

REVIVING HOUSING RIGHTS OF THE UNDOCUMENTED THROUGH DISPARATE IMPACT AND THE FOURTEENTH AMENDMENT: THE PROBLEM WITH THE FHA, § 1981, & PREEMPTION

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INTRODUCTION

Anti-immigrant housing ordinances have become a tool for state authorities in their efforts to curb local effects of a defunct federal immigration scheme.¹ Federal frustration and resentment has culminated in state resistance through ordinances inquiring into citizenship status as a condition for renting or leasing property.² The legality of these discriminatory ordinances is disputable and heavily contested.² But

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1. See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1329 (2012) (observing that state frustration over federal immigration reform has culminated in local enforcement regimes); Lauren Gilbert, *Immigration Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 168 (2012) (“For many state and local leaders, institutional failure on the part of the Department of Homeland Security has justified the entrance by state and local governments into a field long considered a federal domain.”); Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 541-45 (2012) (describing the “recent tsunami of state and local immigration laws” as an exercise of concurrent jurisdiction and an attempt to disrupt federal immigration policy).

2. See Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22 (discussing decisions regarding illegal hiring of and renting to undocumented persons as creating “nationwide checkerboard of conflicting laws” between states where uniform federal immigration reform is necessary). There is a similar checkerboard of conflicting opinions regarding the proper role of states in the immigration power, with some commentators favoring an expanded role for states and others resisting state encroachment in a traditionally federally exclusive power. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that there is space for a shared immigration power); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (2007) (arguing that states can assume a larger immigration role than they have historically); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 123 (1994) (proposing increased state assumption of immigration function). But see Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007) (directly rebutting Spiro’s pro-state argument); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1616-18 (2008) (discussing problematic nature of state and local involvement in the immigration power). For a more detailed assessment of the state and federal tension in regulating immigrants, see *infra* Part V and accompanying notes.

states assert that it is only reasonable for them to play an active role in regulating the spillover impact of the federal failure.³ When the federal government cannot perform its federal duty, it is only logical for states to fill the void through state ordinances that affect the rights of undocumented immigrants.⁴ Where federal law remains deficient or inadequate, local and municipal laws provide interior enforcement and a second layer of protection.⁵ According to the states, the economic and social costs of undocumented immigrants and weak border control set forth the following threshold question: Why should the federal government possess immigration power when the lion's share of the impact of illegal entry and costs rests with state and local governments? Should states have some authority in preventing the transformation of their territory into a sanctuary for undocumented immigrants?

The questions are fair, and are often met with the unsatisfying conclusion that the admission and exclusion of immigrants is traditionally a federal issue. In terms of immigration policy generally, federalism is a substantial obstacle for states. When a problem implicates both federal and state jurisdictional concerns, it is objectionable to permit one agent to solve the adverse impact of an influx that manifests real, yet different consequences in the state versus federal arenas.⁶ For the federal government, undocumented immigration assaults notions of nationhood and national identity, but for states, the influx affects more pragmatic considerations, such as resource allocation and benefits.⁷

This paper addresses this tension between federalism and the discrepant consequences of federalism by analyzing how the state-federal conflict defines itself in the area of housing access. This tension between state and federal power has been central to the discussion of the constitutionality of local housing ordinances,⁸ where

3. This has raised considerable concern, however, since states and localities, themselves subject to restrictionist public sentiment, "endorse and pursue aggressive policy measures that unquestionably will have racially disparate impacts." Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 612 (2012).

4. See Dina Francesca Haynes, *Crossing the Border: The Future of Immigration Law and Its Impact on Lawyers*, 45 NEW ENG. L. REV. 301, 303 (2011).

5. This second layer of enforcement compensates for a porous border, thereby providing a multiplier effect to the scheme of immigration enforcement. See Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780 (2008) (discussing the "intuitive appeal" of the multiplier effect). Pham, however, argues that private enforcement schemes are only symbolically significant, at the cost of increasing real discrimination. *Id.* at 825-26.

6. Indeed, the proper balance between federal and state control over issues of concurrent jurisdiction, such as immigration, is a subject of intense discussion. See Ryan Terrance Chin, *Moving Toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1889-91 (2011) (stating that both the intent of subfederal immigration laws and role of subfederal governments in immigration policy are unclear). As a response to this debate, cooperative federalism appears more enticing than the more restrictive dual federalism system. Cooperative federalism envisions the sharing of responsibilities between state and federal governments and avoids carving out exclusive domains of regulation. See, e.g., Annie Decker, *Preemption Conflation: Dividing the Local From the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 355-56 (2012); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006) (discussing dynamic federalism and related terminology). Unfortunately, while cooperative federalism has been endorsed in other legal arenas, immigration policy has remained intensely dualistic and polarized, despite the use of § 287(g) agreements and the deputizing of local enforcement agents in immigration functions.

7. See Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (positing that the increase in state and local regulation of immigration is actually over local resource allocation, not immigration *per se*).

8. See L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants*

undocumented immigrants must navigate the varied legal tools available to them.⁹ I call for a return to the Fourteenth Amendment and equal protection discourse for resolving the constitutionality of anti-immigrant housing ordinances. In examining the continuing validity of equal protection, I define the legal remedies that exist within the housing context, specifically offering insight into the Fair Housing Act (FHA), 42 U.S.C. § 1981, and preemption arguments.

In Part I, I provide examples of anti-immigrant housing ordinances and examine their treatment before the courts. In doing so, I highlight the prevalence of preemption doctrine in judicial decision making regarding state regulation and provide a foundation for the preemption discussion. In Part II and Part III, I respectively address the prevailing advantages and disadvantages of FHA and § 1981 challenges to the flourishing of anti-immigrant housing ordinances, since these statutory forms of recourse continue to thrive, even amidst a preemption-focused constitutional stricture. While these legal avenues should not be discounted entirely, their deficiencies have not gone unnoticed. In Part IV, I summarize the limitations of the FHA and § 1981 and explain that certain loopholes allow discrimination against undocumented immigrants to continue. In Part V, I qualify why courts' use of preemption grounds is insufficient for an affirmative aliens' rights framework. While scholars have suggested resorting to preemption doctrine because of the inconsistency of equal protection and its characterization as functionally inoperable, equal protection remains salvageable and effective.¹⁰ In Part VI, I explain the academic reluctance to employ the equal protection approach, but affirm that its use is preferable as a decisional basis. I subsequently articulate a new equal protection approach for analyzing the new creature of anti-immigrant housing ordinances to better capture phantom discriminatory intent,¹¹ and argue that we must depart from the prevailing standard for disparate impact in housing toward a stronger, more critical impact-based rubric.

Under this framework, I arrive at two conclusions. First, that undocumented

as *Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 480 (2008) (discussing America's failure to articulate a uniform, national voice on issue of undocumented immigrants).

9. For a discussion of the state role, see Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008) (recognizing that state and local involvement is essential because they are already tasked with the integration of immigrants into the community: "immigration regulation should be included in the list of quintessentially state interests, such as education, crime control, and the regulation of health, safety, and welfare, not just because immigration affects each of those interests, but also because managing immigrant movement is itself a state interest.").

10. Indeed, equal protection already influences preemption discourse, as equal protection arguments are often supplementary to preemption ones. See generally David F. Levi, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1081 (1979) ("Although the equal protection of illegal aliens was not an issue before the Court, the Court's discussion of preemption had overtones of equal protection. The Court used equal protection terminology to find that protection of the state's lawfully resident labor force and economy were 'vital state interests,' and that the legislation was 'tailored to combat effectively the perceived evils.'") (citations omitted). Instead, I argue that this trend should be reversed, and equal protection arguments should assume a primary potency. See *infra* Part VI, C.

11. The term "discriminatory intent" has been constitutionally understood to be animus or invidious discrimination. Laws guided by animus will fail to pass constitutional muster. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"). Indeed, unconstitutional animus has been described as the "doctrinal silver bullet." Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 889 (2012).

immigrants should be a suspect classification under the FHA, if not also under tiered constitutional scrutiny.¹² Second, upon the assumption that undocumented status will not be recognized in this way, this paper finds that equal protection analysis relying on race or national origin—through disparate impact—can be adapted to address hostile state laws.

PART I: ANTI-IMMIGRANT HOUSING ORDINANCES AND THEIR PROLIFERATION

The furious debate surrounding comprehensive immigration reform and the federal malaise that has followed has fostered state-level legislative resistance.¹³ The anti-immigrant housing ordinances that have subsequently developed deserve examination and lay the groundwork for understanding how and why states took matters into the halls of their legislatures. These anti-immigrant ordinances traditionally deny housing or working within a state, but can go much further and impose onerous restrictions on mixed-status families¹⁴ and undocumented children within those families. Of the numerous breeds of anti-immigrant ordinances, the ones that limit housing are tremendously open to hostile biases and some form of discrimination. Particularly important are the infamous Hazleton Ordinance,¹⁵ the Escondido Ordinance,¹⁶ and the Farmers Branch Ordinance.¹⁷ These ordinances have

12. Judicial review can be classified into three levels of examination pursuant to rising degrees of scrutiny. The higher the “tier of review,” the more likely a court is to strike down laws as insufficiently related or tailored to the government interest. Those three tiers of scrutiny in ascending degrees of inspection are rational basis, intermediate, and strict scrutiny review. Rational basis requires merely that a law is rationally related to a legitimate governmental interest. Intermediate or midlevel review requires that a law be substantially related to an important governmental objective. Finally, rigorous strict scrutiny demands that laws are narrowly tailored to a compelling governmental interest. In each ascending tier of review, not only is the “means” subjected to increased judicial criticism, but the governmental interest is likewise more crucial. The tiered scrutiny system thus permits discrimination by laws if the means employed bear a sufficient relation to the importance of the government interest itself. If that relationship is tenuous, courts are likely to strike the law as unconstitutional. As a matter of clarity, “heightened scrutiny” refers to intermediate review, but has also been colloquially used to refer to both intermediate and strict review in some instances.

13. See Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in Keller v. City of Fremont*, 45 CREIGHTON L. REV. 503, 503-04 (2012).

14. The term “mixed-status family” refers to families whose members possess different immigration statuses. Quite frequently, the term refers to families with both documented and undocumented family members. While children in such families are likely to be separated from their parents, a parent with documented status may also be separated from his or her undocumented spouse. The harsh impact of mixed statuses on family unity is therefore quite prominent. See Timothy E. Yahner, *Splitting the Baby: Immigration, Family Law, and the Problem of the Single Deportable Parent*, 45 AKRON L. REV. 769, 778-81 (2012) (for further exploration of the consequences of status differentiations on family structures).

15. Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), *invalidated by* Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Pa. 2006), *enforced*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

16. Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), *invalidated by* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

17. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007). The City of Farmers Branch then enacted a series of anti-immigrant ordinances after Ordinance 2892, including Ordinance 2903, *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 866-77, 879 (N.D. Tex. 2008) (Farmers Branch II), and the most recent Ordinance 2952, *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010) (Farmers Branch III).

been selectively chosen for examination, as they have been constitutionally tested and invalidated.¹⁸ Accordingly, it is useful to examine the reasoning behind this jurisprudence in order to provide a richer context for the preemption critique and the equal protection discourse developed in the latter parts of this paper.

For the purposes of this article, deconstructing the Hazleton Ordinance's regulation of landlords is integral in order to understand the impact on housing for undocumented families and to understand the public outcry that spawned thereafter.¹⁹ The Hazleton Ordinance was enacted on September 21, 2006 with strong anti-immigrant sentiment behind it. Under the guise of enforcing compliance with federal immigration law, the Ordinance sought to "abate the nuisance of illegal immigration" and to protect existing citizens from the "debilitating effects on their economic and social well-being imposed by the influx of illegal aliens."²⁰ It has since been widely replicated in many other states as the model anti-immigrant ordinance.²¹ The Ordinance also penalizes businesses that employ undocumented immigrants²¹ and prohibits landlords from renting property to them.²² Section 5(A)(1) of the Ordinance, or simply the anti-harboring provision, penalizes those who "lease, let, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law."²³ As if the provision was not enough to deter "harboring" of undocumented immigrants, section 5(A)(2) provides that the offense can be cumulative: "a separate violation shall be deemed to have been committed on each day that such harboring occurs, and for each adult illegal alien harbored in the dwelling unit."²⁴ A separate cumulative violation is further deemed to have been committed if the owner does not provide timely identification necessary for federal verification of the occupants' immigration status.²⁵ Therefore, the Ordinance is unduly broad and punishes homeowners who allow undocumented immigrants to live with them, with no

18. That is not to say that this list is exhaustive. Rather, these are merely seminal examples of the plethora of anti-immigrant housing ordinances that exist. *See* San Bernardino, Cal. Illegal Immigration Relief Act Ordinance (proposed May 15, 2006); CHEROKEE COUNTY, GA., ORDINANCE 2006-003 (Dec. 5, 2006) (requiring landlords inquire into immigration status); VALLEY PARK, MO., ORDINANCE 1708 (2006); VALLEY PARK, MO., ORDINANCE 1721 (2007); VALLEY PARK, MO., ORDINANCE 1715 (Sept. 26, 2006), among others. The San Bernardino ordinance in particular would have made lives of immigrants intolerable. One provision would have prevented renting property to undocumented immigrants. The ordinance never came into effect. *See* Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 GEO. IMMIGR. L.J. 243, 281 (2011) (therein also providing an exhaustive survey of anti-immigrant housing and nuisance ordinances).

19. I therefore limit my analysis to the housing provisions of the Hazleton Ordinance. While outside the immediate purview of this article, there is also lively discussion surrounding the rights of landlords at issue. Indeed, depending on the language of the state ordinance, some landlords may have viable due process property rights based on revocation of their tenants, withholding of their rent by the state, and termination of their licenses. Since many ordinances proscribe the harboring of undocumented immigrants, landlords also stand to suffer from conflicting definitions of harboring within the circuits. *See, e.g.,* Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289 (2008) (discussing circuit interpretations of "harboring"); Pham, *supra* note 5, at 791-93.

20. Hazleton, Pa., Ordinance 2006-18 § 2(F) (Sept. 21, 2006). An earlier version was passed on July 13, 2006. *See* Hazleton, Pa., Ordinance 2006-10.

21. Hazleton, Pa., Ordinance 2006-18 § 4(A) (Sept. 21, 2006).

22. *Id.* § 5(A).

23. *Id.* § 5(A)(1) (defining "harboring" quite loosely).

24. *Id.* § 5(A)(2).

25. *Id.* § 5(A)(3).

exception for mixed-status families.

The enforcement process is also expansive, since virtually *anyone* can bring an enforcement action against the resident or landlord.²⁶ A written and signed complaint to the Hazleton Code Enforcement Office detailing the alleged violation and violators is all that is required, although the Ordinance does explicitly prohibit complaints based “solely or primarily on the basis of national origin, ethnicity, or race.”²⁷ Upon receipt of the complaint, the City shall confirm with the federal government if the prospective occupant possesses valid immigration status,²⁸ and in the event that a violation has been found, the landlord or owner has five business days to remedy the violation.²⁹ If the landlord fails to take corrective action within the five-day time frame, the city shall suspend or deny the rental license³⁰ and the landlord will “not be permitted to collect any rent, payment, fee, or any other form of compensation from, or on behalf of, *any* tenant or occupant in the dwelling unit” (emphasis added).³¹ The denial of suspension can only be removed through a sworn affidavit from the landlord that the violation is remedied.³²

Thus, the Hazleton Ordinance aggressively operates in a grey area: whether the state law is an expression of the local housing power (a state police power), in which case the law is likely to be upheld, or whether it is a radically new state immigration power, in which case its constitutionality is highly disputable. The district court in *Lozano v. City of Hazleton* found that both the business hiring provision and the landlord rental provision were preempted by federal law,³³ and the Third Circuit ultimately held the same, although on different grounds.³⁴ The Third Circuit examined the Hazleton Ordinance in context with the Supreme Court’s then-recent *De Canas v. Bica* opinion and highlighted the importance of the *De Canas* framework to an appropriate preemption investigation.³⁵ In its analysis, the Third

26. *Id.* § 5(B)(1).

27. *Id.* §§ 5(B)(1)-(2).

28. *Id.* § 5(B)(3).

29. *Id.* § 5(B)(4).

