7–8.

83. *General Motor Corp. v. Tracy*, 519 U.S. 278, 299 (1997).

84. *Id.*

not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.⁸⁵

Determining whether entities are similarly situated is largely a fact-intensive inquiry.⁸⁶

Non-bank money transmitters have largely been dominant in the remittance sending industry. Still, banks and credit unions do offer competing remittance transfer products to those offered by non-bank money transfers.⁸⁷ Remittance transfers are primarily cash-to-cash transfers,⁸⁸ and typically do not require a consumer to have a bank account.⁸⁹ And while non-bank money transmitters have historically dominated this market,⁹⁰ banks and credit unions may offer remittance services in partnership with non-bank money transmitters or they may have their own product to facilitate a cash-to-cash transfer without the need for an associated banking account.⁹¹

In distinguishing between the remittance transfers provided by a non-bank money transmitter and a bank, a state may argue that wire transfers initiated at banks or credit unions are more likely to be for business purposes as opposed to personal remittances.⁹² Arguably, this is a distinction between the entities that show that they are not similarly situated. Another argument that could be made to distinguish the products is how each institution is regulated. Banks and credit unions are regulated under differing state codes than

85. *Id.*

86. *See id.*

87. See Letter from Michigan Credit Union League to Jennifer Johnson, Secretary of the Board of Governors of the Federal Reserve System (July 20, 2011), available at http://www.federalreserve.gov/SECRS/2011/July/20110728/R-1419/R-1419_072011_82956_33459222190_1.pdf; Letter from First Tennessee Bank National Association to Jennifer J. Johnson, Secretary of the Board of Governors of the Federal Reserve System (July 20, 2011), available at http://www.federalreserve.gov/SECRS/2011/July/20110728/R-1419/R-1419_072011_82962_334726443517_1.pdf.

88. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 22, at 7–8.

89. *Id.* at 6.

90. *Id.*

91. *See id.* at 8.

92. *See* DILIP RATHA & JAN REIDBERG, ON REDUCING REMITTANCE COSTS 21–24 (WORLD BANK 2005), available at <http://siteresources.worldbank.org/INTPROSPECTS/Resources/Onreducingremittancecosts-revisedMay12.pdf> (explaining banks are regulated under state banking codes and money transmitters are regulated under state money transmitter codes).

money transmitters.⁹³ This difference in regulatory structure could weigh in favor of the entities being treated differently. It could also be argued that banks and credit unions serve a different market for wire transfers than do money transmitters.⁹⁴ For example, a bank may argue that its wire transfer products cater to customers that hold personal checking or savings accounts.⁹⁵ A money transmitter, however, does not have an account-based relationship with its consumers, and therefore relies on a different market base for its wire transfer product.⁹⁶

On the other hand, banks and credit unions acknowledge and market the competitiveness of their wire transfer products against those services of non-bank money transmitters.⁹⁷ Many banks are competing directly to attract the perceived financially underserved market that has relied on money transmitters to send personal remittances.⁹⁸ Lawmakers and consumer advocates have also recognized that banks and credit unions are becoming an increasingly competitive provider of sending cross-border remittances.⁹⁹ In fact, policymakers and consumer advocates alike have pushed for banks and credit unions to become more competitive with non-bank money transmitters.¹⁰⁰ While non-bank money transmitters and banks and credit unions are licensed under different state codes,¹⁰¹ for purposes of consumer protection, federal law recognizes a remittance transfer provider as a “person or financial institution that provides remittance transfers for a consumer in the normal course of its business, whether or not the consumer holds an account with such person or financial

93. *See id.* at 23–24.

94. *See id.* at 21–22.

95. *See id.*

96. *See id.* at 12.

97. *See, e.g., Wells Fargo Celebrates a Decade in Consumer Remittances with Fee Waiver Offer: Send Money Internationally for Free*, ALA. BUS. MONTHLY, Feb. 15, 2013, available at <http://www.akbizmag.com/Alaska-Business-Monthly/February-2013/Wells-Fargo-Celebrates-a-Decade-in-Consumer-Remittances-with-Fee-Waiver-Offer-Send-Money-Internationally-for-Free/>.

98. *See id.*

99. *See Remittances: Regulation and Disclosure in a New Econ. Env't: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Servs.*, 111th Cong. 4, 25, 41, 70, 74 (2009).

