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# ANCHOR BABIES: SOMETHING LESS THAN EQUAL UNDER THE EQUAL PROTECTION CLAUSE

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## I. INTRODUCTION

Are some American citizens more equal than others? The thought seems absurd. Putting aside the ever increasing allegations of discrimination based on race, class, or economic power—which are difficult to parse under the best circumstances—there is a real and growing subclass of citizens: children born in the United States to undocumented immigrant parents. Pejoratively described as “anchor babies,”<sup>1</sup> these citizen children suffer from misguided attempts at immigration control by municipal and state governments. A recent wave of legislative action targets immigrants who are unable to verify their lawful immigration status by evicting such persons or by blocking their access to housing.<sup>2</sup> These “Housing Ordinances” purport to invest the landlord with the responsibility of immigration enforcement ostensibly for the greater good of the community.<sup>3</sup> Non-compliant landlords face the threat of substantial monetary fines and even jail time.<sup>4</sup> None of the Housing Ordinances carve out exceptions for those

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<sup>1</sup> The Dallas Observer newspaper and Dallas Morning News have quoted proponents of the ordinance making statements such as: (1) “They’re taking our jobs, our homes. There’s unemployment partly because of the Hispanics. The lady who took my job is Hispanic, and she’s bilingual”; (2) “The education system is tanking, health care has gone through the roof, everybody is bilingual”; and (3) “The schools are being overrun by non-English speaking kids . . . I’m tired of paying for ‘anchor babies.’” Complaint at 10, *Reyes v. City of Farmers Branch*, No. 3:08-CV-01615-O (N.D. Tex. Sept. 12, 2008), available at [http://www.maldef.org/assets/pdf/ordinance2952\\_complaint091208.pdf](http://www.maldef.org/assets/pdf/ordinance2952_complaint091208.pdf), *aff’d*, 586 F.3d 1019 (5th Cir. 2009).

<sup>2</sup> Fair Immigration Reform Movement, *Database of Recent Local Ordinances on Immigration*, STATEIMMIGRATIONLAWS.COM (2007), <http://www.stateimmigrationlaws.com/wp-content/uploads/2010/03/FAIRImmigrationLocalChart.pdf>.

<sup>3</sup> See ESCONDIDO, CAL. ORDINANCE 2006-38R (Oct. 18, 2006); FARMERS BRANCH, TEX., ORDINANCE 2903 (May 12, 2007); HAZLETON, TEX., ORDINANCE 2006-18 (Sept. 21, 2006) amended by HAZLETON, TEX., ORDINANCE 2006-40 (December 28, 2006) and HAZLETON, TEX., ORDINANCE 2007-6 (March 21, 2007) (collectively, the “HOUSING ORDINANCES”).

<sup>4</sup> See HOUSING ORDINANCES, *supra* note 3.

immigrants who are parents of citizen children.<sup>5</sup> This omission raises grave equal protection concerns.<sup>6</sup>

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>7</sup> In *City of Cleburne*, Justice Stevens described the analysis as a series of questions:

What class is harmed by the legislation, and has it been subjected to a “tradition of disfavor” by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a “rational basis.”<sup>8</sup>

Suspect classifications that place special disabilities on certain disfavored groups create a “class or caste” system that is both subordinating and unconstitutional<sup>9</sup>—a second-class citizenship that the Fourteenth Amendment was intended to abolish.<sup>10</sup> And this is exactly what is occurring when overbroad and constitutionally impermissible state legislation evicts citizen children, or denies them equal access to housing, along with their undocumented-immigrant parents.

To date, litigation has not explored this consequence of the Housing Ordinances, but depriving citizen children of access to housing is a fatal flaw that renders the ordinances flatly unconstitutional. Even if a municipality can justifiably pass legislation that addresses the concern of illegal immigration, that legislation may not trample on guaranteed constitutional rights of citizens, whether they are at the age of majority or not. Like the *Civil Rights Cases* brought on behalf of African-American citizens in the mid-twentieth century, future litigation should begin to carve out excep-

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<sup>5</sup> See HOUSING ORDINANCES, *supra* note 3.

<sup>6</sup> There appears to be an implied acknowledgement by state legislators that legislation targeting immigrants is likely unconstitutional. The latest proposal gaining national attention is to revise the Fourteenth Amendment to deprive automatic citizenship to children born in the United States to undocumented aliens. Paul Davenport & Amanda Lee Myers, *State Lawmakers Preparing Citizenship Legislation*, YAHOO NEWS, Oct. 20, 2010, [http://news.yahoo.com/s/ap/20101019/ap\\_on\\_re\\_us/us\\_illegal\\_immigration\\_citizenship](http://news.yahoo.com/s/ap/20101019/ap_on_re_us/us_illegal_immigration_citizenship) (describing Arizona State Senator Russell Pearce’s attempt to “collect support across the country from legislators to challenge automatic U.S. citizenship to the children of illegal immigrants . . . ‘This is a battle of epic proportions,’ Pearce said Tuesday during a news conference at the Arizona Capitol. ‘We’ve allowed the hijacking of the 14<sup>th</sup> Amendment.’”) This approach would conveniently render equal protection, and other federal constitutional concerns, moot.

<sup>7</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

<sup>8</sup> *Cleburne*, 473 U.S. at 453 (Stevens, J., concurring).

<sup>9</sup> *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

<sup>10</sup> See *Hirabayashi v. United States*, 320 U.S. 81 (1943).

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tions to these Housing Ordinances until the ordinances address the issue of illegal immigration narrowly or are deemed facially unconstitutional.

This article considers the constitutional analysis that should be used under the Equal Protection Clause when examining legislation like the Housing Ordinances. Two aspects of the ordinances are particularly pertinent to this discussion: first, they require the eviction of undocumented immigrants and their citizen children without exception; and second, they block equal access to housing by citizen children on the basis of the immigration status of their undocumented parents.

Part II of this Article discusses the passage of the Equal Protection Clause in the 1860s, in the aftermath of the Civil War. This discussion confirms that the Fourteenth Amendment was crafted in broad language so that it could adequately protect against improper discriminatory legislation in any form, including laws that are facially neutral.

Part III of this Article discusses the evolving equal protection jurisprudence relating to undocumented immigrants. Suspect classification is not conferred upon undocumented immigrants, but nonetheless, the Supreme Court has granted these individuals a certain amount of protection under the United States Constitution, including the right to due process and the right to equal access to secondary public school education. As with education, housing is not considered a fundamental right, but the Court appears to apply a heightened scrutiny analysis to education and its important social benefits that is slightly more than a rational standard but not as rigorous as either strict or intermediate scrutiny.

Part IV of this Article reviews the Housing Ordinances that have been challenged in federal court to date. The three federal courts have all enjoined enforcement of the ordinances, but have done so primarily on the basis of a perceived conflict with federal immigration laws. Only one court has addressed the equal protection issue, and even then, the court's holding does not adequately address which rights apply to citizen children of undocumented immigrant parents. Because such ordinances are becoming more prevalent, it is only a matter of time before one is crafted to overcome the conflict with federal immigration laws.