30. *Id.*

31. *Id.* § 5(B)(5). Indeed, the use of “any” here implicates many people in the dwelling and it is quite over-inclusive, encompassing not merely the “offenders.”

32. *Id.* § 5(B)(6).

33. I pause for a brief expository note on preemption doctrine. The doctrine of preemption is rooted in the Supremacy Clause of the Constitution, which states that “[the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” U.S. CONST. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (Supremacy Clause invalidates local laws that “interfere with or are contrary to” federal law). Preemption may take any of three forms: express preemption, implied or field preemption, and conflict or obstruction preemption. See *Geir v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (describing conflict preemption as occurring when the local regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” or it is “impossible for private parties to comply with both state and federal law”); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (describing express preemption as occurring when Congress provides statutorily clear and express terms); *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982) (describing implied or field preemption where “Congress’ command is . . . implicitly contained in its structure and purpose.”).

34. *Lozano v. City of Hazleton*, 620 F.3d 170, 202 (3d Cir. 2010), *cert. granted, vacated*, 131 S. Ct. 2958 (2011).

35. 620 F.3d at 206-07. In short, *De Canas* established a three-part test. 424 U.S. 351 (1976). First, it must be determined whether the local regulation at issue directly or indirectly regulates immigration. *Id.* at 355. If it is a direct regulation, the presumption against preemption does not adhere, but if it is an indirect regulation, the court must then analyze whether the local regulation operates in a

Circuit criticized the district court for failing to differentiate between state laws that directly regulate immigration and those laws which merely withheld state resources, and therefore only *indirectly* regulate immigration.³⁶ As a result, the Third Circuit found that a presumption against preemption should apply where the local law both indirectly regulates immigration and shares a close connection with an important state interest.³⁷

Against this backdrop, the Third Circuit distinguished the employment provisions from the rental provisions, and observed that the latter provisions fell within traditional confines of state authority. In other words, the housing regulation at issue would not be presumed preempted because housing is not an area of federal interest, but a sphere where states exercised considerable legislative autonomy.³⁸ The Third Circuit noted that the Hazleton Ordinance differed fundamentally from restrictions on employment because it regulated housing solely on the basis of federal immigration status.³⁹ It therefore refused to grant a presumption against preemption in the housing context, inevitably finding that the local regulation was an attempt to preclude persons from living in the United States.⁴⁰

With the refusal to apply the presumption against preemption, the Circuit correspondingly recognized that the Immigration and Nationality Act (INA) preempted the housing provisions because they were, in effect, an effort to remove persons “based on a snapshot of their current immigration status, rather than based on a federal order of removal.”⁴¹ The state’s focus on “current immigration status” is crucial to the preemption analysis, as the state is effectively removing persons when their status would not necessarily implicate their removal.⁴² As a result, the Circuit court struck the housing provisions under both field and conflict preemption

sphere traditionally controlled by state police power. *Id.* at 357. If deemed to function within state police authority, courts should presume that Congress did not intend to preempt it in analyzing both express and implied preemption challenges. *Id.* at 358. It is important to highlight that the *De Canas* framework attempts to establish a balance between state and federal authority—it does not establish a presumption against state statutes simply because undocumented immigrants are the subject matter of the law: “[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* at 355. For a more complete analysis of the presumption against preemption framework or what is called the “*De Canas* presumption,” see Brittany M. Lane, Comment, *Testing the Borders: The Boundaries of State and Local Power to Regulate Illegal Immigration*, 39 PEPP. L. REV. 483, 542-45 (2012).

36. 620 F.3d at 206.

37. *Id.* at 206-07. The Third Circuit proceeded to find that the district court erred by failing to apply the *De Canas* preemption framework. The Circuit Court articulated that the employment provisions of the Hazleton Ordinance regulated the “employment of persons unauthorized to work in this country,” thereby falling within the state’s historic police power. *Id.* at 206. The Third Circuit held that the Ordinance was not expressly preempted by the Immigration Reform and Control Act of 1986 (IRCA) because the Ordinance was a licensing law protected by the Act’s savings clause. *Id.* at 207-09; see IRCA, 8 U.S.C. § 1324a(h)(2) (2006). However, the Third Circuit nonetheless found that the employment provisions were conflict preempted by IRCA, as it altered the careful balancing of federal law objectives. 620 F.3d at 212-19.

38. *Id.* at 219-20.

39. *Id.*

40. *Id.* at 220-21.

41. *Id.* at 221.

42. As the Third Circuit articulated, lack of valid immigration status does not automatically make one removable. *Id.* at 221-22. The Third Circuit therefore also rejected the state’s argument regarding concurrent enforcement. *Id.* at 222-23.

doctrine.⁴³ They were deemed impermissible state regulation of immigration under the guise of housing law.⁴⁴

Like the Hazleton Ordinance, the contested ordinance in *Garret v. City of Escondido* similarly penalized “any person or business that owns a dwelling unit . . .” that “harbor[s] an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.”⁴⁵ The Escondido Ordinance defined “illegal alien” in the same manner as the Hazleton Ordinance—as “an alien who is not lawfully present in the United States, according to terms of United States Code Title 8, section 1101 *et seq.*”⁴⁶ However, the *Garret* court differed from the Third Circuit *Lozano* court by finding that the housing provision “[did] not determine the condition under which an individual may remain in the country, relying solely on federal agencies and authorities to make that determination for the City.”⁴⁷ The issue of deferral—that is, of whether sufficient delegation of authority is provided to the federal government to stave off a Supremacy Clause and preemption finding⁴⁸—is the primary question.

Thus, in determining whether a state law is a regulation of immigration, the *Garret* court and the Third Circuit in *Lozano* come to slightly different conclusions based on their own analysis of how laws can or cannot be preempted. Where the *Garret* court relied on whether the ordinance defined immigration status solely through federal immigration law, concluding that the law is not a regulation of immigration,⁴⁹ *Lozano* focused on whether the ordinance is a determination of “which aliens may live in the United States,” thereby placing less emphasis on the deferral question.⁵⁰

In *Villas at Parkside Partners v. City of Farmers Branch, Tex. (Farmers Branch III)*, the Farmers Branch Ordinance established a licensing scheme revoking authorization to occupy rental housing if residents were “not lawfully present,” a determination left to the federal government.⁵¹ Essentially, rental housing is conditioned on the occupant receiving an occupancy license from the building inspector, but the Farmers Branch Ordinance excludes undocumented immigrants from being eligible for that “public benefit.”⁵² The process for obtaining this occupancy license is laden with peculiarities: there must be an application filed, a five dollar application fee paid, and a grant of the license, followed by verification by the building inspector of the potential occupant’s immigration status with the federal government.⁵³ If the verification results in a determination that the occupant is not lawfully present in the United States, the inspector can revoke the occupancy license just granted.⁵⁴

43. *Id.*

44. *Id.*

45. 465 F. Supp. 2d 1043, 1047–48 (S.D. Cal. 2006) (citation omitted).

46. *Id.* at 1048.

47. *Id.* at 1055.

48. See *supra* note 35 for a discussion of the Supremacy Clause and preemption.

49. 465 F. Supp. 2d at 1055–56.

50. 620 F.3d 170, 220 (3d Cir. 2010).

51. 701 F. Supp. 2d 835, 838 (N.D. Tex. 2010) (Farmers Branch III).

52. *Id.* at 839; see also Farmers Branch, Tex. Ordinance 2952, Preamble.

53. *Id.* at 839.

54. *Id.* at 842.

The Ordinance also regulates landlords. For landlords who rent to undocumented persons, the inspector can suspend the landlord's rental license, but even more detrimentally, "[d]uring the period of suspension, the landlord shall not collect any rent, payment, fee, or any other form of compensation from, or on behalf of, *any* occupant or tenant in the *single* family residence" (emphasis added).⁵⁵ The court ultimately concluded that the Ordinance, "though grounded in federal immigration classifications, is an invalid regulation of immigration because it uses those classifications for purposes not authorized or compelled by federal law."⁵⁶ Rejecting the state's public benefit argument, the court observed that the licensing scheme "impose[s] additional local restrictions on those who wish to remain in Farmers Branch" and that "[l]ocal regulation that conditions the ability to enter into private contract for shelter on federal immigration status is of a fundamentally different nature than the sorts of restrictions on employment or public benefits that have been found not to be preempted regulations of immigration."⁵⁷ The court made clear that the Ordinance effectuates use of federal immigration classifications in a manner that the federal government has not authorized and for which the state possesses no authority.⁵⁸ In other words, the federal government has structured a comprehensive immigration system for adjudication of an immigrant's removal from the country, and this licensing scheme interferes with that federal framework, sufficient for a finding of implied preemption under both field and conflict theories.⁵⁹

Upon review, the Fifth Circuit found that the "ferreting out and exclusion of undesirable illegal immigrants" was the intended and practical effect of Ordinance 2952.⁶⁰ The Circuit affirmed the district court's determination that the Ordinance was an impermissible regulation of immigration, and confirmed that the district court did not err in declining to afford it a presumption of validity.⁶¹ In doing so, the Circuit held that "state or local legislation that interferes with or burdens the broad federal power is impermissible, even if local and federal laws share a common goal,"⁶² thus making clear that state mirroring of federal definitions may not be sufficient to overcome preemption challenges. Indeed, states have attempted to write their local regulations using language referring to federal status verification prior to denying rental housing. This, however, essentially functions as control of who can and cannot live in the United States,⁶³ and as such, is in the realm of the federal government.

55. *Id.* at 843 (quoting section 1(D)(6) of Farmers Branch Ordinance 2952). Again, the use of "any" is over-inclusive and the Ordinance's limitation to only single family residence raises concerns about discriminatory targeting.

56. *Id.* at 855.

57. *Id.*

58. *Id.* at 856 ("The statutory definition cannot, simply by virtue of the inclusion of the term 'license,' be interpreted to include purely private contracts for shelter or other necessities. The federal government has not authorized or contemplated classification of aliens for that purpose, and instead allowed local discretion to limit eligibility for particular types of benefits.")

59. *Id.* at 857-59.

60. *Villas at Parkside Partners v. City of Farmers Branch*, 675 F.3d 802, 810 (5th Cir. 2012) (Farmers Branch IV).

61. *Id.* at 811.

62. *Id.*

63. *Id.* at 816 ("It is no response to say, as the City does, that the Ordinance defers to the federal classification of an alien's immigration status because, although the Ordinance uses some of the same terms as federal immigration law, it seeks to use an alien's immigration status for a purpose different from that intended under the federal scheme.")

The Fifth Circuit stated, in support of this conclusion, that “[i]t is difficult to conceive of a more effective method of ensuring that persons do not enter or remain than by precluding their ability to live in it.”⁶⁴ The Fifth Circuit court thus read the Ordinance as a state-enacted immigration enforcement regime “to deal with illegal aliens in whatever manner the locality deems fit.”⁶⁵ It is crucial to take the Fifth Circuit opinion in stride, however, as it is expected to be reheard en banc. A reconsideration of this analysis may be more fruitful once that decision is rendered.

These three examples illustrate the staunch grasp preemption doctrine has over judicial analysis of anti-immigrant housing ordinances. Questions of whether the local regulation falls under state regulation of public benefits and resource allocation, or federal regulation of immigration, often arise. The status of local regulation that restricts housing inevitably requires determinations regarding the meaning and intent behind the housing provision in the first place. Should the local regulation, through housing, aim to expel undocumented immigrants from residence, courts are more willing to conclude that the local ordinance is a regulation of immigration under a preemption assessment mandated by the Supremacy Clause. While preemption is indeed a strong decisional basis for courts, many courts and academics have also found more traditional housing remedies adequate to meet undocumented immigrants’ needs. Part II dives into an exploration of these mediums.

PART II: THE PROMISE OF THE FHA AND ITS FAILURE TO DELIVER

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended) represents a comprehensive federal effort to achieve racial integration and prohibit discrimination based on race, color, religion, and national origin.⁶⁶ Although the FHA originally protected against discrimination on the basis of race, color, and religion,⁶⁷ 1974⁶⁸ and 1988⁶⁹ amendments to the Act increased and broadened its

64. *Id.* at 813 (quoting *Lozano v. City of Hazleton*, 620 F.3d 170, 220-21(2010)). The Fifth Circuit also distinguished its finding by stating that “access to housing, or the lack thereof, is also a more direct regulation of an alien’s presence in a location than the denial of employment. . . .” *Id.* at n.48.

65. *Id.* at 815.

66. *See* Fair Housing Act (FHA) 42 U.S.C. § 3604 (2006); Jorge Andres Soto & Deidre Swesnik, THE PROMISE OF THE FAIR HOUSING ACT AND THE ROLE OF FAIR HOUSING ORGANIZATIONS 4 (2012). According to scholars, the Act purports to remedy many problems:

Among other things, the Fair Housing Act specifically prohibits: refusal to rent or sell housing; refusal to negotiate for housing; making houses unavailable; denial of a dwelling; setting different terms, conditions or privileges for the sale or rental of a dwelling; providing different housing services or facilities; falsely denying the availability of housing for inspection, sale or rental; blockbusting; denying persons access to or membership in a facility or service related to the sale or rental of housing

Id.

67. 42 U.S.C. § 3601 (2006).

68. *See* Housing and Community Development Act, Pub. L. 93-383, 88 Stat. 633 (1974) (adding sex as a protected class).

69. *See* Soto & Swesnik, *supra* note 69, at 4-5 (stating that the Fair Housing Act was amended to provide HUD enforcement power and added persons with disabilities and familial status as protected groups. It also expanded discrimination to include “acts of interference, coercion, and the intimidation or threatening of individuals in the exercise of their rights in housing-related sales, rentals, or lending.”). “Familial status” was added as a protected group because of the spread of “no child” policies and the impact of those housing policies on communities of color. It became apparent that the facially neutral

scope and protections.⁷⁰ Instead of providing relief solely through private litigation,⁷¹ the FHA establishes a procedural framework, vesting tremendous discretion in the Attorney General, for countering adverse discrimination in the housing market.⁷² The Attorney General possesses the ability to raise an independent lawsuit for the protection of the community if a “pattern or practice” denies housing access or if it is in the “general public importance.”⁷³ The FHA, therefore, provides many avenues for legal recourse, both personal and private and on a public and large scale. In either case, whether private or public, the relief available can be in the form of compensatory or punitive damages, or even injunctive relief.⁷⁴ Moreover, there is no limitation on permissible defendants under an FHA claim, as 42 U.S.C. § 3604 provides only that it shall be unlawful to engage in various prohibited acts.⁷⁵ Despite the FHA’s attempts to make legal recourse available on a broader scale, however, the phenomenon of landlord screening of prospective residents for citizenship status still resulted in a disparate impact against immigrants in housing.⁷⁶ Rather than resolving the problem by including undocumented immigrants as a protected group under the FHA, the U.S. Department of Housing and Urban Development (HUD) “solved” the problem by encouraging that investigations and inquiries into citizenship status be uniformly applied to all applicants.⁷⁷

policy was a pretext for racial discrimination. *See* Blomgren v. Ogle, 850 F. Supp. 1427, 1429 (E.D. Wash. 1993) (“Congress noted racial segregation was exacerbated by the exclusion of families with children in the sale or rental of a dwelling.”); *see also* JANE G. GREENE & GLENDA P. BLAKE, HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 3, 34 (1980); ROBERT W. MARANS ET AL., MEASURING RESTRICTIVE RENTAL PRACTICES AFFECTING FAMILIES WITH CHILDREN: A NATIONAL SURVEY (1980).

70. For greater discussion of FHA amendments and the history and rationale behind their enactments, see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 144-46 (2012).

71. 42 U.S.C. § 3613(a) (2006).

72. Individuals may file a complaint with the Department of Housing and Urban Development (HUD), which solves complaints through conciliation, 42 U.S.C. § 3610(b)(1)(2006); temporary preliminary relief, § 3610(e)(1) (2006); or administrative proceedings, § 3612(b) (2006). HUD is the agency charged with broad enforcement authority to administer the FHA. *See* 42 U.S.C. §§ 3608(a), (b) (2006); *id.* § 3608(e) (HUD has duty to study and report on its efforts); *id.* § 3614(a) (rulemaking authority).