100. *See id.* at 4, 25.

101. *See, e.g., Md. Code Ann., Fin. Inst. §§ 3-101–6-909* (LexisNexis 2013) (governing banks and credit unions); *Md. Code Ann., Com. Law §§ 4A-101–4A-108* (LexisNexis 2013) (governing funds transfers).

institution.”¹⁰² Thus, federal law defines remittance transfer providers to include non-bank financial institutions, banks, and credit unions. This unifying definition could weigh in favor of arguing for similar treatment between the different providers.

Regardless of the technical distinction between the entities that must charge a remittance tax and those that are exempt from charging it, the tax is likely to burden out-of-state business more so than in-state businesses. Non-bank money transmitters, such as Western Union or MoneyGram, are national, or multi-national, corporations whose business operations are not centered in the taxing state.¹⁰³ While some banks within a state may be nationally chartered, most banks are state-chartered and correspondingly have a significant presence and operations within a state.¹⁰⁴ Naturally, a consumer seeking to make a wire transfer will recognize that the remittance tax can be avoided simply by performing the transaction at an exempted competitor. Thus, to the extent that local or state banks may be the beneficiaries of such customer diversions, such a remittance tax may favor state businesses over out-of-state businesses. In addition, non-bank money transmitters are placed at a further disadvantage from in-state banks and credit unions because of the burdens of complying with the taxing statute. Because the costs of training, collecting, reporting, and remitting the taxes adds a cost to the process of wiring money using through a non-bank money transmitter, the tax may impose a competitive disadvantage between out-of-state businesses and in-state businesses.

As banks and credit unions are becomingly increasingly competitive in the remittance industry, states should consider equal application of a remittance tax to all financial institutions within its jurisdiction in order to avoid an appearance of economic protectionism. Federal law has recently recognized the similarities between banks offering remittance services and non-banks offering remittance services by extending a consumer protection law equally to financial institutions engaging in cross-border wire transfers. As such, federal law recognizes that banks and non-bank entities offer competitive remittance sending products to the extent that the

102. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1073(a); 15 U.S.C. § 16930-1(g)(3) (2013).

103. See, e.g., 2011 WESTERN UNION ANNUAL REPORT, 6, 19 available at http://ir.westernunion.com/files/doc_financials/WU2011AR.pdf; *About Us*, MONEYGRAM, <http://www.moneygram.com/MGICorp/index.htm> (last visited Apr. 1, 2014).

104. See AM. BANKERS ASS'N, THE BENEFITS OF CHARTER CHOICE: THE DUAL BANKING SYSTEM AS A CASE STUDY, 2, available at http://www.aba.com/ABIA/Documents/256b2738c12e40688b23b325f10f0909Dual_Banking_Charter_100409999992.doc.

consumers of both entities deserve equal disclosures and protections under consumer protection laws.

IV. REMITTANCE TAXES UNDER THE EQUAL PROTECTION CLAUSE

A. *Overview Of The Equal Protection Doctrine*

The Fourteenth Amendment guarantees that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁵ Under the doctrine of Equal Protection, persons who are similarly situated must be treated similarly.¹⁰⁶ However, equal protection of the laws is not guaranteed to persons who are not similarly situated.¹⁰⁷ Generally, Equal Protection challenges pivot on whether a classification made by a state improperly discriminates or disadvantages a class of persons.¹⁰⁸ Equal Protection jurisprudence recognizes that states must have flexibility to make distinctions and generalizations in order to effectively govern.¹⁰⁹ “A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.”¹¹⁰

Such a deferential standard of review is not warranted in every Equal Protection case.¹¹¹ Where a state attempts to legislate on the

105. U.S. CONST. amend. XIV. For a thorough understanding of the historical movement behind equal protection, see Alfred Avins, *The Equal “Protection” of the Laws: The Original Understanding*, 12 N.Y. L.F. 385, 386-425, explaining the historical legacy of the equal protection movement, including the drafting of the amendment, the passage of the amendment, and the early interpretations of the amendment.

106. *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

107. *See id.* at 248. (Burger, J., dissenting) (noting that although the Equal Protection Clause guarantees similar treatment of similarly situated persons, the Court can increase or decrease the degree of “judicial scrutiny” after asking if there is a legitimate reason for the discrepancy between the classes of people).