Part V of this Article argues that the use of strict scrutiny is appropriate because citizen children comprise a suspect class and housing can be described as a quasi-fundamental right. Though the Supreme Court refuses

to identify undocumented immigrants as a suspect class,<sup>11</sup> this determination simply does not apply to citizen children. Just as the Court has expressly declined to hold children liable for the alleged wrongdoings of their parents in other contexts, minor children of undocumented immigrants should not be held responsible for where they were born, or for their parents' decision to violate federal immigration laws. Moreover, equal access to housing is a benefit that is protected under federal statutory law.<sup>12</sup> This legal protection elevates housing from a mere social benefit to a fundamental value that implicates constitutional rights.

Even if citizen children do not make up a suspect class, the Housing Ordinances should not withstand analysis under a rational standard of review. There is no legitimate state purpose that can impede the constitutional rights of a class of citizens who are otherwise politically powerless against the majoritarian process. Minor citizen children cannot vote against discriminatory legislation or legislators, and are prevented by law from entering into rental contracts. As such, the Housing Ordinances will lead to the creation of a shadowy underclass, but this time it will be comprised of *citizens*, not undocumented immigrants. Surely the Equal Protection Clause was meant to prevent this result.

## II. THE EQUAL PROTECTION CLAUSE WAS ENACTED TO PREVENT THE LEGISLATURE FROM CREATING A SECOND-CLASS CITIZENRY

The Fourteenth Amendment was passed in the aftermath of the Civil War, as the 39<sup>th</sup> Congress attempted to piece back together a divided country.<sup>13</sup> Section 1 confers citizenship, and its associated rights, upon individuals born in the United States:

*All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without*

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<sup>11</sup> See *Plyler v. Doe*, 457 U.S. 202, 219 (“Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.”); *id.* at 225 (“the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a *legitimate* state goal.” (emphasis added) (citing *DeCanas v. Bica*, 424 U.S. 351 (1976))).

<sup>12</sup> See Fair Housing Act, 42 U.S.C. § 3604(a) (2006); see also Part V-B-4, *infra* discussing federal housing laws and their anti-discrimination provisions.

<sup>13</sup> See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 6–9 (1949).

due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*<sup>14</sup>

As with all constitutional questions, a court interpreting the Fourteenth Amendment must consider the legislative purpose behind the amendment, as well as the context surrounding its passage.<sup>15</sup> Unsurprisingly, the guarantee of equal protection became necessary in the tumultuous aftermath of the Civil War.<sup>16</sup> During the Reconstruction, newly freed slaves were in need of civil rights legislation that would protect them against violence and against southern opposition to their freedom.<sup>17</sup> The Fourteenth Amendment had its

<sup>14</sup> U.S. CONST. amend. XIV, § 1 (emphasis added).

<sup>15</sup> See *eBay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, J., concurring) (“When it comes to discerning and applying those standards [of equitable discretion], in this area as others, ‘a page of history is worth a volume of logic.’” (quoting *NY Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

<sup>16</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1376 (1867); CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Speech by Senator Trumbull of Illinois) (“It is the intention of this bill to secure those rights. The laws in the slaveholding States have made a distinction against persons of African descent on account of their color, whether free or slave. . . . [S]ince the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished.”).

<sup>17</sup> CONG. GLOBE, 39th Cong., 2d Sess. 1376 (1867) (table showing murders of freedmen in Texas in 1866); CONG. GLOBE, 39TH CONG., 1ST SESS. 474 (1866). The legislative history of the Fourteenth Amendment demonstrated, among other things, that discriminatory enforcement of States' criminal laws was of great concern to the drafters. CONG. GLOBE, 39th Cong. 1st Sess. 129, 184, 211, 212, 421, 471, 497, 522, 569, 594, 1365, 1376, 1413, 1438, 1679, 1755, 1809, 1863 (1865–66) (characterizing the Civil Rights Bill of 1866 as a Bill to protect the civil rights of all persons in the United States and to furnish the means of their vindication).

In his dissent in *McCleskey v. Kemp*, 481 U.S. 279 (1987), Justice Blackmun noted that, in its introductory remarks to its report to Congress, the Joint Committee on Reconstruction, which proposed the Joint Resolution that became the Fourteenth Amendment, specifically noted the continued prevalence of race-based violence: “This deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.” *Id.* at 346 (Blackmun, J., dissenting) (quoting STAFF OF JOINT COMM. ON RECONSTRUCTION, 39TH CONG., 1ST SESS. XVII (1866), reprinted in REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION (Books for Libraries Press 1971)). Justice Blackmun also cited the witnesses who testified before the Committee on accounts of criminal acts of violence against black persons that were not prosecuted despite evidence that could identify the perpetrators: “They have not any idea of prosecuting white men for offenses against colored people; they do not appreciate the idea,” *McCleskey*, 481 U.S. at 346 n.2 (citing testimony of George Tucker, Virginia attorney); “Of the thousand cases of murder, robbery, and maltreatment of freedmen that have come before me, . . . I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons,” *id.* (citing testimony of Dexter H. Clapp); “I have not known, after six months' residence at the capital of the State, a single instance of a white man being convicted and hung or sent to the penitentiary for crime against a negro, while many cases of crime warranting such punishment have been reported to me,” *id.* (citing testimony of Brev. Maj. Gen. Wager Swayne); “[I]t is of weekly, if not of daily, occurrence that freedmen are murdered . . . [S]ometimes it is not

origins in the Civil Rights Act of 1866,<sup>18</sup> but Congress eventually recognized that, unless the legislation became a constitutional amendment, the congressional protection would not be enforceable against the states.<sup>19</sup> Congress was also concerned that future congressional acts might deconstruct these newly granted civil rights if they were backed by legislation only.<sup>20</sup>

The language of the Equal Protection Clause, and all of Section 1 of the Fourteenth Amendment, was ultimately the result of a compromise fueled by debate over the language of Sections 2, 3, and 5.<sup>21</sup> Section 1 passed with relatively little discussion on the scope of its provisions, leaving the intent of congress on this point open to judicial interpretation.<sup>22</sup> The two

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known who the perpetrators are; but when that is known no action is taken against them. I believe a white man has never been hung for murder in Texas, although it is the law," *id.* (citing testimony of Maj. Gen. George A. Custer). Justice Blackmun also cited the testimony of J.A. Campbell, who explained that although the authorities knew the identities of men suspected of killing two blacks, no arrest or trial had occurred. *Id.*

<sup>18</sup> See Civil Rights Act, Ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2006)); see generally Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

<sup>19</sup> See *e.g.*, CONG. GLOBE, 39TH CONG., 1ST SESS. 2502 (1866) (remarks by Henry J. Raymond) ("Next it came before us in the form of a bill [Civil Rights Act of 1866], by which Congress proposed to exercise precisely the powers which that amendment was intended to confer, and to provide for enforcing against State tribunals the prohibitions against unequal legislation. I regarded it as very doubtful, to say the least, whether Congress, under the existing Constitution, had any power to enact such a law; and I thought, and still think, that very many members who voted for the bill also doubted the power of Congress to pass it").

<sup>20</sup> CONG. GLOBE, 39TH CONG., 1ST SESS. 2465 (1866) (remarks by M. Russell Thayer of Pennsylvania) ("As I understand it, it is but incorporating in the Constitution . . . the principle of the civil rights bill . . . [so that it] shall be forever incorporated . . .").

<sup>21</sup> See Earl M. Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 968–69 (1984).