73. § 3614(a).

74. § 3610(c)(1). Before 1998, punitive damage awards were limited to \$1,000, but with the 1998 Amendment to the FHA, that restriction has been withdrawn. *See* Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619 (1988).

75. This is in contrast to Title VII, which does restrict the class of defendants. To be fair however, § 3604 does exempt some types of properties from FHA protection. *See, e.g., id.* § 3603(b) (excluding certain boarding homes and single-family residences); *id.* § 3607(a) (exempting properties run by religious organizations and private clubs). However, the FHA does allow claims brought against third-party defendants. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 12B-1 (“The [fair housing] statute makes little effort to define the scope of proper defendants.”); *see also* Stacy E. Seischnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 1000-03 (2012) (exploring other provisions of the FHA that deal with third-party defendants).

76. For a sampling of the constitutional treatment of these anti-immigrant housing ordinances, see Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Garret v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006); Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 864-66 (9th Cir. 2008); Chamber of Commerce v. Edmondson, 594 F.3d 742, 765-71 (10th Cir. 2010).

77. Response to Concerns about Housing Security Following September 11, 2001—Screening and Rental Procedures, NAT’L FAIR HOUS. ADVOCATE ONLINE, http://www.fairhousing.com/index.cfm?method=page.display&pagename=hud_resources_sept11 (last visited Apr. 2, 2013).

To be fair, the FHA offers strong protections to immigrants seeking housing because it proscribes discrimination against all persons regardless of whether or not they possess valid authorization to remain within the United States.⁷⁸ Moreover, the FHA also acknowledges claims on either disparate treatment⁷⁹ or disparate impact⁸⁰ theories. The basis for an FHA violation rests on the premise that property owners are likely to discriminate against persons based on race, color, or national origin when they intentionally or unintentionally discriminate against undocumented immigrants to comply with local anti-immigrant housing ordinances that disallow or sanction renting or leasing to the undocumented.⁸¹ In this sense, the effect of carrying out the anti-immigrant housing ordinance and the means used (through alienage discrimination) result in adverse discrimination to others, undocumented or not, based on race, color, or national origin.⁸²

But therein lies the dilemma: anti-immigrant housing ordinances cannot be enforced absent impermissible spillover discrimination against protected classifications. Landlords, unskilled in detecting undocumented immigrants, will selectively enforce local ordinances by only inquiring and asking for documentation from certain persons who appear to be “illegal.”⁸³ The notion of illegality then develops to be intertwined with physical-visual indicators, such as race and national origin.⁸⁴ Therefore, the enforcement of such anti-immigrant housing ordinances remains exceptionally susceptible to subjective biases and preferences.

As a result, to address the problem of relying on physical indicators as predictors of legal status, scholars, such as Professor Oliveri, have advocated for an expansion of the FHA statutory framework to include alienage and legal status as protected grounds. This would, Oliveri proffers, cover the problem of national origin discrimination that still exists under the FHA.⁸⁵ For Oliveri, “discrimination

78. See Soto & Swesnik, *supra* note 69, at 10 (citing *Espinoza v. Hillwood Square Mut. Assoc.*, 522 F. Supp. 559 (E.D. Va. 1981) (holding that the FHA protects against discrimination on the basis of citizenship status when it had the intention or effect of national origin discrimination)).

79. Disparate treatment claims arise when housing laws are motivated by discrimination based on race, color, religion, sex, familial status, or national origin, although discriminatory purpose need not be the “sole or dominant motive.” *United States v. City of Parma*, 494 F. Supp. 1049, 1053-54 (N.D. Ohio 1980).

80. Unlike disparate treatment theory, which requires proof of a discriminatory motive in the enactment of the state law, disparate impact allows for proof of a constitutional violation based on the discriminatory effects of the law. *Id.* at 1053. Under disparate impact theory, the plaintiff must demonstrate that an otherwise facially neutral law nonetheless manifests a discriminatory or disproportionate impact upon a protected class. *Id.*

81. See Margaret McEntire, Note, *The Constriction of Rights: A Property Law Approach To City-Based Immigration Initiatives That Place Rental Bans On City Ballots*, 12 SCHOLAR 291, 310 (2010) (“rental bans requiring the documentation of immigration status are the catalyst for discrimination based on race and national origin.”).

82. See *id.*

83. Clifton R. Gruhn, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants’ Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 535-36 (2008); see also Pham, *supra* note 5, at 781 (observing that private parties, untrained in immigration law, are likely to make mistakes that lead to either over-enforcement or under-enforcement of immigration laws).

84. See McEntire, *supra* note 81, at 312. The question remains whether ascertaining undocumented immigrant status can ever be divorced from inquiry on account of race, color, or national origin. I maintain that it cannot. Rather, race, color, or national origin are slowly becoming proxies for “what an immigrant should look like.”

85. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 122-23 (2009).

slippage, and the fact that both alienage and legal status discrimination are permissible under the Fair Housing Act, already create conditions in which people who have every right to be in this country are likely to be discriminated against in housing.”⁸⁶ For her, the necessary solution is at least three-fold: (1) to prohibit the promulgation of these subfederal anti-immigrant housing ordinances; (2) to form a national U.S. policy that refrains from supporting these state anti-immigrant measures; and (3) to make alienage status discrimination a legally actionable ground under the FHA.⁸⁷

The FHA, nonetheless, provides a basis to preempt these discriminatory anti-immigrant housing ordinances. Race or national origin should not have any bearing on the probability that a certain individual is present in the United States lawfully. While the issue remains open whether national origin can be a factor, among many, in stopping an individual when he or she is physically close to the United States border, that factor seems much less convincing in the attempt to gain access to state housing, where residents may be legally permanent residents or have other legal rights to remain.⁸⁸ Anti-immigrant housing ordinances, therefore, cannot be easily effectuated absent the strong possibility of illegal discrimination against an FHA protected class. These anti-immigrant housing ordinances plainly violate the FHA by burdening protected groups, which have been explicitly protected under the FHA. In this manner, the FHA subverts and preempts these anti-immigrant housing ordinances because such local regulation runs counter to the federal housing scheme and encourages discrimination against protected classes (race, color, or national origin).⁸⁹

Despite the FHA’s recognition of both disparate treatment and disparate impact claims, another major problem of the FHA rests in the lack of affirmative protection for undocumented persons. The FHA’s promise of equal opportunity and fair housing is still far from being a reality.⁹⁰ Prevailing scholars have explained this shortcoming as arising from various sources, such as: “inadequate enforcement of civil rights laws; weaknesses in the FHA’s enforcement provisions; its focus on isolated acts of discrimination; lack of public awareness of federal fair housing protections; the difficulty of detecting discrimination; and low rates of reporting or complaining about discrimination.”⁹¹ Given these various criticisms of the FHA, it is likely that only a multifaceted approach will succeed in ending discrimination.⁹²

86. *Id.* at 124.

87. *Id.* at 119-23.

88. *Id.* at 122-23.

89. See Pham, *supra* note 5, at 781 (noting that legal complexities of immigration law provide chances for intentional discrimination, and that “private parties intent on discrimination find the perfect pretext in private enforcement laws.”).

90. Housing discrimination against persons of color is still highly prevalent. See XAVIER DE SOUZA BRIGGS, THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 1, 10 (Xavier de Souza Briggs ed., 2005) (“[E]ffective public policy must address the failures of the market to deliver meaningful choice regardless of race”); Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800 (2008); Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 558 (2008) (“The modern fair housing movement, theoretically empowered by passage of the Fair Housing Act, has not made significant strides toward creating a nation of open and inclusive communities of opportunity.”).

91. Seicshnaydre, *supra* note 75, at 976.

92. See SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE

Even this simultaneous approach, however, is unlikely to address the hidden problem of phantom intent⁹³ that underlies landlord behavior.

However, by encouraging stronger enforcement through the FHA's affirmative housing mandate, the goal of racial integration can come to fruition. The affirmative housing mandate refers to HUD's statutory obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA]."⁹⁴ The affirmative housing mandate has gained traction among scholars because its language has statutory grounding and appears to require action, not merely prevention.⁹⁵ Courts have interpreted the affirmative housing mandate to require HUD "do more than simply not discriminate itself; it reflects the desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases."⁹⁶ This promise requires remediation on a level that prospectively addresses not only malicious practices immortalizing

UNDERMINING THE AMERICAN DREAM 321 (2004) ("Anti-discrimination enforcement, though necessary, is not a sufficient condition for achieving true integration."); Fred Freiberg, *Promoting Residential Integration: The Role of Private Fair Housing Groups*, in HOUSING MARKETS AND RESIDENTIAL MOBILITY 219, 239-40 (G. Thomas Kingsley & Margery Austin Turner eds., 1993) ("[P]ursuing an enforcement strategy alone will never produce the kind of society where people can exercise a free and informed choice when selecting a place of residence."). Indeed, scholars in housing law have now shifted from a discussion of access toward a more nuanced analysis of housing "choice," as access alone is rarely adequate when access is only open to/within racially segregated communities. See, e.g., Seicshnaydre, *supra* note 75.

93. By "phantom intent," I implicate a concept that has only seen irregular discussion and which has largely been under-analyzed. While this label within the immigration-housing context is mine, Professor Lawrence has characterized this notion as "probable conscious but covert discriminatory intent." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 329-30 n.50 (1987). This term, however, has seen some scant attention in contract law. See Abraham Drassinower, *Unrequested Benefits in the Law of Unjust Enrichment*, 48 U. TORONTO L.J. 459, 465 (1998). It is vital to emphasize the "probable" and "covert" nature of landlord discrimination against immigrants and differentiate it from unconscious bias generally. Phantom intent is often purposeful and hidden, and as a result, its impact may spillover against citizens or other protected persons. Unconscious bias, by contrast, is unintentional, and its effects may or may not be hidden. For further critique of equal protection's failure to address implicit bias, see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 995-96 (observing that "[a]ntidiscrimination law, no less than any other area of law, should be based on a realistic understanding of human behavior," such that "if individuals act on implicit bias . . . the law should respond, if only because similarly situated people are not treated similarly."). See also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) ("Unconscious bias, interacting with today's 'boundaryless workplace,' generates inequalities that our current antidiscrimination law is not well equipped to solve.") (citation omitted); Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958 (1993) (stating that current Equal Protection doctrine's reluctance to accept disparate impact claims absent evidence of discriminatory intent "perfectly reflects the prevailing white ideology of colorblindness and the concomitant failure of whites to scrutinize the whiteness of facially neutral norms."); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 878 (2004) (recognizing Equal Protection is subject to "limitations inherent in the Supreme Court's current approach to racial stigma").

94. 42 U.S.C. § 3608(e)(5) (2006).

95. *Id.* The affirmative housing mandate requires that agencies and community development programs act in ways to affirmatively further fair housing, and extends to a broad range of federal agencies, not simply those that administer housing. As Seicshnaydre put it, "HUD must do more than just dismantle ghettos; it must ensure that displaced ghetto residents have housing options outside the ghettos it has helped create." See Seicshnaydre, *supra* note 75, at 1005.

96. NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 155 (1st Cir. 1987); Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973).

discrimination, but also remediation that ends remnants of past discrimination.⁹⁷

While HUD recognizes this statutory obligation in theory, in practice its affirmative housing mandate has been aspirational and sporadically applied.⁹⁸ The affirmative housing mandate's shortcomings may partially be the result of HUD's symbiotic relationship with local entities and HUD's inability to affect affirmative housing in the absence of buy-in from such local entities.⁹⁹ HUD relies on these entities to enforce the affirmative housing mandate, and in turn, these entities rely on and receive HUD grant funding.¹⁰⁰ Grantees of such funding are required to analyze and identify existing impediments to fair housing options, take action to overcome the impediments identified, and maintain records reflecting their analysis. They are to document their use of government funds and confirm how their spending leads to the expansion of fair and open housing.¹⁰¹ It is questionable whether these local entities effectively carry on the fair housing goal without private community biases and involvement, and whether this federal-to-local devolution of responsibility is the ideal vehicle to open the doorways of housing opportunity and achieve the goals embodied by the FHA.¹⁰² Most critically, HUD must exercise stronger federal direction and control over the grant funding provided to its local partners, so that the use of such funding truly eliminates housing impediments and promotes housing inclusion.¹⁰³ The FHA problem, in some senses, remains a structural one, but relying on the FHA alone is inadequate protection when pervasive discrimination surrounds the application process.¹⁰⁴

A second difficulty with relying on the affirmative housing clause is that

97. See Otero, 484 F.2d at 1133; see also *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Gautreaux v. Chicago Hous. Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969).

98. THE NAT'L COMM'N ON FAIR HOUS. & EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING: REPORT OF THE NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY 38–40 (2008) (In 2008, the three largest federal programs failed to sufficiently further fair housing, and seemed in certain situations to effectuate and permit segregated housing patterns).

99. 1 U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE i (1996), <http://www.hud.gov/offices/theo/images/fhpg.pdf> (“The goal of devolution of responsibility in the area of fair housing means that communities will have the authority and the responsibility to decide the nature and extent of impediments to fair housing and decide what they believe can and should be done to address those impediments.”).

100. See 42 U.S.C. § 5304(b)(2) (2006); 24 C.F.R. § 570.601(a) (2012).

101. 24 C.F.R. § 91.225 (2012); 24 C.F.R. § 570.601 (2013).

102. HUD is statutorily required to gather and collect data on whether its actions are actually effective. See 42 U.S.C. § 3608(e)(6) (2006). However, the current scheme is not beyond reproach. See Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW ENG. L. REV. 65, 95 (2001) (“The central need is for re-assertion of state and federal authority: as long as localities control land use decisions, most will act in their perceived, selfish interests, not for the broader common good.”).

103. HUD regulations require local entities to define and identify housing impediments—it is the local entities themselves, not HUD, which define what problems exist in housing access and housing choice. This allows local entities, which can be swayed by community involvement, to allocate the HUD grant funding to what it perceives are the “housing impediments.” It is foreseeable that these local entities may not be the most objective in performing their housing analyses. See Seicshnaydre, *supra* note 75, at 1009 (observing that local control of housing strategy has failed to undue segregation and increase housing choice, and that “HUD has provided guidance to local entities about what their local analyses should include, but otherwise has ignored the vast potential of the analysis for creating entrance strategies.”).

104. Indeed, “residential segregation remains a key feature of America’s urban landscape” years after the FHA’s promulgation. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (2010).

neither the clause specifically, nor the FHA generally, addresses the primary intent of local ordinances. Without a recognition that alienage status is a protected statutory ground under the FHA, the basis for a cause of action must rely on other secondary grounds, namely national origin or race discrimination likely to impact immigrants in housing. Any protection they do offer remains based on pretext. While the statute only recognizes race or national origin discrimination as valid authoritative bases, in reality immigrants may be discriminated against because of their citizenship status.¹⁰⁵ As a result, some undocumented immigrants will not be able to employ the FHA if their “physical indicators” do not conform to race, color, or national origin.¹⁰⁶ Put differently, not every undocumented immigrant will simultaneously be discriminated against on the basis of their race, color, or national origin discrimination *and* alienage status, and for these individuals who are discriminated against solely on the basis of their legal status, the FHA leaves them without any form of relief.

Moreover, there are aspects of the FHA that implicitly allow discrimination to continue. The reasonable restriction provision and maximum occupancy limitation of the FHA provide a backdoor within the housing framework to discriminate against undocumented immigrants. Despite allowing administrative review of abuses, there is no private right of action under the FHA to hold HUD accountable to the affirmative housing mandate.¹⁰⁷ One particular statutory loophole, 42 U.S.C. § 3607(b)(1), denies recourse from state or local laws that are “reasonable . . . restrictions” on the maximum occupancy of a dwelling.¹⁰⁸ Section 3607(b)(1)’s maximum occupancy restriction, intending to prevent overcrowding, functionally bars an FHA cause of action by any tenant because such “reasonable restrictions” are exempt from FHA jurisdiction.¹⁰⁹ Therefore, section 3607(b)(1) purportedly disproportionately impacts immigrants who are more likely to live in multi-generational or extended family groupings, where family size is larger. The silver lining to § 3607(b)(1), however, is that restrictions regarding “family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants” are not exempted from FHA regulations. Therefore, challenges of these types of restrictions can still be brought against states as violations of the FHA.¹¹⁰ Thus, the maximum occupancy and family character dichotomies for analyzing housing ordinances leads to fragmented and mixed success, making challenges of § 3607(b)(1) unpredictable and costly.