108. *See id.* at 237 (Blackmun, J., concurring) (stating that this case deals with a classification which disadvantages children); *id.* at 248 (Burger, J., dissenting) (stating that in order to determine if the discrimination is improper, the Court examines whether there is a legitimate reason for the inconsistency).

109. *See Ry. Express Agency v. New York*, 336 U.S. 106, 110–11 (1949) (holding that judicial deference should be given to legislative judgments in the field of economic regulation).

110. *Plyler*, 457 U.S. at 216 (majority opinion).

111. *See United States v. Virginia*, 518 U.S. 515, 516 (1996) (applying heightened scrutiny to a gender based classification at a state-supported university); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (applying the most rigid scrutiny to a state

basis of certain classifications deemed to be suspect, such as race or national origin, the law will be reviewed under strict scrutiny.¹¹² Under this most rigid scrutiny standard, a state must show that the statute is narrowly tailored to advance a compelling government interest.¹¹³ The Court has also determined that classifications based on legitimacy and gender are deemed semi-suspect and afforded a heightened level of review, although not strict scrutiny.¹¹⁴ If neither a fundamental right nor a suspect classification is implicated, then the law will receive highly deferential review, and will be upheld so long as the classification is shown to have some rational basis to a legitimate government interest.¹¹⁵ However, on rare occasions, the Court has invalidated statutes under this most lenient test because it found the statute was based on animus.¹¹⁶

B. *The Doctrine Of Animus*

A finding of unconstitutional animus is significant to any rational basis review because such a finding is the only way a plaintiff can secure a victory on the most lenient standard of review.¹¹⁷ For example, in the seminal case of *U.S. Department of Agriculture v. Moreno*, the Court invalidated a law under the rational basis test

miscegenation law); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying strict scrutiny to a federal law classification based on national origin).

112. See *Loving*, 388 U.S. at 11; *Korematsu*, 323 U.S. at 215.

113. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2006) (validating the law school's narrowly tailored use of race in its admissions process in order to further the compelling interest of having a diverse student body).

114. See *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (rejecting that a classification based on illegitimacy should be held to strict scrutiny but it deserves more exacting scrutiny than an economic interest); *Craig v. Boren*, 492 U.S. 190, 197(1976) (holding that gender classifications must serve important governmental interests and must be substantially related to the attainment of those interests); see also S. SIDNEY ULMER, *SUPREME COURT POLICYMAKING AND CONSTITUTIONAL LAW* 425 (1986) (summarizing the Court's jurisprudence in using heightened scrutiny).

115. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a classification based on homosexuality bears no rational relation to a legitimate government purpose); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that a classification based on mental disabilities is subject to rational basis review); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (holding that a classification based on age is subject to review under the rational basis standard).

116. See *Romer*, 517 at 635; *City of Cleburne*, 473 U.S. at 435; *Palmore v. Sidoti*, 466 U.S. 429, 443 (1984); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973). For a complete review of the Supreme Court's jurisprudence on animus, see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012).

117. Pollvogt, *supra* note 116, at 889.

based on a finding of animus.¹¹⁸ The case challenged an amendment to the Food Stamp Act of 1964, which withdrew food stamp allowances if any person living in a household was unrelated to the other household resident.¹¹⁹ The law was challenged under Equal Protection because it created two classes of persons for food stamp purposes, one class “composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest.”¹²⁰ Since the law did not invoke a suspect classification, nor did it involve a fundamental right, the Court applied rational basis review.¹²¹

The Court held that the relatedness or unrelatedness of the household members was irrelevant to the Act’s express purposes of improving nutrition among the poor and the distribution of agricultural surpluses.¹²² The Court held that an intent to discriminate against “hippies,” reflected in the legislative history, was not a legitimate governmental interest.¹²³ “[I]f . . . ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”¹²⁴

Similarly, the Court invalidated a local ordinance based on a rational basis review after a finding of animus.¹²⁵ Here, the Court reviewed a city council’s decision under a municipal ordinance to deny a special use permit for the building of a group home for persons with mental disabilities.¹²⁶ The Court determined that rational basis review was appropriate and rejected the argument that persons with mental disabilities should be deemed a suspect classification.¹²⁷ The Court found that the denial of the permit to the group home was based on stereotypes, societal fears, and private bias.¹²⁸ The Court considered the purported interests of the City Council’s decision including, overcrowding, building on a flood

118. *U.S. Dep’t of Agric.*, 413 U.S. at 534.