<sup>22</sup> The Fourteenth Amendment was created largely by the northern Republicans, as many of the southern Democrats were not in attendance. See Cong. Globe, 39th Cong., 1st Sess. 1–4 (1865) (roll call and list of states and representatives present). Even among the Republicans, there was not a consensus as to what protections and civil rights the former slaves should receive: Thaddeus Stevens, a radical abolitionist, advocated strongly that former slaves should be entitled to equal civil rights, including suffrage. CONG. GLOBE, 39TH CONG., 1ST SESS. 74–75 (1865) (speech by Stevens on Reconstruction). However, many Republicans came from states with segregated school systems or had laws that discriminated against certain groups, and did not want to see any disruptions to their system. Bickel, *supra* note 17, at 35–40. Most of the framers did not embrace the idea of complete equality between blacks and whites. See, *e.g.*, Maltz, *supra* note 20, at 937. The issue of suffrage was a major controversy:

The most immediate problem was the political sentiment of the populace in the North. Suffrage was a key problem; the electorate generally seemed to oppose guaranteeing blacks the right to vote. Moderates took a practical approach and sought to retain support by moving relatively slowly on the issue of black rights. Radicals, by contrast, pressed for full equality notwithstanding the political dangers of such a position.

main schools of thought on the scope of the Equal Protection Clause are (1) the “duty to protect” reading and (2) the “no improper classification” reading.<sup>23</sup>

Interpreting the Equal Protection Clause under the “duty to protect” reading requires only a minimally adequate standard: equality in the performance of law enforcement duties and in the remedial functions of the government.<sup>24</sup> The “duty to protect” interpretation is a strictly literal commandment that the states enforce the laws equally as to every person in its jurisdiction.<sup>25</sup> Using this analysis, a court should not identify disadvantaged classifications or groups, but should instead limit its analysis to whether the state’s legislation is applied equally.<sup>26</sup> As the 1884 United States Supreme Court explained,

The [F]ourteenth [A]mendment, in declaring that no State “shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,” undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, *and acquire and enjoy property*; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the

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*Id.* The framers fell somewhere in between, wanting to afford the newly freed slaves only the bare necessities of civil rights, such as freedom passage, contracting rights, and equal application of the laws—particularly criminal laws. Bickel, *supra* note 17, at 62–63.

Alexander Bickel claims that Thaddeus Stevens’s address to Congress captured the general congressional sentiment toward the Fourteenth Amendment:

The focus of attention is well indicated by Stevens’ brief address immediately before the first vote in the House. In this atmosphere, Section One became the subject of a stock generalization: it was dismissed as embodying and, in one sense for the Republicans, in another for the Democrats and Conservatives, ‘constitutionalizing’ the Civil Rights Act.

Bickel, *supra* note 17, at 58. The remaining sections of the amendment received less attention: Section 2 addresses the method for apportionment of Congressional Representatives. U.S. CONST. amend. XIV, § 2. Section 3 prevents anyone from holding office who participated in a rebellion against the United States. *Id.* § 3. Section 5 provides Congress with the power to enforce the provisions of the Fourteenth Amendment. *Id.* § 5.

<sup>23</sup> See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 220–21 (2008).

<sup>24</sup> See *id.* at 293–310.

<sup>25</sup> *Id.* at 220.

<sup>26</sup> See *id.* at 244 (quoting CONG. GLOBE, 42D CONG., 1ST SESS. app. 113–15 (1871)) (statement of Rep. Farnsworth) (“Whatever law punishes a white man for a crime shall punish a black man in the same way and to the same degree”; that is, the law shall do so. Whatever law protects the one shall protect the other, and the same redress shall be afforded by law to one as to the other.”)

enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.<sup>27</sup>

The alternative approach, the “no improper classification” reading, is based on the speeches given by Senator Oliver Morton, a framer of the Fourteenth Amendment, several years after the Amendment passed:

What is meant by “equal protection of the laws?” Does it mean simply that every person shall be entitled to protection against an assault and battery or against personal violence, and stop there? It has no such limited meaning as that. The meaning is just the same as if it read “Every person shall be entitled to the equal benefit and protection of the laws.” When it says “no person shall be denied the equal protection of the laws,” it is exactly equivalent to saying that all persons shall be entitled to the equal protection of the laws. The word “protection” there is used in that sense. Law is made for protection; the protection of person, the protection of property, the definition and protection of civil and political rights. The whole body of the law is for protection in some form—the definition and protection of the rights of person and property; and when the fourteenth amendment [sic] declares that every person shall be entitled to the equal protection of the laws, it means the equal benefit of the laws of the land. It forbids all discriminations of every character against any class of persons, being citizens of the United States.”<sup>28</sup>

Senator Morton interpreted the Equal Protection Clause broadly, asserting that the negative language (“no state shall”) creates an affirmative right in the citizens of the United States (“every person shall”).

The Supreme Court initially adopted the narrower reading articulated by the “duty to protect” standard.<sup>29</sup> In the *Slaughter-House Cases*, the Court held that the Equal Protection Clause was solely directed at race-based discrimination, with no application outside that context.<sup>30</sup> Seven

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<sup>27</sup> *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (emphasis added).

<sup>28</sup> 43 CONG. REC. app. 358 (1874).

<sup>29</sup> See *Slaughter-House Cases*, 83 U.S. 36, 81–83 (1873).

<sup>30</sup> *Id.* at 81. “In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden. . . . We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the



years later, however, in *Strauder v. West Virginia*,<sup>31</sup> the Supreme Court broadened its interpretation of the Equal Protection Clause to include the “no improper classification” reading.<sup>32</sup> The *Strauder* Court acknowledged that the broad language of the Equal Protection Clause supported the idea that the drafters did not intend to enunciate an exclusive list of protections, or grant protection based solely upon race.<sup>33</sup> Thus, judicial interpretation became an avenue for identifying disadvantaged classes, or suspect classes, that are entitled to the constitutional right of equal protection.<sup>34</sup>

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purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.” *Id.* The *Slaughter-House* Court later clarified that this was not a case in which class identification was necessary, and reserved further discussion for when such a case was considered. *Id.*

<sup>31</sup> 100 U.S. 303 (1879). In *Strauder*, the petitioner was a black man who had been convicted of murder by an all white jury. *See generally id.* He appealed to the United States Supreme Court, arguing that his constitutional rights were denied under a West Virginia law permitted only whites to serve on juries. *Id.* at 304–05.

<sup>32</sup> *Id.* at 306–07 (“This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases*, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.” (citations omitted))

<sup>33</sup> *Id.* at 307–10 (“If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. . . . The Fourteenth Amendment makes no attempt to enumerate the rights is [sic] designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory, but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.”)

<sup>34</sup> Bickel, *supra* note 17, at 58–60. In his influential article on the Equal Protection Clause, *The Original Understanding and The Segregation Decision*, Professor Alexander Bickel interprets the facially neutral Fourteenth Amendment as going beyond discrimination based on race. *Id.* Bickel posits that, while the discussions at the 39<sup>th</sup> Congress were mainly centered upon the plight of the newly freed

Federal courts today struggle to define the parameters of suspect classes. While most modern-day discrimination is far less blatant than in the days of slavery, the creation of a second-class citizenry is still possible when legislatures, in their zeal to enforce immigration laws, draft overreach ordinances that violate the guarantee of equal protection.