PART III: THE § 1981 CONTRACT CLAUSE AND ITS PROBLEMS

Using the Contract Clause of the Civil Rights Act of 1866¹¹¹ is still quite effective in establishing a framework for undocumented immigrants to exercise their

105. See Oliveri, *supra* note 85, at 121.

106. See *id.* at 122.

107. See NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 152, 154 (1st Cir. 1987); Shannon v. U.S. Dep’t of Hous. & Urban Dev., 436 F.2d 809, 818 (3d Cir. 1970).

108. 42 U.S.C. § 3607(b)(1) (2006).

109. See Daniel Eduardo Guzmán, Note, “*There Be No Shelter Here*”: *Anti-Immigrant Housing Ordinances and Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL’Y 399, 428 (2010).

110. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728 (1995).

111. Ch. 31, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981-1982 (2006)).

housing rights, even if it is no longer a viable route for securing employment rights. Under § 1981, “[a]ll persons within the jurisdiction of the United States shall have the same right to make or enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens” (emphasis added).¹¹² Historically, § 1981 applied to undocumented immigrants and had a strong constitutional track record in that respect.¹¹³ Scholars have properly noted that this protection extends to private contracts.¹¹⁴ Prior to 1991, the “make and enforce contracts” language of § 1981 did not protect against problems arising after the establishment of the contract.¹¹⁵ Later

112. Relevant portions of 42 U.S.C. § 1981(a) follow:

Statement of equal rights

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

(b) “Make and enforce contracts” defined

For the purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Id.

113. See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“[t]he protection of [42 U.S.C. § 1981] has been held to extend to aliens as well as to citizens.”); see also *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 546-47 (2007) (holding an alien is a “person” for purposes of § 1981 and forbidding the prohibition of undocumented persons from entering into leases); *Sagana v. Tenorio*, 384 F.3d 731, 737-39 (9th Cir. 2004); *Anderson v. Conboy*, 156 F.3d 167, 170 (2d Cir. 1998) (holding that §1981 prohibits both private and state alienage discrimination); *Duane v. GEICO*, 37 F.3d 1036 (4th Cir. 1994) (holding that § 1981 prohibits private discrimination against legally permanent residents in the making of contracts); *Bhandari v. First Nat’l Bank of Commerce*, 829 F.2d 1343, 1349 n.13 (5th Cir. 1987) (prohibiting governmental discrimination on basis of alienage, but holding §1981 does not prohibit private discrimination); *King v. ZirMed, Inc.*, No. 3:05CV-181-H, 2007 WL 3306100, at *5 (W.D. Ky. Nov. 6, 2007) (holding that denying illegal immigrant workers’ right to contract flies in the face of § 1981); see also *Gruhn*, *supra* note 85, at 544 (“[Section 1981] has been interpreted to protect against discrimination based on race and alienage, and therefore applies directly to documented immigrants and their right to contract free from discrimination based on their immigration status.”).

Thus, it is clear that discrimination by government actors comes under § 1981, and while *Bhandari* dictates that private discrimination is beyond § 1981, most courts have interpreted § 1981 to apply to both private and public discrimination against undocumented immigrants. For a sampling of the confusion that § 1981 has caused regarding its application to private versus governmental alienage discrimination, see Aaron M. Danzig, Note, *The Scope of 42 U.S.C. § 1981: Protection Against Private Alienage Discrimination*, 11 GEO. IMMIGR. L.J. 527, 528-29 (1997) (observing circuit split as to whether § 1981 prohibits private alienage discrimination); Angela M. Ford, Comment, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457, 459 (2001); Oliveri, *supra* note 85, at 84 n.127 (for extensive case law analysis of § 1981).

114. See *Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (extending § 1981 to private action); Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1053 (2007); Christine N. Cimini, *Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?*, 65 VAND. L. REV. 389 n.228 (2012).

115. See 42 U.S.C. § 1981(a) (2006). Indeed, § 1981 has been historically weak. The Section was largely forgotten as a legal remedy until it was revived in the employment discrimination context in

amendments, however, expanded the protective scope of “make and enforce contracts” to include “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”¹¹⁶ Thus, the appeal of a § 1981 challenge to anti-immigrant ordinances is the solid body of statutory and case interpretation, which has affirmatively created a legal avenue to sustain immigrant housing needs.¹¹⁷ That the section applies to both government and private actors, exempting the color of law requirement present in other sections of the Civil Rights Act,¹¹⁸ also considerably broadens the scope of available relief.¹¹⁹ Critical, however, is that while § 1981 claims are treated similarly as other claims arising under Title VII, § 1981 provides a longer time frame for filing.¹²⁰ Filing a separate Title VII claim with the EEOC has no effect on the statute of limitations for a § 1981 claim.¹²¹ Moreover, these forms of legal redress are practical because “plaintiffs face a lower bar to establish wrongdoing under [FHA and] Section 1981” than under traditional equal protection analysis.¹²² If there is any limitation with § 1981, it would be that, compared to Title VII, § 1981 fails to provide for attorney’s fees.¹²³ Still, § 1981—its amenability to both government and private actors, extended timeframe for filing, and lower bar—has many attractive features.¹²⁴

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). Furthermore, during the short period between *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and the 1991 Civil Rights Act overturning *Patterson*, § 1981 failed to protect against racial harassment during the term of employment, as it only protected at the point of hiring. See Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, n.246 (2009).

116. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981(b) (2006)). Pursuant to this amendment, the Court has interpreted § 1981 to extend to “all phases and incidents of the contractual relationship,” not simply those at the moment of the contract’s inception. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 302 (1994). Section 1981 has thus been broadly interpreted to protect against post-contract poor living conditions, functioning almost as a pseudo warranty of habitability. See *Green v. Konover Residential Corp.*, No. 3:95CV1984 (GLG), 1997 WL 736528 (D. Conn. Nov. 24, 1997).

117. See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (“Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. at 295 (1976) (Section 1981 “proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race.”); *Lozano v. City of Hazleton*, 496 F. Supp. 2d at 546 (Hazleton Ordinances violated § 1981). But see *infra* notes 124-127 and accompanying text (analyzing that § 1981 may not be ideal solution because of enactment of IRCA).

118. *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 387 (1982); see 42 U.S.C. § 1983 (2012) (example of provision of Civil Rights Act which requires color of law in order for liability to take effect).

119. See 15 AM. JUR. 2D *Civil Rights* § 27 (2000) (explaining characteristics of Section 1981).

120. Ordinarily, under Title VII, the complainant must file a charge with the EEOC within 180 days of the supposed unlawful or discriminatory practice or within 300 days if the aggrieved individual chooses to file a discrimination complaint with a state or local agency. 42 U.S.C. § 2000e-5(e) (2000). Section 1981, however, “does not contain a statute of limitations.” *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004).

121. See *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 465-66 (1975) (rejecting petitioner’s complaint that § 1981 should be tolled alongside administrative EEOC complaint); see also *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. at 371, 380-83; *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987).

122. Todd Donnelly Batson, Note, *No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981*, 74 BROOK. L. REV. 131, 150 (2008).

123. *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. at 460.

124. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 304 n.3 (1994) (“Even in the

Despite this extensive protection however, § 1981 is not without major shortcomings. Most importantly, the historical ability for undocumented immigrants to pursue § 1981 claims has been undermined by the enactment of the Immigration Reform and Control Act (IRCA) of 1986, one of the most draconian immigration policies to date.¹²⁵ Section 1981 provides all persons with the right to make and enforce contracts as “white citizens,” but IRCA prohibits undocumented immigrants from entering employment contracts. Because of this conflict, courts have found that IRCA impliedly repealed § 1981 insofar as § 1981 applied to undocumented immigrants’ right to enforce employment.¹²⁶ The *Lozano* court, however, limited the implied repeal to employment contracts and did not go so far as to also foreclose § 1981 claims in the realm of housing.¹²⁷

While this concession appears to allow undocumented immigrants the ability to continue to use § 1981 against landlords, IRCA has cast a shadow of doubt over whether deferential interpretation of § 1981 in the housing context will survive, especially as courts begin to consider IRCA’s anti-harboring provision and how that provision relates to renting and leasing property.¹²⁸ Thus, § 1981 is no longer the unqualified enforcement action it once was. The law remains viable for legally permanent residents and citizens, but is no longer a legal avenue for undocumented immigrants in employment. Its application in housing, while currently safe, remains uncertain.

The shortcomings of § 1981 exist for undocumented immigrants and legal permanent residents alike in the statutory language. In particular, § 1981 prohibits race and ethnicity discrimination, but does not prohibit sex, national origin, religion,

employment context, § 1981’s coverage is broader than Title VII’s, for Title VII applies only to employers with 15 or more employees, . . . whereas § 1981 has no such limitation.”)

125. IRCA, §§ 101(a)(1), 102(a), 8 U.S.C. §§ 1324a, 1324a(h)(2), 1324b (2006).

126. See *Keller v. City of Fremont*, 853 F. Supp. 2d 959, 981 (D. Neb. 2012) ; *Lozano v. City of Hazleton (Lozano I)*, 496 F. Supp. 2d 477, 547 (M.D. Pa. 2007). Section 1981 is deemed to be repealed by implication insofar as it conflicts with IRCA.

127. See *Lozano I*, 496 F. Supp. 2d at 547 n.75. Therein, the *Lozano* court observed that:

IRCA involves the employment of unauthorized workers. It does not mention other types of contracts including contracts to provide housing. Further, as discussed above with regard to pre-emption, the federal government allows certain aliens to work in the United States and implicitly to live here. To forbid these individuals from entering into housing contracts would be inconsistent with their being allowed to remain in the country.

Id.

128. Indeed, in *Keller*, the court discussed this very question and noted that *Lozano I* “did not address the question of whether IRCA’s prohibition on the harboring of aliens unlawfully in the United States (8 U.S.C. § 1324(a)(1)(A)(iii)) also worked as a repeal of § 1981 to the extent that § 1981 would allow illegal aliens to enter into leases for residential dwelling units.” *Keller*, 853 F. Supp. 2d at 981. In its reasoning, the *Keller* court observed the split between the Third and Eighth Circuit regarding what constitutes “harboring” for purposes of IRCA. The Third Circuit’s decision in *Lozano v. City of Hazleton (Lozano II)*, 620 F.3d 170, 223 (2010), held that the renting of property to another did not amount to harboring. By contrast, the Eighth Circuit found that conduct that merely “substantially facilitates an alien’s remaining in the country illegally” would be sufficient to satisfy IRCA’s harboring provision, such that IRCA repeals § 1981 in the renting context. *Keller*, 853 F. Supp. 2d at 982 (quoting *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir.2008)). The conflict within the Circuits raises doubt over whether IRCA’s anti-harboring provision precludes § 1981 claims for undocumented immigrants in the area of housing access. In any event, the *Keller* court noticed the discrepancy, but proceeded to deny the § 1981 claim on the grounds that § 1981 does not allow disparate impact claims. *Id.* Because of that disposition, while the court raised the issue of § 1981’s interaction in rental housing, it was not clear whether § 1981 should continue to operate in that sphere.

age, or disability discrimination—the latter five grounds being protected under Title VII.¹²⁹ If limiting the protected classifications to race and ethnicity were not enough, § 1981 also limits the types of discrimination claims that can be brought.¹³⁰ Because § 1981 prohibits claims based on disparate impact,¹³¹ the ability to raise a cognizable claim under the statute is quite narrow. Rather, § 1981 only allows for claims based on disparate treatment.¹³² Although intent under § 1981 can be inferred from the generous “totality of the circumstances” test, which includes both direct and circumstantial evidence, the difficulty lies in the fact that the complainant has to prove the discrimination was intentional for a claim to be successful. Therefore, to succeed, the complainant must demonstrate that the state intended to discriminate based on alienage or race in enacting the ordinance.¹³³ Thus, “in a case in which there is direct evidence of racial discrimination, a plaintiff who wishes to bring a claim of race-based disparate treatment must first establish a prima facie case of intentional discrimination;” after, the burden can be rebutted by the defendant upon a showing that the same decision would have been made in the absence of considering race as a factor.¹³⁴ The requirement of purposeful discrimination and proof of this

129. 42 U.S.C. § 2000e-2(a) (2000) (Title VII).

130. Disparate impact discrimination occurs when a facially neutral policy or practice nonetheless has a disproportionate impact on a protected class. *See Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 387-88 (1982) (holding that § 1981 only applies to intentional discrimination and not to “practices that merely result in a disproportionate impact on a particular class”). A law or practice is facially neutral when it does not explicitly treat persons differently based on particular characteristics.

131. *See id.*; *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999); *Pisharodi v. Valley Baptist Med. Ctr.*, 393 F. Supp. 2d 561, 574 (S.D. Tex. 2005) (stating that racial animus is a necessary element in a § 1981 claim); *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 111 (1st Cir. 1988) (“A plaintiff may not make a disparate impact claim under section 1981”).

132. *See Goodman v. Lukens Steel Co.*, 580 F. Supp. 1114, 1121 (E.D. Pa. 1984) (finding intent is required and necessary element of § 1981 cause of action because rights conferred under the statute do not extend to facially neutral laws, even if laws impact and burden a particular race unevenly); Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 335 (2001). Thus, disparate treatment claims, requiring proof of invidious motive, make the scope of possible claims narrower. *See supra* notes, 79 and 80, for difference between disparate impact and disparate treatment claims.

133. *See Gen. Bldg. Contractors Ass’n, Inc.*, 458 U.S. at 375; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 488 (1968) (Section 1981 affords protection where racial discrimination is intentional and impedes freedom to contract); Gruhn, *supra* note 83, at 545. It is important to observe, however, that while § 1981 protection prohibits race or alienage discrimination, it does not extend to national origin discrimination. *See, e.g.*, *Pisharodi*, 393 F. Supp. 2d at 574-75; *Sajous v. First Nat’l Bank of Chi.*, No. 87-C-3564, 1987 WL 28403, at *3 (N.D. Ill. Dec. 21, 1987) (“[t]he rule that claims of discrimination based solely on national origin are not recoverable under § 1981 is firmly established.”). *But see Chandoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16 (D.N.J. 1994) (permitting national origin discrimination claim to be brought under § 1981 where national origin discrimination implicates race discrimination as well). Courts appear in agreement that national origin is not a protected classification for § 1981 claims, as national origin is not included in the statutory language. Nonetheless, courts functionally seem to protect ethnicity and national origin discrimination when such discrimination is implicated with race discrimination. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (finding that persons belonging to Arab ethnic group were protected under § 1981 because discrimination based on ancestry or ethnic characteristics was racial in character); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir. 1988) (applying § 1981 to persons of Lebanese origin).

134. Charu A. Chandrasekhar, Note, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L. L. REV. 169, 204 (2004); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (articulating the shifting of legal burdens for claims alleging non-facially discriminatory actions). Indeed, it is fruitful to note that § 1981 claims follow the same legal framework adopted in Title VII discrimination claims, that is, the McDonnell Douglas burden-shifting approach. *See Holtzman v. World Book Co.*, 174 F. Supp. 2d 251, 258 (E.D. Pa.

discriminatory intent in § 1981 claims, therefore, raises a paramount obstacle for weaker claims based on circumstantial evidence.

By accepting only disparate treatment claims, and protecting only race and ethnic discrimination, § 1981 excludes a plethora of probable alienage-based discrimination. One solution could be to amend § 1981 to include national origin discrimination as well. Indeed, as Professor Oliveri has noted, “national origin discrimination frequently takes the form of discrimination based on non-protected but related characteristics such as legal status, language, or ethnic traits.”¹³⁵ Moreover, IRCA’s adverse impact on judicial interpretations of § 1981’s reach compromise § 1981’s future longevity as an enforcement mechanism for undocumented persons.