119. *Id.* at 529.

120. *Id.*

121. *Id.* at 533–34.

122. *Id.* at 533–34, 538.

123. *Id.* at 534.

124. *Id.*

125. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985).

126. *Id.* at 447–48.

127. *Id.* at 446.

128. *Id.* at 448.

plain, and traffic congestion.¹²⁹ However, these interests were irrelevant to the classification because they would still be present whether a group home for the mentally disabled, an apartment building, or a nursing home was built.¹³⁰ The Court inferred that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”¹³¹

Most recently in its cases of animus jurisprudence, the Court invalidated an amendment to the Colorado constitution which would have prohibited any government action from protecting a class of persons from discrimination based on sexual orientation.¹³² The Court declined to address whether sexual orientation was a suspect classification, or whether the Amendment infringed on a fundamental right, thereby requiring the application of heightened scrutiny.¹³³ Instead, the Court applied rational basis review, appearing to acknowledge its deferential nature: “a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”¹³⁴ Of significance, *Romer* was decided prior to the Court’s decision in *Lawrence v. Texas* that held that it was unconstitutional to criminalize homosexual activity between consenting adults in private.¹³⁵ Thus, the *Romer* majority sidestepped the question as to whether it was permissible to disfavor homosexual status when the law disfavored homosexual conduct.¹³⁶ Instead, the Court held that the structure of the Amendment created distinctions between classes of persons where no distinctions previously existed.¹³⁷ Subsequently, the Court determined that a law may not draw classifications of persons “for the purpose of disadvantaging the group burdened by the law . . . [because] ‘class legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment.’”¹³⁸

129. *See id.* at 448–50.

130. *Id.*

131. *Id.* at 450.

132. *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996).

133. *Id.* at 631–32.

134. *See id.* at 632.

135. *Compare id. with Lawrence v. Texas*, 539 U.S. 558 (2003).

136. *Romer*, 517 U.S. at 628–30.

137. *See id.* at 633.

138. *See id.* at 633–35 (quoting *The Civil Rights Cases*, 109 U.S. 3 (1883)).

C. *Analyzing Remittance Taxes Under the Equal Protection Clause*

Some remittance taxes may be susceptible to an Equal Protection challenge. However, an Equal Protection challenge is very fact-specific and the outcome can only be determined on a case-by-case approach.¹³⁹ Many of the remittance taxes examined in this comment are not likely to present an Equal Protection challenge. For example, the Oklahoma remittance tax is not likely to fail under Equal Protection scrutiny because it does not make a classification that is unreasonable to achieve a legitimate government interest. To begin with, the wire transfer tax in Oklahoma does not make an unreasonable classification. Any person in Oklahoma seeking to make a wire transfer through a non-bank money transmitter will have to pay the tax.¹⁴⁰ In addition, the bill was sponsored with the intent to fund the Department of Investigation's Drug Money Laundering and Wire Transmitter Revolving Fund.¹⁴¹ The Oklahoma legislature perceived that this tax would assist state law enforcement efforts in capturing money launders and illegal drug activities that use wire transfers to move their profits.¹⁴² Arguably, the measure is underinclusive, as it does not capture all wire transfers since banks and credit unions offer competitive services to money transmitters.¹⁴³ However, a legislature may enact legislation that takes incremental steps to eradicate a perceived problem, so long as the means is rationally related to a legitimate government interest.¹⁴⁴ A state undeniably has policing authority over criminal activities such as what is being targeted by the Oklahoma legislature.¹⁴⁵ Therefore, the Oklahoma remittance tax is rationally related to a legitimate government interest and would survive an Equal Protection challenge. Several states have considered remittance tax models very similar to that of the Oklahoma model, from the structure of the proposal to the intended usage of the revenues¹⁴⁶; the above analysis would be applicable to these types of proposals.