### III. THE EQUAL PROTECTION CLAUSE AND (ILLEGAL) IMMIGRANTS: WHEN DOES STATUS MATTER?

The Supreme Court has had the opportunity to consider the Equal Protection Clause with respect to immigration status. As can be expected, racial discrimination always lurks in the background of these cases.

#### A. OYAMA V. CALIFORNIA<sup>35</sup>

In the years following World War II, prejudice ran high against persons of Japanese descent, especially in California, where internment camps were not yet a distant memory.<sup>36</sup> In 1948, the United States Supreme Court heard *Oyama v. California*, a case involving California's Alien Land Law, which forbade aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land.<sup>37</sup> Kajiro Oyama was a legal American resident,<sup>38</sup> but immigrants from Japan were not eligible for American citizenship under immigration law at that time.<sup>39</sup> The penalty for the statute's violation was an escheat to the state as of the date of acquisition of the real property.<sup>40</sup> The underlying statutory presumption was that any property purchase by an ineligible alien was made to avoid the escheat.<sup>41</sup> This presumption was extended to encompass the payment of consideration by an ineligible alien for a property purchase, even if the

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slaves, the members of Congress could have specifically limited the Equal Protection Clause to racial discrimination. *Id.* They did not; in fact, alternative drafts of the Fourteenth Amendment were introduced to the joint committee limiting the scope of the Equal Protection Clause to racial discrimination but were rejected. *Id.*

<sup>35</sup> 332 U.S. 633, 650–69 (1948).

<sup>36</sup> *See, e.g.*, *Oyama v. California*, 332 U.S. 633, 650–69 (1948) (Murphy, J., concurring).

<sup>37</sup> *Id.* at 636 (majority opinion).

<sup>38</sup> *Id.* at 635.

<sup>39</sup> *Id.* at 635 n.3. The *Oyama* Court noted that the Japanese people were among the few groups that were not eligible for citizenship. *Id.* As of 1943, most persons born outside the United States were eligible for naturalization, including persons from China and India. *Id.* However, however Japanese persons were remained completely ineligible for citizenship. *Id.*

<sup>40</sup> *Id.* at 635–36.

<sup>41</sup> *Id.*

property was deeded to an American citizen or other eligible resident alien.<sup>42</sup>

In 1934, Oyama purchased a parcel of agricultural land in Southern California that was deeded in the name of his minor son, Fred.<sup>43</sup> After the purchase, Oyama initiated proceedings that legally declared him to be his son's guardian.<sup>44</sup> In 1937 Oyama purchased a second parcel of land in the same manner.<sup>45</sup> Five years later, in 1942, the Oyamas, along with all other persons of Japanese descent, were removed from the Pacific Coast by federal decree.<sup>46</sup> In 1944, while the Oyamas were still interred, the State of California filed a petition to declare an escheat on the two parcels of land.<sup>47</sup> The question before the Supreme Court was the constitutionality of California's Alien Land Law Act under the Equal Protection Clause.<sup>48</sup>

The Court held that the Alien Land Law violated Fred Oyama's equal protection rights as a citizen child.<sup>49</sup> According to the Court, the statute demonstrated the State's intent to discriminate against the Japanese on the basis of national origin,<sup>50</sup> and possibly race.<sup>51</sup> To overcome Oyama's constitutional challenge, California had to demonstrate a "compelling" interest, which it ultimately failed to do.<sup>52</sup> Indeed, California's main justification for the Alien Land Law was to prevent ineligible aliens from evading the state's land ownership laws.<sup>53</sup> As the Court described, the heart of the issue was the conflict between a state's right to legislate and the federal constitutional right of a citizen, even one of Japanese descent, to own land in the United States.<sup>54</sup> When these rights clash, the *Oyama* Court firmly stated,

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<sup>42</sup> *Id.* at 636.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 636-37.

<sup>45</sup> *Id.* at 637.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 635-36.

<sup>49</sup> *Id.* at 640.

<sup>50</sup> *Id.*; see also *id.* at 660 (Murphy, J. concurring) ("The framers of the California law were therefore able to utilize the federal [immigration laws which excluded Japanese immigrants from achieving American citizenship] with full assurance that the result would be to exclude Japanese aliens from the ownership and use of farm land.").

<sup>51</sup> See *id.* at 644-46 (majority opinion).

<sup>52</sup> *Id.* at 640. The Court did not reach the issue of whether the Alien Land Act denied an ineligible alien the right to equal protection. *Id.* at 647.

<sup>53</sup> *Id.* at 646.

<sup>54</sup> *Id.* at 647.

*“the rights of a citizen may not be subordinated merely because of his father's country of origin.”*<sup>55</sup>

The Court's conclusion is particularly noteworthy because California's Alien Land Law was a facially neutral statute.<sup>56</sup> Legislative history and societal sentiment during the time period supported the conclusion that the statute's primary purpose was to intentionally discriminate against Japanese immigrants by construing its language more strictly against persons of Japanese descent, even if they held citizenship.<sup>57</sup> At least one Justice found the climate of prejudice and hate at the time of the statute's enactment to be dispositive in his decision to reverse the Oyama escheat.<sup>58</sup>

<sup>55</sup> *Id.* (emphasis added). The Court distinguished *Hirabayashi v. United States*, 320 U.S. 81 (1943), which upheld the constitutionality of a war provision that sanctioned the Japanese internment due to national security concerns. *Oyama*, 332 U.S. at 646. In the absence of those concerns, the Court reiterated, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Id.* at 646 (quoting *Hirabayashi*, 320 U.S. at 100).

<sup>56</sup> *See Oyama*, 332 U.S. at 650 (Murphy, J., concurring) (“In its argument before us, California has disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect. Reference is made to the fact that nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiance as a determinant of who may not own or hold farm land.”); *see also id.* at 648 (Black, J., concurring) (“That the effect and purpose of the law is to discriminate against Japanese, because they are Japanese is too plain to call for more than a statement of that well-known fact.”).

<sup>57</sup> *See id.* at 650–61 (Murphy, J., concurring). In California, the customary presumption was that if a parent paid the consideration for a conveyance of real property to his or her child, it was a gift. *Id.* at 641 (majority opinion). Under the Alien Land Law Act, the presumption was reversed when the transaction was made on behalf of a child by a parent of ineligible status. *Id.* at 642. (“[I]f the father is ineligible for citizenship, facts which would usually be considered indicia of the son's ownership are used to make that ownership suspect; if the father is not an ineligible alien, however, the same facts would be evidence that a completed gift was intended.”). *Id.* The Court concluded that the discrimination targeted only Japanese Americans and did so solely on the basis of their Japanese heritage:

The only basis for this discrimination against an American citizen, moreover, was the fact that his father was Japanese and not American, Russian, Chinese, or English. But for that fact alone, Fred Oyama, now a little over a year from majority, would be the undisputed owner of the eight acres in question.

*Id.* at 644 (majority opinion).

<sup>58</sup> *See id.* at 650–61 (Murphy, J., concurring). At the time of the statute's passage in 1913, the Attorney General of California explained that the Act would limit the number of Japanese residing in the United States:

[[T]he Alien Land Law] seeks to limit [Japanese] presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land. And it seeks to limit the numbers who will come by limiting the opportunities for their activity here when they arrive.