PART IV: COMMON THREADS OF DEFICIENCY BETWEEN THE FHA AND § 1981

Both FHA and § 1981 claims fail to protect *all* undocumented persons because it is impossible to determine undocumented status based on visual indicators alone. Physical traits or appearance are not accurate determinants of legal status and such proxies often lead to selective enforcement. The FHA and § 1981 protect undocumented immigrants primarily because these persons are frequently minorities or persons of color, traits which are visibly noticeable. Therefore, they are only opportunistically protected whenever the FHA or § 1981 proscribes race and national origin discrimination, or race and ethnicity discrimination respectively.¹³⁶ Therein lies the issue: the FHA and § 1981 can only protect undocumented immigrants insofar as the discrimination is tied to race, national origin, or ethnicity. In other words, immigration status discrimination is phantom discrimination, as it often overlaps with other more obvious protected grounds and is difficult to detect. The FHA and § 1981 are complicit in tying their statutory protection to visual indicators, and the gap between status-based and indicator-based protection becomes apparent.

2001). Under that framework, the plaintiff bears the initial burden of demonstrating a prima facie case of discrimination. The factors for a prima facie case of discrimination have been established in *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), and *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). After the plaintiff meets this threshold, the defendant must show a “legitimate, non-discriminatory reason” for its action. If the defendant articulates that non-discriminatory reason, the burden returns to the plaintiff to prove that it was in fact pretext in order to prevail. *McDonnell Douglas*, 411 U.S. at 802; see also Amanda Hopkins, *What’s Wrong with My Nativity Scene?: Religiously Discriminatory Restrictive Covenants in New York*, 13 RUTGERS J.L. & RELIGION 415 (2012) (describing the *McDonnell* burden-shifting framework within the FHA and the difficulty in succeeding through it); William R. Corbett, Case Note, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 216-19 (2003) (reflecting on “continuing viability of *McDonnell Douglas*”). For a fuller discussion of the operation of § 1981 within the larger Title VII context, see Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 189-91 (2006).

135. Oliveri, *supra* note 85, at n.127.

136. As aforementioned, the FHA proscribes race and national origin discrimination and § 1981 proscribes race and ethnicity discrimination. What this means is that, for the FHA specifically, only undocumented immigrants who “appear illegal” based on their race or national origin may be protected while other immigrants are overlooked. The FHA therefore prohibits discrimination against a black person or a person from Iraq, but it fails to protect discrimination against immigration status, which cannot, in all instances, necessarily fall under the enclaves of race or national origin, even if it often does. Similarly, § 1981 prohibits race and ethnicity discrimination. Again, immigration status-based discrimination may not fit neatly under either of these two protected classifications.

Status-based discrimination is incredibly difficult to detect, as there are no visual cues indicating possession of legal status: if the majority of undocumented immigrants are undetectable pursuant to traditional physical-visual indicators, the FHA and § 1981 become ineffective means to safeguard the plight of undocumented persons denied housing. Race, ethnicity, and national origin as protected grounds cannot do enough when the motive behind landlord inquiries is immigration status.¹³⁷ Short of incorporating alienage status into the statutory language, these two forms of redress are limited by the nexus that must exist between the disparate discrimination against the immigrant and an already-existing protected class.¹³⁸ Such a nexus may not always exist in all circumstances of discrimination against immigrants.

PART V: PREEMPTION REMAINS NORMATIVELY DEFICIENT TO EFFECTUATE IMMIGRANTS' RIGHTS

Along this spectrum of “solutions,” preemption analysis is certainly an appealing and attractive alternative to the FHA and § 1981, and one which has seen judicial popularity in striking local anti-immigrant ordinances.¹³⁹ Indeed, scholars have increasingly reimagined the use of preemption doctrine to combat local anti-immigration ordinances that attempt to rely on police powers.¹⁴⁰ The preemption rationale has been favorably explored within the broader context of foreign relations and globalization, and has been supported as a means to affect uniform policy domestically and globally.¹⁴¹ The premise behind preemption is simple: states should not involve themselves in the federal domain, so as to contravene uniform national

137. For example, “there is a gap in protection for national origin minorities, who cannot be discriminated against because of their national origin per se, but who can be discriminated against based on characteristics associated with national origin.” Oliveri, *supra* note 85, at 86.

138. Oliveri provides an appropriate example of this conundrum aptly through an example of a landlord who adopts a citizen-only housing policy:

The noncitizens’ only recourse under the FHA would be to proceed under a disparate impact theory of discrimination, alleging that the permissible ground for discrimination (alienage) in fact operates to perpetuate discrimination on an impermissible ground (national origin). This would require the plaintiff to demonstrate that the alienage discrimination caused a significant disparate impact on a specific national origin minority group. Even if such a showing were made, the defendant would then be permitted to argue that the discrimination has a legitimate business justification.

Oliveri, *supra* note 85, at 84-85 (internal citations omitted).

139. Except for *Plyler v. Doe*, 457 U.S. 202 (1982), courts have emphasized preemption as a means to invalidate subfederal legislation targeting undocumented immigrants. *See, e.g.*, *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 764-72 (N.D. Tex. 2007); *Garret v. City of Escondido*, 465 F. Supp. 2d 1043, 1054-57 (S.D. Cal. 2006); *see also* Olivas, *supra* note 2, at 29 (maintaining that “there is no compelling reason to discard the preemption power, as it retains its common law and statutory vitality”).

140. *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1739-41 [hereinafter *The Rights of Others*] (arguing that a federal preemption-based institutional competence argument operates obliquely to effectuate immigrants’ equal protection rights and therefore acts as functional equal protection); Olivas, *supra* note 2.

141. Peter Spiro has argued that when viewed through an unraveling of the foreign policy lens, the immigration power “no longer remains an exclusive federal responsibility.” Spiro, *supra* note 2, at 134. In refuting Spiro’s argument that preemption is outmoded, Michael Olivas analyzes how preemption creates uniformity in light of the increasing need for a single, national U.S. immigration policy and for foreign uniformity, as the United States assumes its position as global leader. *See* Olivas, *supra* note 2, at 29; Michael A. Olivas, Comment, *Preempting Preemption: Foreign Affairs, States Rights, and Alienage Classifications*, 35 VA. J. INT’L L. 217, 236 (1994).

immigration policy.¹⁴² However, that does not mean that states have no role in regulation that merely touches the contours of the immigration power.¹⁴³ Advocates satisfied with preemption doctrine to further undocumented immigrants' rights recognize the problems with equal protection: alienage as a classification may warrant rational basis, and with it go much of the constitutional teeth. While likely not considered to be an "immutable" characteristic, alienage is as pervasive as other forms of discrimination, and the resulting consequences of that discrimination are no less disturbing or unsettling. According to these experts, preemption provides an ideal framework as it is "classification-blind."

Despite the emerging appeal of preemption doctrine,¹⁴⁴ the problem with the approach remains: it is a slow, painful, and sporadic process, untied to the notion that immigrants require affirmative and positive rights.¹⁴⁵ Indeed, courts can differ regarding whether crafty anti-immigrant housing ordinances defer appropriate authority to the federal government.¹⁴⁶ In some ways, the benefits of preemption analysis are its own weaknesses: by not framing and addressing the suspect nature of the immigrant class (or lack thereof), preemption analysis lacks a stable ground.¹⁴⁷ The preemption approach seeks to use the very anti-immigrant nature of federal immigration ideology to affect a positive outcome for immigrants. In this way, it is extremely results-oriented and should be short-lived.¹⁴⁸ Preemption does not care how a decision comes out—federalism cannot instill a proper immigrants' rights framework if undocumented immigrants as a class do not have a role in the decisional calculus.¹⁴⁹ Indeed, as Professor Motomura has noted, "for the typical

142. See *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (The "[p]ower to regulate immigration is unquestionably exclusively a federal power.").

143. *Id.* at 357 (concluding that Congress did not intend to absolutely oust state power to regulate within their police powers when it enacted the INA); Cf. Alyssa Garcia Perez, *Texas Rangers Resurrected: Immigration Proposals After September 11th*, 8 SCHOLAR 277, 290-91 (2006) (analyzing factors influencing whether state laws preempt federal law).

144. The affinity for preemption is evidenced by one scholar's remark that it is "almost certainly the most frequently used doctrine of constitutional law in practice." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994); see also Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) ("Preemption is one of the most widely applied doctrines in public law, yet it remains surprisingly underanalyzed."); Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 367 (2011) ("Preemption has become one of the most frequently recurring and perplexing public law issues facing the federal courts today.").

145. Preemption does not incorporate the immigrant into a nation. Its classification-blind mentality is therefore both a benefit and detriment. This has caused some scholars to shift away from a preemption model for immigrants' rights, at least in traditional state-defined areas. See Rodríguez, *supra* note 9, at 631 (arguing that "Congress should adopt a presumption against preemption" when communities regulate immigration matters to encourage integration).

146. See Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2061 (2008) [hereinafter *Immigration Outside the Law*] ("If a subfederal law purports to rely on federal standards, the connection between the meaning of unlawful presence and the scope of subfederal enforcement authority prompts a more complex inquiry.").

147. See Oliveri, *supra* note 85, at 68–69 (arguing that preemption is inherently unstable and not useful in challenging anti-immigrant housing restrictions). Professor Oliveri states, "First, there is no guarantee that future courts will find these ordinances preempted. The *Farmers Branch* ruling appears to be limited to the facts, and it is entirely possible that future courts will break with *Hazleton* and find that ALL housing provisions are not preempted at all." *Id.*

148. See *Immigration Outside the Law*, *supra* note 146, at 2064 ("conventional focus on preemption is fragile").

149. See Marisa S. Cianciarulo, *The "Arizonification" of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L.

subfederal law targeting immigration outside the law, . . . the only available constitutional challenge is preemption—a poor vehicle for articulating the policy dimensions of such concerns based on animus.”¹⁵⁰ Preemption also ignores the material reality of immigrants’ lives, as it is unable to address backdoor occupancy ordinances that attempt to restrict overcrowding or public safety.

Another problem with preemption is that courts must ascertain the often ambiguous intent of the INA in finding whether an ordinance is express; implied or field; or obstacle or conflict preempted. Thus, while equal protection doctrine for aliens has certainly been underdeveloped and unpredictable, the question of whether a state law is a “regulation of immigration” can be equally complex. To say that equal protection lacks clarity is an understatement, particularly when preemption analysis can hardly be deemed straightforward as states and the federal government increasingly cooperate. The original spheres and duties of states and the federal government have become less clear and more overlapping.¹⁵¹ Deputization of state and local government actors as part of the immigration scheme brings the immigration power away from the border, and serves to further confuse what is the proper scope and balance of federal and state control.¹⁵²

Another reason to leave preemption behind is that, eventually, a state or local ordinance will delegate sufficient referral or authority to the federal government that it cannot be said that states or municipalities are acting without or against the intent of Congress and the federal scheme. Similarly, preemption will continue to fall into disuse as more laws are carefully written to appear facially neutral, leaving out any references to immigrants or immigration and couching the law as a regulation within traditional confines of state police power. As states become more creative and accommodating of the federal scheme, preemption will lose its potency. This phenomenon is already being played out—local ordinances are increasingly deferring to schemes requiring federal confirmation before state action and are often written as housing provisions regulating “overcrowding,” “maximum occupancy,” and “family.”¹⁵³ In several states, primarily in the South, these

REV. 85, 128 (2012) (describing preemption doctrine as dispassionate); Jason H. Lee, *Unlawful Status as a “Constitutional Irrelevancy”?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 28-29 (2008) (“Equal Protection Clause recognizes the humanity of illegal immigrants in a way that preemption doctrine . . . does not. The protection of an individual’s rights under the Equal Protection Clause acknowledges his personhood. . .”).

150. *Immigration Outside the Law*, *supra* note 146, at 2065. Cf. Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L. J. 940, 941 (1980) [hereinafter *State Burdens*] (providing that preemption model “better orders alienage jurisprudence than does equal protection analysis” and is “conceptually appropriate to the analysis of alienage regulations”).

151. See *Immigration Outside the Law*, *supra* note 146, at 2060-68 (discussing the relationship between unlawful presence and enforcement authority in immigration law). Motomura defines the distinction as whether immigration law is self-executing or discretionary. If self-executing, subfederal enforcement tends to pose no conflict, but if discretionary, such enforcement does conflict. He describes the discretionary nature as *de facto* immigration law. *Id.*

152. This problem has been given substantial attention by the academy, but there is no clear answer. As Motomura describes, the criticism against state and local involvement in immigration enforcement not only falls on the question of state use of race and ethnicity, but also on the concern that “not only unauthorized migrants, but also lawfully present U.S. citizens and noncitizens, will suffer targeting and discrimination by race and ethnicity.” *The Rights of Others*, *supra* note 140, at 1743; see, e.g., Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 318-20 (2009); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 982-83 (2004).

153. See Guzmán, *supra* note 109, at 402.

maximum occupancy ordinances have taken hold most likely in order to curtail minority or Latino settlement.¹⁵⁴ Whether these are “regulation[s] of immigration” preempted by the federal regulatory mosaic appears much harder to answer; the fact that the ordinances are facially neutral and fall within the traditional police power of housing regulation gives the state a favorable presumption that the legislation is proper.

This observation has incited some scholars to find that the correct decision regarding preemption is to actually uphold these local anti-immigrant ordinances. That is, preemption is outmoded and states should play an increasing role locally and internationally. According to Professor Spiro, a long time critic of preemption doctrine, federalism functions competitively with state and federal interests constantly at odds.¹⁵⁵ When states legislate, they do so at the cost of federal national authority, and vice versa. For Spiro, the proper rationale is to sustain anti-immigrant local ordinances against constitutional invalidation because state enactments on the local level force states to balance the costs of the law with the purported benefits they confer.¹⁵⁶ This balancing, Spiro suggests, would create a process of self-realignment for the states, such that, upon actual application of the state ordinance and further introspection, these discriminatory laws will inevitably wither away.¹⁵⁷ Throughout this experimentation, states can satisfy their anti-immigrant agendas and avoid pushing for the same on a federal level. In this sense, the anti-immigrant sentiment is channeled at the subfederal level, like a “steam-valve,” foreclosing national action.¹⁵⁸ Such a conception would appear to base the creation of state ordinances on a state’s proper balancing of the costs and benefits of the local legislation with the adverse impact of immigration influxes.¹⁵⁹

Where this reasoning founders, however, is that state ordinances do not always engage in this balancing appropriately. Rather, the discriminatory animus involved in the promulgation of local ordinances indicates that state balancing goes awry—that there are circumstances which may compel states to disregard the fiscal costs of state ordinances in favor of the social costs of racial steering¹⁶⁰ and an “improved” community. In other words, states can nonetheless disregard the actual costs of anti-immigrant ordinances and engage the irrational decision to take a

154. See Database of Recent Local Ordinances on Immigration, FAIR IMMIGRATION REFORM MOVEMENT (July 23, 2007), www.ailadownloads.org/advo/FIRM-LocalLegislationDatabase.doc (providing list of anti-immigrant housing ordinances as of 2007); PRLDEF List of Local Ordinances (Nov. 29, 2007), www.ailadownloads.org/advo/.

155. See Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

156. *Id.*

157. See *id.* (arguing that state and local governments should proceed by trial and error because having the national government pass strong anti-immigrant sentiments would affect disfavored policies; instead, state activism in this way will promote competition between states themselves); see also Peter J. Spiro, Op-Ed, *Let Arizona’s Law Stand*, N.Y. TIMES, Apr. 23, 2012, at A19 (proposing that Arizona S.B. 1070 should be upheld because striking the law would encourage tougher laws at the federal level).

158. Spiro, *supra* note 155, at 1627.

159. *Id.* at 1640-41 (“Most important are the concrete economic interests which would militate against adopting anti-alien measures. Leaving aside presumed across-the-board corporate preferences for a greater supply of labor (rendered cheaper thereby), foreign corporations might have an aversion to locating in states that appear unreceptive to aliens in general, or to their nationals in particular.”).

160. For a discussion on racial steering, see McEntire, *supra* note 81, at 312.

financial hit if it means removing a particular class of persons from residing in state borders. Such a deficiency has been reflected in the literature, which has evolved to address the much more complex nature of the federalism relationship. Indeed, Professor Olivas has contrasted Spiro's steam-valve theory¹⁶¹ with a much more fluid and flexible principle to better reflect that the state-federal dialectic does not operate as a zero-sum game, as Spiro may believe, but rather as a tug-of-war where each side always maintains some degree of control.¹⁶² The preemption landscape is thus quite contested.