139. See Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 456 (1999).

140. OKLA. STAT. ANN. tit. 63, § 2-503.1j (West Supp. 2014).

141. See *id.*

142. See Monies, *supra* note 13.

143. § 2-503.1j.

144. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

145. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 785-86 (2007).

146. See *supra* note 18 and accompanying text.

However, it is worthwhile to examine remittance tax measures to understand when they may offend the Equal Protection clause. A tax may be held invalid on Equal Protection grounds if it was enacted with nothing more than bare animus to harm a politically unpopular group and does not bear a rational relation to a legitimate government interest.¹⁴⁷ While the following examination will be case-specific, the principals from this analysis are relevant to any legislature considering enacting a remittance tax.

As previously noted, Equal Protection analysis begins with the determination of the measure's classification.¹⁴⁸ Remittance tax proposals that apply the tax to consumers who are unable to prove their lawful presence in the country is essentially a classification illegal immigration status.¹⁴⁹ Although state laws that classify based on alienage receive the highest level of scrutiny in an equal protection challenge,¹⁵⁰ classifications based on illegal immigration do not.¹⁵¹ The Court, in its landmark holding of *Plyler v. Doe* boldly articulated that an adult illegal immigrant has no right to feel entitled to receive any state benefits afforded to its residents.¹⁵² Further, a remittance tax does not invoke a fundamental right as it is merely an economic regulation.¹⁵³ Thus, a remittance tax will be based on rational review basis.

Even under a rational review examination, tax proposals that are designed to penalize undocumented immigrants may be invalidated because the measure is based on a bare desire to harm a politically unpopular group. Such a finding of animus is rare,¹⁵⁴ however, remittance tax measures fueled by anti-immigrant sentiments may encounter this constitutional flaw. In some instances, state legislators have made their policy intentions well-known as they work to advance such tax measures.¹⁵⁵ For example, in Georgia and North Carolina, legislators titled their respective legislation the "Illegal Immigrant Fee Act."¹⁵⁶ In Mississippi, a state Senator sponsored a remittance tax bill specifically to penalize "those illegals . . . [who]

147. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

148. See discussion *infra* Part IV.A.

149. See H.B. 1238, 2005–2006 Leg., Reg. Sess. (Ga. 2006).

150. Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

151. Plyler v. Doe, 457 U.S. 202, 223 (1982).

152. *Id.* at 219-20.

153. See *id.* at 216–20.

154. See *supra* notes 125–27 and accompanying text.

155. See *supra* notes 143–44 and accompanying text.

156. H.B. 1238, 2005–2006 Leg., Reg. Sess. (Ga. 2006); H.B. 2560, 2005-2006 Leg., Reg. Sess. (N.C. 2005).

are constantly wiring money back to Mexico or Guatemala . . . taking money out of our economy, [and] we are never going to see that money again.”¹⁵⁷ Such remarks may demonstrate that the intended purpose of the tax is to punish undocumented immigrants for taking money out of the state’s economy. In addition, remittance tax proposals that apply the tax only to consumers wiring money to Mexico or South America, or another specific country, may trigger an Equal Protection challenge based on the reasonableness of the classification.

Although states do have a legitimate interest in protecting its jobs, resources, and collecting taxes,¹⁵⁸ it can be argued that an undocumented immigrant is not taking money out of a state’s economy by wiring a portion of his earnings to his native country. An undocumented person contributes to the state’s economy by the mere act of living and working within the state.¹⁵⁹ Furthermore, a person’s earnings or wages belong to the individual and not the state.¹⁶⁰ While the state has taxing authority over such wages, such wages are ultimately the property of the individual, be it a U.S. citizen or an undocumented alien.¹⁶¹

Other legislators sponsoring similar remittance tax proposals have offered similar arguments to express the need for such a bill.¹⁶² Although statements vary from legislator to legislator, a common theme of hostility and resentment towards illegal immigrants is expressed.¹⁶³ In Texas, for example, a legislator expressed that the intention of his remittance tax proposal was to make Texas a “less attractive state for undocumented immigrants.”¹⁶⁴ Establishing the intent of a punitive tax on arguments based on stereotypes or irrational fear may trigger an animus analysis under the Equal Protection Clause.

157. Interview by JT Williamson with State Senator Joey Fillingaine, in Hattiesburg, Miss. (Dec. 16, 2010), available at <http://www.wnd.com/2011/01/257501/>.