*Id.* at 657 (Murphy, J., concurring) (citing a speech by Ulysses S. Webb made in 1913). In his concurrence, Justice Murphy presented examples of the anti-Japanese sentiment that had existed in the United States since the early 20th century:

The Japanese were depicted as degenerate mongrels and the voters were urged to save ‘California—the White Man's Paradise’ from the ‘yellow peril,’ which had somewhat lapsed in the public mind since 1913. Claims were made that the birth rate of the Japanese was so high that the white people would eventually be replaced and dire warnings were made that the low

Thus, *Oyama* stands for the proposition that a facially neutral statute may not be upheld under the Equal Protection Clause if it places an impermissible burden on the rights of citizens, even minors, based on their parents' immigration status.

B. SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ<sup>59</sup>

Twenty-five years after *Oyama*, in 1973, the Supreme Court clarified its equal protection analysis of suspect classifications (or its "no improper classification" reading) in the context of state financing of public secondary schools.<sup>60</sup>

*San Antonio Independent School District v. Rodriguez* was a statewide class action brought by Mexican-American parents whose citizen children attended elementary and secondary schools in the San Antonio, Texas area.<sup>61</sup> The parents, on behalf of their children, challenged a Texas school-funding program that allegedly allocated less money to districts with poor and minority students.<sup>62</sup> The class was comprised of citizen children throughout the state who were members of ethnic minority groups and who resided within school districts with low property-tax bases.<sup>63</sup>

The program in question was the Texas Minimum Foundation School Program, which relied on funding from both the state and local level.<sup>64</sup> Under the program, the state would contribute funds to the local school districts that were specifically earmarked for teacher salaries, operating expenses, and transportation costs.<sup>65</sup> Remaining expenses were the obligation of the local school districts, which, operating as an aggregate, collected funds from residents within their districts through an *ad valorem* property tax.<sup>66</sup> The *Rodriguez* class alleged that substantial discrepancies in per-student school expenditures existed between economically rich and poor

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standard of living of the Japanese endangered the economic and social health of the community. Opponents of the initiative measure were labeled 'Japlovers.' The fires of racial animosity were thus rekindled and the flames rose to new heights.

*Id.* at 658–60.

<sup>59</sup> 411 U.S. 1 (1973).

<sup>60</sup> See generally *id.* (analyzing Texas's public school financing system).

<sup>61</sup> *Id.* at 4–5.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 9–11. Overall, the Texas Minimum Foundation School Program accounted for nearly half of the total education expenditures; the remaining funding came from a combination of local tax revenues and federal funding. *Id.* at 9 n.21.

school districts.<sup>67</sup> The class claimed that the program violated the Equal Protection Clause because of the disproportionate effect it had on poor and minority students.<sup>68</sup>

Applying a strict scrutiny analysis, the federal district court agreed with the plaintiffs and determined that wealth was a suspect classification that required a compelling state interest—which the defendants failed to provide.<sup>69</sup> The district court held that the program violated the Equal Protection Clause,<sup>70</sup> but the Supreme Court disagreed.<sup>71</sup> Indicating that it would not lightly countenance the designation of a suspect class, the *Rodriguez* Court set out the parameters for such a classification<sup>72</sup>: if an equal protection claim is based on a suspect class, the classification must have a functional or absolute definition.<sup>73</sup> In the Court's judgment, the plaintiffs had failed to adequately define "poor" as a classification and had also failed to show that the school funding program discriminated against a "definable category of 'poor' people" who suffered from an absolute deprivation of their constitutional rights<sup>74</sup>:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>75</sup>

After determining that the class was not suspect, the Court turned to the class's alternative equal protection claim. An equal protection claim merits heightened scrutiny if the state impermissibly interferes with the exercise of a fundamental right.<sup>76</sup> While acknowledging that "education is perhaps the most important function of state and local governments,"<sup>77</sup> the

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<sup>67</sup> *Id.* at 13–16.

<sup>68</sup> *Id.* at 15–17.

<sup>69</sup> *Id.* at 16. The district court found that "wealth" could be deemed a fundamental right or interest. *Id.*

<sup>70</sup> *Id.* at 1.

<sup>71</sup> *Id.* at 18.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 19.

<sup>74</sup> *Id.* at 25. The class argued that the children in the lower revenue tax districts were receiving a lower quality education. The *Rodriguez* Court, however, held that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.* (quoting *Brown v. Bd. of Educ.*, 347 US 483, 493 (1954)). Plaintiffs argued that education was so closely tied to freedom of speech, voting and civic participation that it became a fundamental

*Rodriguez* Court refused to recognize education as a fundamental right guaranteed by the Constitution.<sup>78</sup> Fundamental rights, the Court asserted, are created by the Constitution, and not by the relative importance of the activity at issue.<sup>79</sup> After determining that neither the plaintiff class nor the right to education warranted heightened scrutiny, the Court applied a rational basis analysis, the least rigorous standard of review,<sup>80</sup> and held that, despite its shortcomings, the Texas school financing system was an “enlightened approach to a problem for which there is no perfect solution” and did not violate the Equal Protection Clause.<sup>81</sup>

With *Rodriguez*, the Supreme Court began a shift away from its previous approach to equal protection challenges based upon the social ills of racism or poverty.<sup>82</sup> The Court acknowledged the difficulty of creating legislation without any discriminatory impact, and indicated that it was loath to step, either literally or figuratively, into the shoes of the legislature.<sup>83</sup> As a result, the *Rodriguez* Court indicated that a plaintiff cannot successfully argue unequal protection based on a suspect classification unless the suspect class is absolutely defined<sup>84</sup> and offers a workable alternative to the challenged state action.<sup>85</sup>

### C. PLYLER V. DOE<sup>86</sup>

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personal right because of its essential nature. *Id.* at 35–36. In dismissing that argument, the Court noted it has “never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.” *Id.*

<sup>78</sup> *Id.* at 35–36.

<sup>79</sup> *Id.* at 33–34.

<sup>80</sup> *Id.* at 40 (“A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.”).

<sup>81</sup> *Id.* at 55.

<sup>82</sup> *See id.* at 70 (Marshall, J., dissenting) (“The majority’s decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth.”).

<sup>83</sup> *Id.* at 41 (majority opinion) (“No scheme of taxation, whether the tax is imposed on property, income or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.”).

<sup>84</sup> *See id.* at 28 (“However described, it is clear that appellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class . . .”).

<sup>85</sup> *See id.* at 41 n.85 (“Those who urge that the present system be invalidated offer little guidance as to what type of school financing should replace it.”).

<sup>86</sup> 457 U.S. 202 (1982).

Nine years after *Rodriguez*, the Supreme Court once again took on the issue of education and equal protection. In *Plyler v. Doe*, the Court was faced with determining whether undocumented immigrant children have the same right to a free secondary public education as citizen children and legally present immigrant children.<sup>87</sup> *Plyler* involved a Texas statute that, ostensibly responding to the rising cost of public education, withheld from local school districts state funds for educating students of questionable immigration status.<sup>88</sup> The statute also empowered local school districts to deny enrollment to students who were unable to prove their lawful status.<sup>89</sup>

After concluding that the Equal Protection Clause applies to every individual domiciled in the United States,<sup>90</sup> whether lawfully or not, the *Plyler* Court reiterated that “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”<sup>91</sup> The Court concluded that a state that subjects an individual or group to its laws, while simultaneously withholding the law’s protections, creates an impermissible sub-class of residents.<sup>92</sup>

Looking to *Rodriguez* to determine whether strict scrutiny applied, the Court first decided that the plaintiffs did not qualify as a suspect class because the legal status of undocumented immigrants is voluntary in nature; that is, undocumented immigrants reside in a foreign country by choice.<sup>93</sup> Second, the Court once again held that education is not a fundamental right.<sup>94</sup> Although the *Plyler* Court declined to apply a heightened level of scrutiny, the Court did not appear to apply the traditional rational basis

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<sup>87</sup> *Id.* at 205. *Plyler* is a consolidation of several class actions challenging the constitutionality of the Texas statute. *Id.* at 206–09.