Furthermore, preemption doctrine permits courts to avoid the basic question on everyone's mind: what standard of review applies to undocumented immigrants as it relates to housing?¹⁶³ The Supreme Court will likely not provide a direct answer. Instead, alienage classifications are likely assessed pursuant to a balancing test, first propagated in *Plyler v. Doe*,¹⁶⁴ because citizenship and immigration status are mutable by definition and because immigrant rights jurisprudence is plagued by various considerations from "outside the law."¹⁶⁵ The Court will continue to embark on its quasi-fundamental/quasi-suspect balancing test to analyze specific anti-immigrant local ordinances. The stronger the right at issue and the need to protect the class, the more likely the Court is to engage in heightened levels of review. In any event, I find this functional approach preferable over a preemption approach because it forces the Court to grapple with the constitutional dilemma. In this regard, there is at least some minor appeal to forcing the Court to perform an equal protection-tiered analysis if the class affected is a discrete and insular minority. Preemption, by contrast, seems lacking.

It has been said that "challenges to the landlord ordinances based on the Equal Protection Clause may be most difficult to support, but the equality concerns to which these ordinances give rise are significant."¹⁶⁶ Any equal protection argument addressing these anti-immigrant housing ordinances is no easy foray, but there is still viability in the claim that litigants should not steer away from its use. The difficulty in the equal protection argument lies in the recognition that for a disparate impact claim to be proven, there must also be evidence of discriminatory intent or purpose. That these ordinances were "intended to have such an effect" on immigrants is a high bar, and the facts suffer from the problem of "cross-contamination." Plaintiffs can claim that the disparate impact is against Latinos or other minority groups, thus invoking national origin or race discrimination (and not

161. See Spiro, *supra* note 155.

162. See Olivas, *supra* note 2, at 30 (power "flows between states and the federal government: there is a constant tug between the two levels, in an almost-hydraulic relationship. As the federal piston pulls, state powers are accordingly diminished; as the state powers increase, the federal piston correspondingly decreases."); see also Olivas, *supra* note 141, at 219-27 (critiquing Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994)).

163. Sosa Thomas, "Mi Casa No Es Su Casa": How Far Is Too Far When States and Localities Take Immigration Matters into Their Own Hands, 29 CHICANO-LATINO L. REV. 103, 112 (2010) ("Courts have yet to rule definitively on the constitutionality of local ordinances that prohibit renting to undocumented immigrants. Various courts have dodged the constitutional issue by issuing restraining orders and injunctions, mostly expressing concerns about the comparative harm to the plaintiffs if these ordinances are put into effect.")

164. 457 U.S. 202 (1982).

165. See *Immigration Outside the Law*, *supra* note 146.

166. CRISTINA RODRIGUEZ ET AL., TESTING THE LIMITS: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES (2007).

necessarily alienage). While that is conducive for establishing valid legal claims under other instruments such as the FHA, it serves to muddy the distinction between alienage (immigration status) and national origin, the former being the classification prompting the discrimination under cover of race, color, or national origin discrimination. Thus, while in result, the discrimination—whether against Latinos or against unlawful status—remains the same, the racial animus motivating the facially neutral laws is not. States may irrationally discriminate and be reprimanded for the discrimination in their ordinances by fact finders, but because alienage discrimination may be manifested through other more prototypical discrimination, the alienage discrimination itself often goes unaddressed. The discrimination receives scarce formal recognition and is also subject to states positing false justifications of their legislative intent.

But before providing an analytical framework that reimagines the core questions of equal protection, it is necessary to recognize why preemption is inadequate. Equal protection provides for positive rights and may provide an avenue to legally eliminate the distinctions between documented and undocumented immigrants.¹⁶⁷ It is integral to “highlight [aliens’] equal moral membership in America . . . because the preemption approach does not always prevail.”¹⁶⁸ At least one scholar has recognized the importance of breaking down the illegal/legal distinction between immigrants:

Illegal immigrants are morally entitled to the same benefits and services provided by states to legal immigrants. . . . This is accomplished through the articulation and application of a participation model of rights that stresses the moral significance of an individual’s membership within society rather than his or her status as a citizen or legal immigrant.¹⁶⁹

Furthermore, Motomura has argued that an understanding of equal protection that synthesizes legal and illegal status “allows the federal government to justify alienage classifications in ways that states sometimes cannot.”¹⁷⁰ As a result, equal protection may possess continuing vitality, practically and normatively, for immigrants’ rights.¹⁷¹

Simultaneously however, while acknowledging the normative benefits of equal protection, Motomura has accepted that models based on institutional or decision-maker accountability can be more availing and receptive to courts.¹⁷² But

167. See Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 98-99 (1985); Lee, *supra* note 149, at 5 (“[T]he equal-protection doctrine highlights the dignity and membership of an individual in American society in a way that the more structural preemption analysis does not.”).

168. Lee, *supra* note 149, at 5.

169. *Id.* at 6-7; see also Linda S. Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 *THEORETICAL INQUIRIES L.* 389, 389 (2007) (“[R]ights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence.”).

170. Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 *VA. J. INT’L L.* 201, 206 (1994).

171. See Lee, *supra* note 149, at 11 (arguing that the treatment of illegal and legal immigrants should be indistinguishable, such that illegal immigrant classifications deserve strict scrutiny—essentially articulating an overruling of *Plyler v. Doe*, 457 U.S. 202 (1982)).

172. See *The Rights of Others*, *supra* note 140.

these frameworks dismiss the importance of the need to specifically address the basic issue: that undocumented immigrants simply must have affirmative rights, manifest through equal protection, which preemption and system-based approaches fail to directly address. As preemption changes or evolves so as to proscribe rights from undocumented immigrants, equal protection must reassume its mantle.

To be clear, if we want affirmative answers, litigants should be willing to raise the constitutional questions. Advocates should argue based on equal protection jurisprudence rather than rest on the usually plenary immigration common law employed in the preemption arguments. Because many courts do not address equal protection challenges when disposing of legal infirmities through preemption doctrine, courts foreclose affirmative rights and assume that equal protection is not applicable. If that is true—that equal protection is ill-equipped to address undocumented immigrant rights—we have surely strayed from the core message of *Carolene Products*, that there are instances where “more exacting judicial scrutiny” is required to protect “discrete and insular minorities” against prejudice.¹⁷³

PART VI: DISPARATE IMPACT EQUAL PROTECTION ANALYSIS REMAINS AN EFFECTIVE LEGAL STRATEGY THAT RECOGNIZES THE ROLE OF PRETEXT IN LOCAL ANTI-IMMIGRANT HOUSING ORDINANCES

A. *The Disconcerting Equal Protection Landscape Denying Undocumented Immigrants of Suspect Classification: Reconsidering Plyler v. Doe*¹⁷⁴

Advocates have shied away from equal protection avenues for legal redress of aliens’ rights. This is caused in part by the unpredictable nature of current case law and the Supreme Court’s failure to answer with any particularity the scope of undocumented immigrants’ rights to access to housing as a constitutional matter.¹⁷⁵ To be fair, equal protection jurisprudence is anything but straightforward or concrete, and this uncertainty has been recognized as a failure of equal protection.¹⁷⁶

Since *Graham v. Richardson*, alienage classifications are inherently suspect and subject to “close judicial scrutiny” by virtue of undocumented immigrants being a perfect example of a discrete and insular minority.¹⁷⁷ While the Court has found that federal law prevents states from denying the “necessities of life, including food, clothing, and shelter”¹⁷⁸ and that the denial of “entrance and abode” likewise

173. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The case also established the proposition that different constitutional claims are subjected to different spectrums of review. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163 (2004).

174. 457 U.S. 202 (1982).

175. See John Ryan Syllaios, Note, *The Future of Discriminatory Local Ordinances Aimed at Regulating Illegal Immigration*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 639, 657 (2010) (arguing that because the Court has not answered the threshold question whether illegal immigrants targeted by ordinances enjoy the rights of U.S. citizens, arguments under the First Amendment, the Contract Clause, the Equal Protection Clause, and the Due Process Clause are weaker than the preemption argument).

176. *State Burdens*, *supra* note 150, at 942.

177. 403 U.S. 365, 372 (1971) (striking down a state law denying welfare benefits to undocumented immigrants).

178. *Graham*, 403 U.S. at 380; see also *Truax v. Raich*, 239 U.S. 33, 42 (1915).

contravenes federal law and would be struck down,¹⁷⁹ these determinations are merely dicta and remain difficult to logically reconcile with *Plyler v. Doe*.¹⁸⁰

Any discussion of equal protection for undocumented persons must discuss the problematic conclusions derived from *Plyler*—that adult undocumented immigrants do not deserve strict scrutiny.¹⁸¹ In this Part, I discuss how the Court should reconsider their reasoning in *Plyler*, and articulate a more concrete stance on the treatment of undocumented immigrants. First, I argue that *Plyler*'s incoherent reasoning makes it ripe to be overruled as an initial matter.¹⁸² It relies on fragile support to come to the conclusion that undocumented children are a more desirable class than undocumented adults. Second, even if it is not overturned, *Plyler* does not preclude the possibility of intermediate scrutiny for adult undocumented immigrants.¹⁸³ Alternatively, should *Plyler* be sustained, equal protection can still protect undocumented immigrants through a stronger disparate impact analysis than has been traditionally recognized in housing law.

In *Plyler*, the Court declared unconstitutional a Texas law providing a free public school education for citizen children, but requiring children of undocumented parents to pay for the same.¹⁸⁴ The Court concluded that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a constitutional irrelevancy. Nor is education a fundamental right.”¹⁸⁵ In coming to this determination, the Court emphasized the voluntary choice involved in entering the purported class and the criminal nature of the act.¹⁸⁶ The Court balanced these factors against the importance of education to operate in society and the fundamental unfairness of punishing innocent children for acts of their parents.¹⁸⁷ In so doing, the Court engaged in rational basis review beyond the normal contours whereby “challenged statutory classifications are [usually] accorded a strong presumption of validity, which is overcome only if the party challenging them negates ‘every conceivable basis which might support it.’”¹⁸⁸

This is where the Court derived a most remarkable inference to justify departing from the traditional rational basis examination. In protecting undocumented children but excluding adult undocumented immigrants from similar

179. See *Graham*, 403 U.S. at 379; see also *Truax*, 239 U.S. at 42.

180. 457 U.S. 202 (1982).

181. *Id.* at n.19 (“We reject the claim that ‘illegal aliens’ are a ‘suspect class.’”).

182. Few have supported that *Plyler* was correctly decided; rather, scholars have argued that the case lacks doctrinal sense. See, e.g., Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 16-23, at 1553 (2d ed. 1988) (desiring that the Court provide a “sturdier analytic foundation” for the result reached); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54-58 (1984) (stating there are “significant problems with the Court’s reasoning [in *Plyler*]”); cf. Kenneth L. Karst, Essay, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 323-24 (1986); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1444-45 (1995).

183. Compare Ryan Terrance Chin, Comment, *Moving toward Subfederal Involvement in Federal Immigration Law*, 58 UCLA L. REV. 1859, 1909-10 (2011) (asserting that baseline scrutiny for immigrants should be intermediate scrutiny), with Weeden, *supra* note 8, at 488 (calling for strict scrutiny for any immigrant targeted by hostile local government policy).

184. 457 U.S. at 206.

185. *Id.* at 223.

186. 457 U.S. at 219 n.19.

187. *Id.* at 219-23.

188. *True v. Nebraska*, 612 F.3d 676, 684 (8th Cir. 2010) (citing *Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 797 (8th Cir.1996)).

heightened scrutiny, the Court placed an importance on volition and the fact that children have no such capacity to contravene federal law. The Court declared that undocumented children “can affect neither their parents’ conduct nor their own status.”¹⁸⁹ The Court essentially differentiated undocumented children and parents as not similarly situated, and chose to protect the former at the cost of the latter. The Court carved out a space for increased deference and sympathy for groups of persons unable to control their circumstances, a surprising determination unfounded in equal protection or in any analysis for determining suspect classifications. Indeed, such an “innocence” or capacity defense is striking and only appears defensible because the affected group is children. Justice Brennan, writing for the majority, after surveying the substantial shadow population and creation of a permanent second caste, found that the “children who are plaintiffs in these cases are special members of this underclass.”¹⁹⁰ Thus, the Court appeared to believe that undocumented children, even within the larger class of undocumented persons generally, should be treated differently from their parents. This focus on volition underscores the concept of mutability in two distinct ways: (1) that undocumented immigrants can choose to become part of this class, and (2) that once within U.S. borders, they can eventually exercise the further option of naturalizing.

How should one treat someone who has chosen to enter illegally, but nonetheless has ties and duties to the nation and possesses a desire to integrate? The problem is that the system does not recognize the intent to become a citizen at this stage of analysis. If courts could define and differentiate those undocumented immigrants desiring to become citizens from those who do not, then perhaps the equal protection doctrine could better reflect that intent and offer substantial protections to those with desires of citizenship. The fact of the matter, however, is equal protection does not yet treat undocumented immigrants so finely in this manner. In other words, courts theoretically should protect those undocumented immigrants with citizenship intent to a larger and greater extent than those undocumented immigrants with no intent to become permanent residents or citizens. At the same time however, the immigration petition-based system scrutinizes those with immigrant intent, and this negative treatment exacerbates judicial indecision. Courts would ideally protect undocumented immigrants under strict scrutiny review, but because the class itself includes these fine gradations of people who both desire and do not desire to become productive permanent members, the tiered scrutiny system remains incompatible and unable to efficaciously capture the complete class for protection. Therein lies a frustration with equal protection discourse: the tension between some classes of undocumented immigrants we prefer (children) versus those we do not (adults). The Court may continue to try and fit “undocumented immigrant” within the confines of the three levels of scrutiny to no avail, since these fine gradations are simply irreconcilable with a blanket categorization that “all undocumented immigrants” deserve a particular level of constitutional inquiry.

To demonstrate the fact that undocumented immigrants do not fit neatly into the tiered scrutiny system, we engage the *Plyler* court’s baffling use of rational basis

189. *Plyler*, 457 U.S. at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)). The *Plyler* Court further continued that “[w]e are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to basic education.” *Id.* at 226.

190. *Id.* at 219.

language mixed with intermediate scrutiny support. The Court repeatedly referenced the rational basis standard, but functionally relied on common law that substantiates an intermediate level review.¹⁹¹ In many portions of the Court's analysis, there is a mixture of the appropriate level of review:

We have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a *substantial interest* of the State."¹⁹²

The *Plyler* decision is itself conflicted. The critical message to take from this confusion, however, is that at the least, intermediate scrutiny for undocumented immigrants is a possibility.¹⁹³ Indeed, it is plausible that in the future, the constant balancing involved in the undocumented suspect class analysis will lead to a finding of intermediate review. Thus, the crucial lesson from the decision should not be that regulations bearing on undocumented immigrant children warrant strict scrutiny, but rather, undocumented immigrants as a class are not foreclosed from midlevel review.

In many ways, Justice Marshall's concurrence has foreseen this incompatibility of undocumented immigrants with structured levels of review.¹⁹⁴ Because of the many variables involved in cases involving undocumented immigrants, the sliding scale approach is best suited for holistically examining the undocumented person. By contrast, the three-tiered approach would result in a zero-sum game of blanket protection or no protection.¹⁹⁵ Regrettably, the political reality places undocumented immigrants far from any such protection, and it is doubtful that courts will abandon their historical levels of review to accommodate the sliding scale, despite the latter better fitting the class of undocumented immigrants.

Plyler should be overruled because it improperly elevates conscious choice to disregard the law as an absolute bar to higher levels of constitutional scrutiny. The case patently overemphasized the volitional nature of undocumented immigrants and

191. *Id.* at 218 n.16.

192. *Id.* at 217-18 (emphasis added). The "substantial interest" language is repeated twice more in the majority opinion, serving only to further muddle the rational basis standard initially explicated. *See id.* at 224, 230.

193. *Id.* at 239 (Powell, J., concurring) ("In my view, the State's denial of education to [children based on legal status] bears no substantial relation to any substantial state interest.").