158. See Legarre, *supra* note 145, at 794.

159. Christian Barry & Gerhard Overland, *Why Remittances to Poor Countries Should Not Be Taxed*, 42 N.Y.U. J. INT’L L. & POL. 1181, 1198 (2010).

160. See *id.* at 1189–90.

161. See *id.* at 1189.

162. See *supra* notes 149–51 and accompanying text.

163. See *supra* note 149–53 and accompanying text.

164. Zahira Torres, *Bill That Would Add 8% Fee to Remittances Presented to Panel*, EL PASO TIMES, March 15, 2011, http://www.elpasotimes.com/news/ci_17614769.

Although a court is highly deferential to the legislature under a rational basis analysis,¹⁶⁵ a remittance tax may still be invalidated because it is not rationally related to a legitimate government interest.¹⁶⁶ For example, in 2011, several states considered remittance tax legislation that would have imposed a tax on all cross-border wire transfers.¹⁶⁷ The legislative intent of the measures was to raise revenue for the building of the U.S.-Mexico border fence.¹⁶⁸ If a state did not share a border with Mexico, then the revenue raised by a remittance tax would be dispersed to a state along the southwest border.¹⁶⁹

States have broad authority under the police power to regulate and tax as necessary to govern.¹⁷⁰ However, it is unlikely that a court could reasonably find that a state has a legitimate interest in raising revenue for national border security efforts. There may be an argument that a state sharing a border with Mexico does have a legitimate interest in raising revenue to fund the state's own border fence. However, such an argument is less plausible if that state does not have a border with Mexico, such as Mississippi.

An argument may be made that states have a legitimate interest in protecting their own resources, and consequently, states have a legitimate interest in enacting border security measures.¹⁷¹ Such an interest is rationally related to a tax on undocumented migrants because undocumented immigrants illegally crossing the southwest border are the very source for the need for enhanced border security. Border security, however, is a matter of national scope, and not a legitimate interest for a state to take up on its own accord.¹⁷² Therefore, such proposals that seek to tax undocumented immigrants with the expressed purpose of sending the raised revenue to border-states for the construction of a border fence may fail even a rational basis review test.

V. CONCLUSION

Immigration, specifically illegal immigration, has become one of the most controversial political debates facing state and federal

165. See *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–48 (1985).

166. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

167. See, e.g., S.B. 2255, 2011 Leg., Reg. Sess. (Miss. 2011).

168. *Id.*

169. See *id.*

170. See Legarre, *supra* note 145, at 785.

171. See *id.* at 786.

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

policymakers. In the halls of Congress, legislators are faced with making meaningful policies that attract a diverse population of immigrants in a lawful manner, protect national resources and national security, and that provide our economy with the skilled and unskilled laborers as necessary.¹⁷³ Legislators in state houses must ensure that the state's resources and finances are used in the most efficient and just manner.¹⁷⁴

Remittance tax measures are efforts to gain revenue from a class of persons perceived not to be paying their fair share.¹⁷⁵ In times of dire budget constraints, the remittance tax model has become increasingly attractive to state lawmakers.¹⁷⁶ However, the bills considered thus far may prove flawed under the Dormant Commerce Clause because they favor in-state interest over out-of-state interests. Furthermore, remittance tax bills, designed with the intent to penalize undocumented immigrants, may be flawed under the Equal Protection Clause. As states further consider such remittance tax measures, they must ensure the tax is equally and fairly applied to all consumers sending remittances is critical to the constitutional validity of these tax measures.

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173. See Bernstein, *supra* note 3.

174. See Nat'l Conf. of State Legs., *supra* note 4.

175. See Harris Blackwood, *Bill Would Tax Illegal Immigrants for Money Transfers*, GAINESVILLE TIMES, Feb. 14, 2006, <http://archive.gainesvilletimes.com/news/stories/20060214/localnews/66760.shtml> (quoting a sponsor of the bill, Rep. James Mills, "We called it exactly what it is, an illegal immigrant fee . . . We've got an illegal immigrant problem in Georgia and if it's not going to be dealt with at the border, we're going to start dealing with these symptoms in the ways we can.").

176. See *supra* note 11 and accompanying text.

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