<sup>88</sup> *Id.* at 205; TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981).

<sup>89</sup> *Plyler*, 457 U.S. at 205.

<sup>90</sup> *See id.* at 212 n.10 (“[E]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction of the United States.”); *see id.* at 215 (“That a person’s initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State’s territorial perimeter . . . . And until he leaves the jurisdiction . . . he is entitled to the equal protection of the laws that a State may choose to establish.”); *see also id.* at 211 (stating that the Equal Protection Clause and Due Process Clause were “fashioned to protect an identical class of persons”). The Court concluded that the Equal Protection was applicable to all persons within the boundaries of a state. *Id.* at 215.

<sup>91</sup> *Id.* at 213.

<sup>92</sup> *Id.* at 213–15.

<sup>93</sup> *Id.* at 219 n.19 (“Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.”).

<sup>94</sup> *Id.* at 221–22.



standard of review in its analysis either.<sup>95</sup> Instead, to pass constitutional muster, the Court stated that the Texas statute would have to further “a *substantial* interest of the state,”<sup>96</sup> as opposed to a legitimate goal,<sup>97</sup> in order to justify the discrimination.<sup>98</sup>

Two factors drove the Court’s analysis.<sup>99</sup> First, the harmed class in *Plyler* consisted of minor children whose unlawful entry into the United States was not within their control.<sup>100</sup> Explaining that children should not be punished for the actions of their parents, the Court found that “[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>101</sup> The majority of the court could not conceive of any rational justification for penalizing the children.<sup>102</sup>

The second driving factor was that, while education is not a fundamental right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”<sup>103</sup> The Court noted that, because education provides tools by which individuals can beneficially participate in society, it plays a fundamental role in maintaining the country’s political and cultural heritage.<sup>104</sup> The wholesale denial of secondary public education to this group of children would result in a permanent underclass of individuals who lacked the skills and resources to better their status in American society.<sup>105</sup> Invoking the memory of *Brown v. Board of Education*, the Court analogized the situation faced by undocu-

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<sup>95</sup> See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151–153 (1938) (applying the traditional rational basis standard of review).

<sup>96</sup> *Plyler*, 457 U.S. at 217–18.

<sup>97</sup> *Id.* at 223–24.

<sup>98</sup> *Id.* at 217–18.

<sup>99</sup> *Id.* at 223–24.

<sup>100</sup> *Id.* at 220.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 221.

<sup>104</sup> *Id.*; see also *id.* at 234 (Blackmun, J., concurring) (“[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”)

<sup>105</sup> *Id.* at 222 (majority opinion). The Court recognized the fact that undocumented immigrant children were unlikely to be deported to their country of origin. *Id.* at 230. Moreover, “undocumented children are ‘basically indistinguishable’ from legally resident alien children[.]” so the savings generated by denying these children a public education was wholly insubstantial in light of the costs. *Id.* at 229–30.

mented immigrant children to that faced by African-American children educated in a segregated school system.<sup>106</sup>

The *Plyler* Court struck down the Texas statute, concluding that, under a rational basis standard, legislation that had the effect of depriving undocumented immigrant children of a secondary public education violated the Equal Protection Clause and was thus unconstitutional.<sup>107</sup>

#### IV. THE HOUSING ORDINANCES

At this time, there are three published federal court opinions addressing the legal complexities associated with these housing ordinances.<sup>108</sup> In each of the three cases the federal district courts held that the ordinances were preempted by federal immigration laws and enjoined the housing ordinances from being enforced<sup>109</sup>; in two cases the courts determined that the ordinances would not survive a procedural due process challenge<sup>110</sup>; in only one case did the court address the plaintiffs' equal protection claims.<sup>111</sup>

##### A. ESCONDIDO, CALIFORNIA

On October 16, 2006, the City of Escondido passed an ordinance entitled "Establishing Penalties for the Harboring of Illegal Aliens in the City

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<sup>106</sup> *Id.* at 222–23 (citing *Brown v. Board of Education*, 347 U.S. 483 (1954)). The *Plyler* Court also appeared to believe that some of the undocumented immigrant children might one day become American citizens. *Plyler*, 457 U.S. at 230.

<sup>107</sup> *Id.* at 229–30.

<sup>108</sup> The following are the only federal court opinions regarding the housing ordinances: *Garrett v. City of Escondido* (*Escondido*), 465 F. Supp. 2d 1043 (S.D. Cal. 2006); *Villas at Parkside Partners v. City of Farmers Branch* (*Farmers Branch*), 496 F. Supp. 2d 757 (N.D. Tex. 2007); and *Lozano v. City of Hazelton* (*Hazelton*), 496 F. Supp. 2d 477 (M.D. Pa. 2007), *aff'd in part*, 620 F.3d 170 (3d Cir. 2010).

<sup>109</sup> *Escondido*, 465 F. Supp. 2d at 1059; *Farmers Branch*, 496 F. Supp. 2d at 774; *Hazelton*, 496 F. Supp. 2d at 521, 525, 529.

<sup>110</sup> *Escondido*, 465 F. Supp. 2d at 1059 (holding ordinance fails to provide adequate procedural due process to landlords and possibly illegal aliens: "the [City of Escondido] presents no evidence of an extraordinary circumstance that would justify the lack of notice and hearing prior to the deprivation of Plaintiff landlords' property interest."); *Hazelton*, 496 F. Supp. 2d at 537–538 ("Because the [ordinance] does not provide notice to challenged employees or tenants, does not inform the employers and owners/landlords of the types of identity information needed, and provides for judicial review in a court system that lacks jurisdiction, it violates the due process rights of employers, employees, tenants and owners/landlords. It is therefore unconstitutional.").

<sup>111</sup> *Hazelton*, 496 F. Supp. 2d at 541–542 (insufficient evidentiary showing to prove discriminatory intent by the city of Hazelton in the absence of a suspect class).

of Escondido” (the “Escondido Ordinance”).<sup>112</sup> The Escondido Ordinance prohibited private landlords or businesses that owned and rented “dwelling units” within Escondido from renting to tenants of undocumented immigration status.<sup>113</sup> Individuals who violated the ordinance could have their business license suspended, which would prevent the offender from collecting rental payments from *any* of the offender’s tenants.<sup>114</sup> Individuals who violated the ordinance more than once could face fines of up to \$1,000 per day, per violation, a jail term of six months, or both.<sup>115</sup> Before the statute

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<sup>112</sup> *Escondido*, 465 F. Supp. 2d at 1047. The following are the relevant provisions of the Escondido Ordinance:

S[ection] 2. Definitions. The following definition shall be added to Section 16-3, and shall be construed so as to be consistent with state and federal law, including federal immigration law:

Illegal Alien: An alien who is not lawfully present in the United States, according to the terms of United States Code Title 8, section 1101 et seq. The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person is an alien who is not lawfully present in the United States.