194. Justice Marshall is not the only one to observe the problems with the tiered scrutiny framework. *See* Mario L. Barnes & Erwin Chemerinsky, Essay, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1080 (2011); Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2342-43 (2006) (offering critiques of the three-tiered regime).

195. This is the quasi-suspect class/quasi-fundamental rights balancing, which I mentioned earlier in Part V. *See, e.g., Plyler*, 457 U.S. at 231 (Marshall, J., concurring). The sliding scale approach essentially instructs that courts should consider other factors than the suspect nature of a class, including the importance of various interests and the invidiousness of the basis of the classification. *Id.*; *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring, stating that "what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting, rejecting the majority's characterization of a "variable standard of review" as the Court appearing as a "super-legislature") (internal quotation omitted).

created precedent refusing to view undocumented status in a suspect way. Simply because a group of persons choose to enter a class does not implicate the automatic assumption that they cannot ipso facto be deemed a suspect class. Other factors intervene which may support a finding that they do, nonetheless, deserve greater constitutional protection. While the Court certainly balanced many of the factors of footnote four of *Carolene Products* to arrive at the outcome that alienage and lawful status are not strictly protected, it functionally overstated mutability and choice when other circumstances compel the alternate determination.¹⁹⁶

If we permit volition to assume the role that the Court believed it played in *Plyler*, it will be a long while, if ever, until alienage becomes a suspect classification.¹⁹⁷ Once undocumented persons have crossed the border, despite the action being a voluntary or involuntary choice, they are still disenfranchised and remain at the whims of the public, local regulation, and great animosity. Perhaps the mutability of a class or volitional nature of a group should not be dispositive in the determination whether a group is a suspect class. It is evident, however, that for undocumented immigrants, the political tensions and compromising position in which they find themselves require a rethinking of not only *Plyler* but of the fundamental definition of suspect classifications.¹⁹⁸ Accordingly, the case for *Plyler*'s continuing validity is a weak one, its reasoning strained, and logic fraught with lingering questions.

If *Plyler* were to sustain any positive legacy for adult, undocumented immigrants, any such contribution would certainly be a small, miniscule benefit compared to the incredibly fact-intensive confusion it has prompted. The case seems to only pave the way to an argument that other fundamental interests may be on par with the special interest of education, or that other fundamental interests deserve special treatment because of a connection to basic functionality in the American system. This "importance of a fundamental interest" argument hardly seems to be sufficiently tangible or concrete to convince a court, but given that *Plyler* has not been overruled, it is surely one weak argument to attempt. As Justice Brennan stated:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction . . . [E]ducation provides the basic tools by which individuals can lead economically productive lives

196. The reluctance to accept undocumented adult immigrants as a suspect class may be attributable to the highly political and racial undertones of this social group, but also because suspect class formation has been foreclosed for some while now as a result of "pluralism anxiety." See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756-58 (2011).

197. See *id.* at 757 (noting that the Supreme Court has not created a new suspect class worthy of heightened review since 1977 and stating that "[a]t least with respect to federal equal protection jurisprudence, this canon is closed.").

198. For one such redefinition of "suspect," see Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 38-42 (2010) (arguing that court jurisprudence reflects two underlying themes for a finding of elevated scrutiny: political process and individual fairness rationales). By contrast, I view the jurisprudence taking a much finer distinction along volition and mutability.

to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.¹⁹⁹

Thus, amidst detrimental language, we encounter this tiny gem. The difficulty in applying such language remains, however, since housing has not been recognized as a fundamental right,²⁰⁰ and is likely only an important interest.²⁰¹ If one can draw sufficient parallels between access to housing and the quasi-fundamental nature of education, then maybe a child-based challenge to housing deprivation can likewise succeed. If plaintiffs successfully analogize housing to education as gatekeeper rights,²⁰² or as avenues for true equality and functionality to contribute to American society, then it may be possible to use the lessons of *Plyler* as a litigation tool.²⁰³

Problematically, this argument ultimately remains quite aspirational. While both housing and education are important social interests, the argument persists that education is still very different from and superior to housing in its capacity for incorporation and integration of undocumented persons into society.²⁰⁴ Whereas housing only allows for the ability to stay and remain, education incorporates and integrates a person more actively and aggressively. Perhaps, for undocumented immigrants particularly, the Court may be more open to calling something a fundamental right if it also facilitates this integration and incorporation theme.

Conversely, it is at least arguable that housing is more fundamental than education.²⁰⁵ The *Plyler* dissent attacked the majority's conclusion as suggesting "no meaningful way to distinguish between education and other governmental benefits" and vociferously questioned whether the majority makes education "more 'fundamental' than food, shelter, or medical care."²⁰⁶ The *Plyler* decision, therefore, seems to push the fundamental rights analysis²⁰⁷ by adding another category:

199. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citations omitted).

200. See *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972) (holding that the "need for decent shelter" and "right to retain peaceful possession of one's home" were not fundamental interests); see generally *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (observing that other interests were at stake and outweighed an interest in living together as an unmarried family unit).

201. *Plyler*, 457 U.S. at 248 (Burger, J., dissenting, indicating that housing is an "important governmental benefit[']").

202. See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 972-73 (2004) (discussing "property regimes" where the law grants owners a "gatekeeper" right to exclude others from a resource, to "governance regimes," which focus on proper use of a resource). Rather than sharing Smith's definition of gatekeeper right, I use the phrase as an adjective to qualify the importance of housing as a precondition to all other rights. After all, residency and housing are often the first rights people desire before they reach out for other services.

203. Indeed, this appears to be the trend for *Plyler*'s future at least in the interim. See *infra* note 209; see also Raquel Aldana et al., *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5, 60 (2012) (noting that "the *Plyler*-treatment of undocumented children as a quasi-suspect class . . . might also be a challenge worth raising in future litigation if Congress fails to resolve the plight of undocumented students.").

204. See *Immigration Outside the Law*, *supra* note 146, at 2071 (discussing the integration of immigrants into the community as one of the three "themes" of *Plyler*).

205. This distinction was raised by the *Plyler* dissent in differentiating education from other important rights. 457 U.S. at 247-48 (Burger, J., dissenting).

206. *Id.*

207. Such traditional fundamental rights analysis usually entails a discussion of whether the freedom or interest is "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people to be ranked as fundamental." *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937).

whether the interest at stake also aggressively incorporates undocumented persons into active, political citizenry. If the interest does, it is more likely to be deemed an important interest.

The largest drawback to the Fourteenth Amendment argument is the uncertainty of available cases and tools from which to draw, rather than from the actual merit of the equal protection or due process approach itself.²⁰⁸ Some scholars suggest that the equal protection and due process routes may be the strongest of protections available to aliens and are protections that courts are most likely to address.²⁰⁹ Others have resorted to a historical analysis of the Equal Protection Clause and have implored that it was enacted to prevent the legislative formation of a second-class citizenry.²¹⁰ Still many reject the validity of an equal protection strategy because *Plyler* presents an insurmountable barrier,²¹¹ or they have advocated that a particular anti-immigrant housing ordinance also burdens children, thereby criticizing the over-inclusiveness of the regulation. Such child-based equal protection arguments²¹² invariably limit the ability to raise challenges, as the challenges must compose of or have some nexus to children,²¹³ which surely is not always the case.

208. See Michael A. Olivas, *The Political Efficacy of Plyler v. Doe: The Danger and the Discourse*, 45 U.C. DAVIS L. REV. 1, 20 (2011) (discussing that *Plyler's* "incorporation of 'inchoate' federal policy and lack of efficacy failed to generate clear doctrine or guidelines."); Syllaios, *supra* note 175, at 664-65 ("Whether the Supreme Court could find that the ordinances are unconstitutional because they deny constitutional rights to illegal immigrants is more difficult to predict. As noted earlier, the Supreme Court's current jurisprudence regarding whether illegal immigrants are entitled to constitutional rights is still ambiguous.").

209. See *Lozano v. City of Hazleton*, 620 F.3d 170, 219-22 (3rd Cir. 2010) (finding the Hazleton Ordinance preempted by federal law and highlighting the importance of aliens' due process rights); see also Syllaios, *supra* note 175, at 665 ("This indicates that, in the future, the Court may be more likely to find that a given set of illegal immigrants is entitled to enjoy those two constitutional rights, to the exclusion of the others.");

210. Laura A. Hernández, *Anchor Babies: Something Less Than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331, 334-40 (2010).

211. 457 U.S. 202, 219 n.19 (1982) (standing for proposition that adult illegal immigrants are not a suspect class, and therefore do not merit strict scrutiny). Peter Schuck has noted that "[s]ome of the manifest difficulties of devising a new constitutional order in an area of law that has long defied one are revealed in *Plyler v. Doe*, in which the Court felt obliged to turn conventional legal categories and precedents inside out in order to reach a morally appealing result." Schuck, *supra* note 183, at 82-83.

212. See Hernández, *supra* note 212, at 360-64 (arguing that citizen children of undocumented immigrants should constitute a suspect class because of their powerlessness and dependency).

213. *But see Ruiz v. Robinson*, No. 11-cv-23776-KMM, 2012 WL 3779058 (S.D. Fla. Aug. 31, 2012). In *Ruiz*, grown citizen children of undocumented parents challenged a state statute that treated residents with undocumented parents as "out of state" for tuition purposes, thereby subjecting them to higher rates. *Id.* at *3. The case represents a fascinating application of *Plyler* and begs the question of whether and to what degree *Plyler* can be employed as precedent. The court's references to *Plyler* demonstrate some possibilities for *Plyler's* credence moving forward, but whether that application is restricted to the realms of education and citizen immigrants, or toward a more general lesson is opaque. What is clear from *Ruiz*, however, is that the "importance of public education" extends into higher secondary education and is no longer restricted to the developing childhood years. *Id.* at *6. To be fair, it cannot be doubted that this, like *Plyler*, is an education access case. Where the challenged law in *Plyler* would have forced children to pay for their public education, the challenged law here similarly subjects adult citizen immigrants to greater tuition payments. The similarities between the cases are striking, but what is even more promising is that the lessons of *Plyler* extend to the group of adult citizen immigrants in *Ruiz*. This extends *Plyler's* reach beyond immigrant children, and can be explained in a variety of ways. The court likely believed that these older immigrant children deserve fair tuition rates because they have contributed to the U.S. life and economy, having developed ties here since birth. Alternatively, the court may have simply transferred the theme of the "importance of public education as an integrative force" onto adult citizen immigrants. Further, and what would be most assuring, is if the court recognized that

B. Towards Disparate Impact in Housing and the Role of Discriminatory Intent

In spite of the jurisprudential indeterminacy, there is confidence in the Fourteenth Amendment equal protection promise to prohibit states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”²¹⁴ Some have even envisioned a rethinking of the *Carolene Products* analysis in efforts to explore the suspect nature of undocumented immigrants.²¹⁵ Surely, it is one thing to be unrepresented in the political process and be powerless under neutral treatment from the majority; it is quite another to subject undocumented persons to an unresponsive political machine while relegating immigrants to an oppressive local movement.²¹⁶ In the latter formulation, the undocumented population requires real, immediate recourse to address their oppression but is politically powerless to call to attention such much-needed redress. In the former, neutral treatment does not demand they be protected immediately. Instead, their political representation or ability to raise concern becomes less compelling, and they may continue to “observe” their phantom status.

Although the *Plyler* logic is tenuous, the argument must be entertained: How can an equal protection analysis for undocumented persons proceed notwithstanding the case? This is a daunting challenge and has deterred some scholars from actualizing an equal protection framework, as it is indeed tempting to rely merely on the FHA and § 1981.²¹⁷ I nevertheless formulate my equal protection vision by borrowing from its operation within the specific context of housing. In this way, equal protection for undocumented immigrants has much to learn from the different role discriminatory intent plays in the housing arena.²¹⁸ Consequently, it is integral to recognize the development of *Arlington Heights*²¹⁹ in addressing disparate

even adult citizen immigrants should not be punished for the actions of their parents. If this latter justification is correct, we are beginning to see a court trend whereby punishing children for parental action may become a relic of a bygone era. Conversely, courts may simply be reemphasizing the significance of education as more than mere fundamental interest. Cases like *Ruiz* flesh out education as essential, regardless of immigration status and age.

214. U.S. CONST. amend. XIV, § 1. It is uncontroversial that the Fourteenth Amendment applies to persons, regardless of alienage status. *Graham*, 403 U.S. 365, 371 (1971) (citing *Truax v. Raich*, 239 U.S. 33, 39 (1915)); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

215. See Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1140-41 (2006) (recognizing the powerlessness of undocumented persons both socially and politically, but finding the “discrete and insular” *Carolene Products* framework deficient, as it cannot grasp that promoting rights for undocumented immigrants likewise protects and serves the general welfare of the majority); see also Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L.J. 105, 141-48 (1997).

216. See Neuman, *supra* note 182, at 1452 (“Having no right to vote, and being subject to a label that obscures their common humanity, aliens are an easy target for political scapegoating. Equal protection doctrine must be responsive to this dynamic. This necessity goes beyond preemption, and beyond children.”).

217. See Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 GA. ST. U. L. REV. 619, 692-93 (2012) (discussing pros and cons of disparate impact equal protection approach and deciding that a modified FHA approach based on *Keating* liability standard is preferred).

218. Oliveri, *supra* note 85, at 84 n.127 (discussing alienage-based housing discrimination).

219. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290 (7th Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights IV)*, 469 F. Supp. 836 (N.D. Ill. 1979); Guzmán, *supra* note 109, at 426-27.

impact and housing discrimination.

Daniel Guzmán has succinctly articulated the purview of disparate impact claims, summarizing the legal framework as taking two different forms within the circuits: the softer and less rigorous standard from the Second Circuit and the more traditional, rigid formation adopted in the other circuits.²²⁰ The Second Circuit test, established in *Tsombanidis v. West Haven Fire Department*,²²¹ provides that a plaintiff, in order to succeed on a disparate impact theory, must prove the following: the occurrence of certain outwardly neutral practices, and a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.²²²

Upon further review of this two-part test, it becomes apparent why this framework for addressing discrimination claims in housing is attractive to undocumented persons. The plaintiff need not demonstrate that the discrimination was intentional, but must merely profess that the facially neutral practice or law did indeed occur, and that it discriminatorily impacted "persons of a particular type,"²²³ the cognizable group. While the plaintiff is not relieved from proving causation and cannot justify a claim upon mere inferences lacking probability, this flexibility is certainly a boon for discrimination claims raised by undocumented immigrants. Previously, undocumented immigrants' main problem with an equal protection approach was the difficulty, in certain instances, of demonstrating that state legislators intended to discriminate against a protected group.

That is not to say, however, that the Second Circuit framework lacks any bite. To establish the second prong of an adverse or disproportionate impact, the plaintiff still must prove that the challenged practice (here, the landlord's inquiries into immigration status) "actually or predictably results in . . . discrimination."²²⁴ The state defendant can rebut the challenge by showing that the ordinance furthered a legitimate, bona fide state interest and that no other alternative existed which could address the governmental interest with less discriminatory effect. The two-step test simply removes the element of intentional discrimination from the plaintiff's burden.²²⁵

220. Guzmán, *supra* note 109, at 425-26. It appears that the Eleventh Circuit has at least approvingly applied the Second Circuit standard. See *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1217-20 (11th Cir. 2008).

221. 352 F.3d 565, 575 (2d Cir. 2003). The *Tsombanidis* case followed *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), a case in which the Second Circuit had already cast doubt on the factors delineated in *Arlington Heights II*. In *NAACP*, the court did not adopt the *Arlington Heights II* factors, but rather shifted the burden of persuasion to defendants. See *NAACP*, 844 F.2d at 939; see also *infra* notes 224-27 and accompanying text regarding test used in other Circuits. Most critically, however, was the court's elaboration on the *Arlington Heights II* factors: "[W]e are not persuaded to adopt precisely the formulation of the *Arlington Heights II* factors . . . [they] are to be considered in a final determination on the merits rather than as a requirement for a prima facie case." *Id.* at 935. This sentiment thus set the stage for the *Tsombanidis* reformulation of the test years later.

222. 352 F.3d at 574-75.

223. *Id.*

224. *Id.* at 575.

225. But removing that burden does not mean plaintiffs will necessarily prevail. Not only must they still prove the second prong of the Second Circuit test, many may also fail on the first prong. See, e.g., *Rodriguez v. Bear Stearns Co., Inc.*, No. 07-cv-1816 (JCH), 2009 WL 5184702, at *6-8, (D.Conn. Dec. 22, 2009). Thus, the Second Circuit test does not implicate universal relief for any disparate impact simply because the intent requirement is forgone. Indeed, the plaintiff in *Rodriguez* also failed on the second prong by failing to show adequate statistical impact. *Id.* at *10-11. The proper way to

In contrast, and as Guzmán has noted, the Fourth, Sixth, Seventh, and Ninth Circuits continue to follow the well-settled *Arlington Heights* test.²²⁶ This framework exceedingly narrows the scope of permissible claims by maintaining that the element of discriminatory intent be demonstrated pursuant to a multi-faceted balancing test:

- (1) Whether there is a disparate impact on a protected group;
- (2) Whether there is any evidence that the municipal action is, in fact, intentional or motivated in part by discriminatory animus;
- (3) Whether there is a legitimate economic or public safety rationale for the municipality's action; and
- (4) Whether the plaintiff is requesting that the municipality provide her with housing, or whether she merely wishes for the municipality to stop interfering with her ability to obtain housing for herself.²²⁷

Under this test, the recognition of facially neutral laws is less explicit and the two prongs of the Second Circuit standard are condensed into the first prong of the *Arlington Heights* test. It also points out the importance of the existence of the contrary state interest to be balanced.²²⁸ Most significant, however, is the *Arlington Heights* second prong calling for proof of whether the local ordinance was motivated by animus or was intentionally discriminatory. This latter test makes it more difficult for plaintiffs to present valid claims because it precludes cases where evidence of discriminatory purpose is weak, but nonetheless probably present.

What the disparate impact tests demonstrate, however, is that equal protection doctrine is deficient because proving discriminatory intent is prohibitively difficult.²²⁹ Equal protection simply has not developed to keep the pace with more discrete and creative facially neutral local discriminatory ordinances, which attempt

demonstrate a disparate impact is through statistical analysis. *Id.*

226. *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights (Arlington Heights II)*, 558 F.2d 1283, 1290 (7th Cir. 1977).

227. *See id.* at 1290-93; Guzmán, *supra* note 109, at 426-27; Oliveri, *supra* note 85, at 95.

228. Unfortunately, despite the countervailing state interest being a factor in this analysis, prejudices all too often cloud legislative judgment when suspect classifications, like race and alienage, are involved. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (finding that suspect classes are “more likely than others to reflect deep-seated prejudice than legislative rationality in pursuit of some legitimate objective.”).

229. Here I build off the analyses suggested in Sofia D. Martos, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099 (2010), and Guzmán, *supra* note 109, by extending the inquiry further into equal protection. *See also* Barnes & Chemerinsky, *supra* note 194, at 1081-83 (noting that the limited evidence available to prove discriminatory intent in equal protection discourse, in combination with the tiered scrutiny framework, places courts in an inadequate position to address inequalities). Indeed, a showing of discriminatory intent is notoriously difficult to meet. Because of this high threshold, phantom discriminatory bases, like alienage, evade detection. For additional criticism of equal protection doctrine's dysfunction, see Reshma M. Saujani, “*The Implicit Association Test*”: *A Measure of Unconscious Racism in Legislative Decision-Making*, 8 MICH. J. RACE & L. 395, 413 (2003) (stating that Equal Protection doctrine is “incapable of rooting out racial discrimination where it is most pernicious”) and Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1137 (1997) (recognizing that “the empirical literature on racial bias” suggests that “most race-dependent governmental decisionmaking will elude equal protection scrutiny.”).

to garner presumptions of validity.²³⁰ In other words, disparate impact theory, reflected in the Second Circuit test, provides for more plausible claims to be brought by immigrants than do disparate treatment type tests, implicit in an *Arlington Heights* examination.

As it stands, equal protection jurisprudence on facially-neutral impact does not adequately acknowledge the role of pretext and its impact on the undocumented population.²³¹ Short of accepting that equal protection be reformed to strike discriminatory laws based on impact alone, thus foregoing the showing of discriminatory motivation, equal protection must be reevaluated to adapt to the increase in discriminatory laws based on alienage. The *Arlington Heights* framework for evaluating disparate housing impact shows that equal protection is no longer able to detect racial motive fairly or effectively²³²—hence, the Second Circuit’s modification. What I convey in the next section is a reconception of equal protection, one that is both pragmatically functional and easily distilled. By reimagining equal protection in this way, plaintiffs can both challenge the validity of these anti-immigrant local ordinances and acknowledge the mistreatment of non-citizens in housing. The framework will allow equal protection to be more availing and accommodating of this discriminatory intent requirement through disparate impact claims.²³³

C. *Circumventing Plyler Through Disparate Impact Analysis of Local Regulation of Alienage Status*

Because *Plyler* exists, equal protection must be rethought to address the pretextual nature of anti-immigrant local ordinances. When the only way to effectively enforce the local anti-immigrant housing ordinance is to make use of suspect classifications protected by the Fourteenth Amendment or the FHA, those

230. See Pollvogt, *supra* note 11, at 894 (observing that most laws, apart from those meant to ameliorate the effects of race discrimination, do not rely on explicit racial classifications); see also Barnes & Chemerinsky, *supra* note 194, at 1081 (“[T]he combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities.”).

231. See *Oyama v. California*, 332 U.S. 633 (1948). In that case, Chief Justice Vinson, writing for the majority, found that the California Alien Land Law, despite not employing specific language targeting Japanese Americans, violated the equal protection rights of an American-citizen son because it discriminated against the son through his non-citizen father. *Id.* at 646-47. Despite finding that the law violated equal protection, however, the Court did not overrule the statute or seem to address the constitutionality of the law. *Id.* It would not be overruled until four years later as a blatant equal protection violation. *Sei Fujii v. California*, 242 P.2d 617, 630 (Cal. 1952).

232. As Pollvogt makes coherent, a disparate impact analysis that still relies on a showing of discriminatory intent remains problematic. See Pollvogt, *supra* note 11, at 897 (noting that a disparate impact devoid of a facial classification is subject to rational basis review, regardless of any suspect nature of the group suffering discrimination). The Second Circuit standard retains a court’s ability to strike unconstitutional ordinances while being sensitive to the fact that alienage discrimination is incredibly discrete and proof virtually scant.

233. In many ways, my emphasis on a disparate impact theory that appreciates the role of intent, without requiring that threshold showing, can be seen as a more flexible and adaptable approach. It is an approach that reinvigorates “a profound suspicion of class-based legislation.” Pollvogt, *supra* note 11, at 937. It enshrines what equal protection needs: a step back from immortalizing discriminatory intent as the green light for constitutional nullification and a step toward broadly seeing the impact of legislation on whole scale groups.

protected groups will inevitably be affected, whether or not the effects are intentional. Thus, when states create ordinances demanding searches into citizenship status, which are likely realistically enforced through over-inclusive profiling, we should be guided by two questions. First, does the ordinance pass constitutional scrutiny against the more obvious class, the undocumented immigrants? Second, does the ordinance also pass constitutional muster against the targeted class, which is the class affected by virtue of the facial enforcement against undocumented immigrants? These two inquiries better allow the fact finder to uncover the nature of the discrimination at issue in a given case. These questions functionally merge in the Second Circuit's disparate impact analysis by narrowing the query to whether probable discriminatory impact results against not necessarily a protected group, but against "persons of a particular type," a very broad description of the potentially affected parties.²³⁴

Any proper framework must address this dual inquiry in order to mitigate the impact and spillover consequences of anti-immigrant public sentiment. The problem with current equal protection analysis is that courts often only analyze classifications and the resulting impact against those classifications, and phantom intent proceeds undetected. These anti-immigrant housing ordinances, therefore, must and usually do pass constitutional scrutiny under an analysis of only the obvious class affected. But, as state enforcement mechanisms become more transparent and lucid, it will become clear that when a protected ground is used improperly as a means to supposedly enforce a legitimate state interest, the unquestionable result is that the scheme, ordinance, or law—more often than not—cannot be sufficiently or adequately tailored. Indeed, using alienage discrimination in a housing ordinance should imply the presumption that race or national origin are the means of enforcement, as the practical inquiry is hardly divorced. Thus, if the analysis is subject to this improper impact examination, it will be clear that the prevalence of state pretext is problematic, and a court will strike down the anti-immigrant ordinance on race or national origin grounds.

Adopting a disparate impact approach to equal protection claims against undocumented immigrants better describes the means analysis performed under a "rationally related," "substantially related," or "narrowly tailored" analysis. Rather than striking down state interests as unfounded or illegitimate, courts should heighten protections to undocumented immigrants by more vigorously invalidating pretextual discriminatory treatment, which often hurts or implicates other protected classes. A statute that burdens a protected class through intentional discriminatory treatment against an unprotected class (undocumented persons) simply cannot be deemed rationally related, even if the state interest is a legitimate one. At that point, the protected groups' rights trigger and, absent severe national security or major public concerns, should control. Yet, courts have been too deferential to a state's legitimate pretextual interests for their anti-immigrant ordinances.

If courts were more willing to strike state laws based on improper impact, they could still recognize the importance of state interests, but do so in a manner that informs localities that there is a correct and incorrect way to encourage change. Doing so would indicate that discrimination based on alienage simply cannot functionally work when the only way alienage discrimination in housing operates is

234. *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003).

through national origin, race, color, or ethnicity discrimination. If alienage discrimination can ever be performed absent and distinct from discrimination against a protected class (race or national origin for example), then the discriminatory treatment, and thus the means, would certainly be more tailored and well-founded. A clear example of this is residency requirements for access to various public benefits, such as welfare, where the alienage discrimination is separate from and is not perpetrated by race or national origin discrimination.²³⁵

Pursuant to this understanding, alienage discrimination can be “proper,” albeit unwise, so long as it avoids suspect class discrimination. Therefore, the analysis recognizes situations where discrimination is appropriate and conforms with the essential premise of rational review that disparate impact is justifiable if sufficiently tailored to a legitimate state interest. The point of contention, however, is that for the special realm of housing, the disparate impact itself is dispositive of the discriminatory intent question. Put differently, disparate impact in housing is evidence of discriminatory intent, such that courts should dispose of the proof of intent requirement. If courts become more willing to emphasize the lack of the rational means by employing the improper means/disparate impact framework for undocumented immigrants, they will realize that anti-immigrant housing ordinances cannot employ a protected ground as an enforcement mechanism when posited state interests lack substance. Indeed, the Second Circuit has already noticed this deficiency. It is about time equal protection reflected it as well.

CONCLUSION

Undocumented immigrants are a quintessential example of a discrete, insular, and powerless minority, unrepresented in the political process. Finding that undocumented immigrants are a suspect class would not necessary implicate “floodgate” concerns. It is possible to increase constitutional review, such as conferring strict scrutiny (or at least intermediate scrutiny), to undocumented persons while enforcing stronger border protections. This traditional “hard on the outside, soft on the inside” approach recognizes that immigrants, once inside, deserve protection regardless of how they entered,²³⁶ and encourages our federal government to enforce immigration laws as it should. To punish undocumented immigrants for a failure of our government creates a scapegoat and removes any accountability for the manner in which our political system should function. Given the quarter century since *Plyler*, it is astonishing the extent to which jurisprudence on undocumented immigrants has remained obscure.

Further, plaintiffs should and need to increasingly utilize FHA and § 1981 challenges to anti-immigrant housing ordinances in order to protect undocumented persons’ rights. Because the Court has refused to confer strict scrutiny to undocumented immigrants, their rights must be promulgated through these statutory

235. See *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (holding that state laws preserving welfare benefits for its own citizens did not justify discrimination against aliens and violated the Equal Protection clause).

236. See Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1137-45 (1994) (articulating a different range of models for granting rights based on minimalistic versus expansive understandings of membership, territorial personhood, and community).

avenues. I certainly do not think they are the primary solution to the deprivation of non-citizen rights, as some have suggested, but they continue to play a meaningful role in the protection of undocumented immigrants. I do not mean to suggest that these approaches should be left behind. I merely provide the normative foundation to propose that the analysis simply does not and cannot end there.

Despite the prevailing academic interest and judicial inclination to use preemption to strike anti-immigrant housing ordinances, the time will come when preemption has outlived its course. The Supreme Court's monumental decision in *Arizona v. United States*²³⁷ would—at first blush—appear to substantiate the notion that preemption is likely to continue as a means for striking invidiously motivated state legislation. But again, preemption merely preempts what federal law has directly addressed, regardless of the state's motivation or purpose in enacting new laws. The Arizona law, S.B. 1070, had the purpose to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”²³⁸ In doing so, Arizona attempted to establish a policy of “attrition through enforcement.”²³⁹ Enforcement through S.B. 1070 would, in theory, serve to reduce the number of unlawful aliens and illegal economic activity.²⁴⁰ After a treatise on the contingencies involved in immigration law²⁴¹ and setting the stage for how preemption doctrine operates,²⁴² the Court held that Section 2(B) of S.B. 1070 was the only provision, of the four at issue in the case, not preempted by federal law.²⁴³ While admittedly three of the four provisions were preempted, preemption is unlikely to govern in the future because of how provision Section 2(B)²⁴⁴ operates with federal law and because the Court is willing to adopt a “test and see” approach, as it did here.²⁴⁵ Section 2(B) was a provision that cleverly covered its bases by incorporating built-in safeguards and limitations for its enforcement—all in order to have courts interpret it with presumptions of validity. Because of the possible constitutionality of the provision operating in tandem and inseparable from its three limitations, the Court in this case was willing to wait to confirm if Section 2(B) does indeed lead to prolonged and illegal detention of aliens.

237. 132 S. Ct. 2492 (2012).

238. Statutory note following ARIZ. REV. STAT. ANN. § 11-1051 (2012).

239. *Id.*

240. See Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155 (2008) (discussing ordinances as part of an attrition by local enforcement strategy).

241. 132 S. Ct. at 2497-98.

242. *Id.* at 2500-01.

243. *Id.* at 2507-11; see also ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (requiring officers to make a “reasonable attempt . . . to determine the immigration status” of persons stopped, detained, or arrested on legitimate bases if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States”). The section also requires that “[a]ny person who is arrested shall have the person's immigration status determined before the person is released.” *Id.*

244. Section 11-1051 had three conditions to curb state abuses against unlawful aliens. First, officers may not consider race except to the extent permitted by the United States or Arizona constitutions. § 11-1051(B). Second, the detainee benefits from a presumption of legal presence if he or she can provide a valid state or tribal identification. § 11-1051(B)(1)-(3). Third and finally, S.B. 1070 must be “implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.” § 11-1051(L).

245. See 132 S. Ct. at 2509-10 (citing *Muehler v. Mena*, 544 U.S. 93, 101 (2005), for proposition that where questioning of immigration status did not prolong a stop, no Fourth Amendment violation was found).

As a result, the more the states promulgate similar laws with supposedly built-in limitations, courts are more likely to hold off deciding issues of such constitutional decree and reserve judgment. In the meanwhile, undocumented persons must be subjected to these anti-immigrant ordinances, until an impact can be seen against the group. The Court's decision to wait and observe "what the law means and how it will be enforced" before choosing to preempt state law as contravening federal law²⁴⁶ reflects the slow path toward progress, in which preemption must inevitably operate. Equal protection suffers from no similar "waiting period" before its command can be felt, and also recognizes the racial animus which may undergird state law. A classification-blind approach for immigrants' rights simply cannot control when increasing state creativity, on paper, masks invidious phantom intent in practice.

This paper has defined the reasons for why a solely preemption-based analysis of state legislation will inevitably become defunct and harder to rationalize. In due time, equal protection will resurface as the proper and appropriate way to establish a basis for long-standing undocumented immigrant protection. The disparate impact/improper means framework provides strong protection for capturing the role of pretext and the duplicative burdening of suspect and non-suspect classes in housing. By illuminating the veiled role phantom intent plays in traditional equal protection of housing laws, the Fourteenth Amendment can still offer a meaningful and exacting framework to hold violators accountable.

246. *Id.* at 2510.