ESCONDIDO, CAL. ORDINANCE 2006-38 R § 2 (Oct. 18, 2006), *available at* <http://www.aialdownloads.org/advoc/EscondidoOrdinance.pdf>.

Section 16E-1. Harboring Illegal Aliens. It is unlawful for any person or business entity that owns a dwelling unit in the City and is subject to Section 16-17, to harbor 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.

a. For the purposes of this section, to let, lease, 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 law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by 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 law, shall also be deemed to constitute harboring.

.....

Section 16E-2. Enforcement. The Business License Division shall enforce the requirements of this section.

.....

d. If after ten business days following receipt of written notice from the City that a violation has occurred and that the immigration status of any alleged illegal alien has been verified, pursuant to United States Code Title 8, section 1373(c), the owner of the dwelling unit fails to correct a violation of this section, the City shall deny or suspend the business license of the dwelling unit as provided in Section 16-235.

e. For the period of suspension, the owner of the dwelling unit shall 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.

§ 3 (amending Chapter 16E of previous ordinance).

S[ection] 4. C[onstruction]. The requirements and obligations of this section shall be implemented in a manner fully consistent with federal law regulating immigration and protecting the civil rights of all citizens and aliens.

§ 4.

<sup>113</sup> *Escondido*, 465 F. Supp. 2d at 1047–48.

<sup>114</sup> *Id.* at 1048.

<sup>115</sup> *Id.*

could be enforced, however, a group of landlords, “Jane Doe” tenants,<sup>116</sup> and human rights activists (“plaintiffs”) filed a lawsuit seeking to enjoin enforcement of the ordinance<sup>117</sup> on the grounds that the Ordinance violated of the Supremacy Clause, the Contracts Clause, the Due Process Clause of the Fourteenth Amendment, and certain state laws<sup>118</sup>—the plaintiffs did not challenge the ordinance on equal protection grounds.

The district court found that the Escondido Ordinance raised serious federal preemption concerns.<sup>119</sup> Though the court determined that the ordinance did not attempt to impermissibly regulate immigration because the ordinance was not “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,”<sup>120</sup> the court found that federal statutes already addressed the harboring of illegal aliens<sup>121</sup> and likely preempted the Escondido Ordinance.<sup>122</sup>

The *Escondido* court also expressed concern over the due process implications of the Escondido Ordinance.<sup>123</sup> Procedural due process requires that an individual be provided with sufficient notice and an opportunity to be heard before that individual is deprived of a life, liberty, or property interest.<sup>124</sup> The *Escondido* plaintiffs had a property interest in collecting rent,

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<sup>116</sup> There was no evidence before the court on the number of citizen children who might be affected by the Escondido Ordinance as the lawsuit protected the identities of affected tenants by allowing them to sue anonymously as “Jane Doe” tenants. *Id.* at 1043.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1054.

<sup>119</sup> *Id.* at 1057.

<sup>120</sup> *Id.* at 1055-56 (quoting *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)). The court agreed with the defendants that a regulation of immigration is one that involves the “creation of standards for determining who is and is not in this country legally . . . [and] not whether a state’s determination in this regard results in the actual removal or inadmissibility of any particular alien.” *Id.* at 1055 (citing *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603-04 (E.D. Va. 2004)). The Ordinance was not a regulation of immigration because it relied solely on federal agencies and authorities to make the determination of immigration status. *Id.*

<sup>121</sup> Supreme Court jurisprudence has established three ways in which a federal law may preempt a state law: “1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or ‘burdens or conflicts in any manner with any federal laws or treaties.’” *Id.* at 1055 (citing *DeCanas*, 424 U.S. at 354, 362-63 (1976)). The *Escondido* court held that the Ordinance was not a regulation of immigration, but that serious questions arose under the field preemption and conflicts preemption prongs. *Id.* at 1055-57.

<sup>122</sup> *See id.* at 1056. The district court focused its analysis on the potentially overwhelming burden of the Escondido Ordinance on the federal government because of Escondido’s total reliance upon the federal system to determine immigration status. *Id.* at 1057.

<sup>123</sup> *Id.* at 1059.

<sup>124</sup> *Id.* at 1058 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

as well as in the funds required to initiate eviction proceedings in compliance with the Ordinance, and the plaintiffs could not be deprived of these interests without notice and a hearing.<sup>125</sup> The Escondido Ordinance, however, provided neither.<sup>126</sup>

Without finding a clear violation of either the Supremacy Clause or the Due Process Clause, the court concluded that its “previous findings of irreparable harm and a balance of hardships tipping sharply in [the] plaintiffs’ favor” justified granting the plaintiffs’ request for a temporary restraining order.<sup>127</sup>

#### B. FARMERS BRANCH, TEXAS

Three months after the enactment of the Escondido Ordinance, the municipality of Farmers Branch, Texas, a bedroom community adjacent to Dallas, passed Ordinance 2903 (“Farmers Branch Ordinance”), which “adopt[ed] citizenship and immigration certification requirements for apartment complexes,” and which the municipality claimed was necessary “to safeguard the public.”<sup>128</sup> Enacted as a ballot measure on May 12,

<sup>125</sup> *Id.* at 1058.

<sup>126</sup> *Id.* at 1058–59.

<sup>127</sup> *Id.* at 1059.

<sup>128</sup> *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 762 (N.D. Tex. 2007) (citing FARMERS BRANCH, TEX., ORDINANCE 2903 (2007), available at <http://www.farmersbranch.info/sites/default/files/Ordinance%20No%202903.pdf>). Ordinance 2903 provided the following, in relevant part:

The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status for each tenant family consistent with subsection (3).

§ 3(B)(2) (emphasis added).

The property owner and/or manager shall require of each family member, except for noncitizens who are minor children of the family or 62 years of age or older, the submission of the following evidence:

i. For U.S. citizens or U.S. nationals, the evidence consists of a signed declaration of U.S. citizenship or U.S. nationality. The verification of the declaration shall be confirmed by requiring presentation of a United States passport or other appropriate documentation in a form designated by ICE as acceptable evidence of citizenship status.

ii. For all other noncitizens, the evidence consists of:

- a. A signed declaration of eligible immigration status;
- b. A form designated by ICE as acceptable evidence of immigration status; and
- c. A signed verification consent form.

§ 3(B)(3)(i)–(ii).

i. The owner and/or property manager shall request and review original documents of eligible citizenship or immigration status. . . .

ii. The owner and/or property manager is *prohibited from allowing the occupancy of any unit by any family which has not submitted the required evidence of citizenship or eligible immigration status* under this Section.

§ 3(B)(4)(i)–(ii) (emphasis added).

2007,<sup>129</sup> the ordinance required landlords without any training or expertise in federal immigration law to determine the prospective tenant's "eligible immigration status."<sup>130</sup> One day before enforcement began on the Farmers Branch Ordinance, a group of apartment-complex owners and residents ("plaintiffs") filed suit in federal court alleging that the ordinance was invalid for five reasons: first, it was preempted by federal law; second, it violated the Contracts Clause; third, it violated procedural and substantive due process; fourth, it violated the Equal Protection Clause; and fifth, it violated the Texas Local Government Code.<sup>131</sup>

In its due process analysis, the *Farmers Branch* court held that the ordinance was void because the term 'eligible immigration status' and the attendant documentation requirements were unconstitutionally vague,<sup>132</sup> and the landlords responsible for enforcing the ordinance were unqualified to make these important determinations.<sup>133</sup> Further, the court held that the Farmers Branch Ordinance violated due process because it failed to sufficiently define the offense that would make landlords liable for criminal penalties.<sup>134</sup>

Although the district court did not decide whether the ordinance violated the Equal Protection Clause, it nonetheless acknowledged that the "dominant, and perhaps sole, purpose of this provision of the Ordinance is to prevent undocumented immigrants from renting apartments in Farmers Branch."<sup>135</sup> The city avoided specific language to express this purpose, but the district court found this discriminatory purpose to be unmistakably clear considering the ordinance as a whole.<sup>136</sup> Indeed, the district court noted that, should the ordinance become effective, it would require the tenant-plaintiffs to "relocate, change jobs and schools, or remain in Farmers Branch and face eviction."<sup>137</sup>

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<sup>129</sup> *Id.* at 761. There were no allegations of voter fraud. See generally *Farmers Branch*, 496 F. Supp. 2d 757.

<sup>130</sup> *Id.* at 775.

<sup>131</sup> *Id.* at 774.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 772 ("The court determines that the Ordinance burdens private citizens and city officials with making immigration status decisions based upon a scheme that does not adopt federal immigration standards.")

<sup>134</sup> *Id.* at 776.

<sup>135</sup> *Id.* at 771.

<sup>136</sup> *Farmers Branch*, 496 F. Supp. 2d at 771. *Id.*

<sup>137</sup> *Id.* at 7767.

Finally, like the *Escondido* court, the district court held that federal immigration laws preempted the ordinance's enforcement,<sup>138</sup> and the court issued a temporary restraining order. On January 22, 2008, three days after the district court granted the plaintiffs' injunction, Farmers Branch passed a revised ordinance to "[c]ontinue to pursue strategies to address illegal immigration."<sup>139</sup> Notably, at the time Ordinance 2952 passed, Tim O'Hare, a Farmers Branch Councilman (who was elected mayor of Farmers Branch in May 2008), stated a more invidious motive for introducing the law: "I saw our property values declining . . . . When that happens, people move out of our neighborhoods, and what I would call less desirable people move into

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<sup>138</sup> *Id.* at 777. The district court held that the federal government alone can issue a "regulation of immigration," defined as "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 764 (citing *De Canas v. Bica*, 424 U.S. 351, 355 (1976)). The court looked to three tests to determine whether federal law preempts a state immigration law or regulation: (1) A statute is preempted if it is a regulation of immigration; (2) A statute is preempted when Congress intends to regulate the area the statute purports to regulate; or, (3) A statute is preempted when it stands in complete conflict with federal law. *Id.* at 764–65. A statute that simply adopts the federal immigration standards would not be preempted under the first *De Canas* test. *Id.* (citing *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603 (E.D. Va. 2004)). Here, the Farmers Branch Ordinance adopted the United States Department of Housing and Urban Development (HUD) guidelines to determine the "eligible immigration status." 496 F. Supp. 2d. at 768. These guidelines are not the federal immigration standards required under *De Canas*, but are guidelines used to determine a noncitizen's eligibility for assistance. *Id.* These guidelines would not allow certain lawfully present aliens from obtaining rental housing and the district court concluded were in conflict with immigration laws. *Id.* In dicta, the district court also found that the Farmers Branch Ordinance violated the *De Canas* test by requiring private landlords to make "determinations of immigration status . . . [even if] for the limited purpose of denying benefits." *Id.* at 772 (citing *LULAC v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995)).

<sup>139</sup> Minutes of City Council of Farmers Branch Meeting Agenda (Jan. 22, 2008) (document available for download at [rec.farmersbranch.info/CityCouncil/Minutes/2008-0122%20Minutes.doc](http://rec.farmersbranch.info/CityCouncil/Minutes/2008-0122%20Minutes.doc)) ("Mayor Phelps stated at the City Council retreat conducted on June 27<sup>th</sup>, 2007, thirty-nine goals were established for the City of Farmers Branch. Goal #16 for the Council is 'Continue to pursue strategies to address illegal immigration issues.' The Council has been steadfast in their pursuit to uphold Ordinance No. 2903, which was approved by the voters in May of 2007, and which has been challenged in court by some individuals and organizations."). The new ordinance amended the previous ordinance and included, in relevant part:

(1) Prior to occupying any leased or rented single-family residence, each occupant must obtain a residential occupancy license.

(2) It is the occupant's responsibility to submit an occupancy license application to the building inspector, pay a fee of \$5 to the City, and obtain a residential occupancy license. If there are multiple occupants seeking to occupy a single rental unit, each occupant must obtain his or her own residential occupancy license.

....

(5) (i) If the applicant is not a United States citizen or national, an identification number assigned by the federal government that the occupant believes establishes his or her lawful presence in the United States.

FARMERS BRANCH, TEX. ORDINANCE 2952 § 1 (Jan. 22, 2008) available at <http://www.farmersbranch.info/sites/default/files/Ordinance%20No%202952.pdf> (amending § 26-79 of FARMERS BRANCH, TEX. ORDINANCE 2903).

the neighborhoods, people who don't value education, people who don't value taking care of their properties."<sup>140</sup> O'Hare also asserted that the undocumented immigrants were largely responsible for the decline of local schools and local retail operations.<sup>141</sup>

Two lawsuits were filed to enjoin enforcement of Ordinance 2952.<sup>142</sup> The two suits were consolidated and all parties agreed to the entry of a preliminary injunction while the case is adjudicated.<sup>143</sup>

### C. HAZLETON, PENNSYLVANIA

In July 2006, the City of Hazleton addressed its heightened concerns over undocumented immigrants by passing the "Illegal Immigration Relief Act" (the "IIRA") and the "Tenant Registration Ordinance" (collectively, the "Hazleton Ordinances").<sup>144</sup> Similar to the ordinances in Escondido and

<sup>140</sup> Stephanie Sandoval, *Farmers Branch proposal would target illegal immigrants*, DALL. NEWS, Aug. 21, 2006, <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/082106dnmetfbimmigration.349844e.html>.

<sup>141</sup> *Id.*; see also *supra*, note 1.

<sup>142</sup> Complaint at 1, *Reyes v. City of Farmers Branch*, 586 F. 3d 1019 (5th Cir. 2009) (No. 3:08-CV-01615-O) and *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:08-CV-1551-B (N.D. Tex. filed Sept. 3, 2008). The plaintiffs in *Reyes* alleged that the ordinance's purpose was to "prevent certain immigrants from renting and living in the City of Farmers Branch." Complaint at 2, *Reyes*, 586 F. 3d 1019 (No. 3:08-CV-01615-O). Specifically, the ordinance was enacted "to limit or reduce the number of Latinos living in the City." *Id.* at 3.

<sup>143</sup> The consolidated case number is No. 3:08-CV-1551-B. See Catholic Legal Immigration Network, *State and Local Anti-Immigration Legislation: Litigation Update*, AILA.COM (Oct. 31, 2008), <http://www.ailadownloads.org/advo/CLINICLitigationUpdateOct2008.pdf>.

<sup>144</sup> HAZLETON, PA, ORDINANCE 2006-13 (Aug. 15, 2006), available at <http://www.aclupa.org/downloads/hazletonfirstordinance.pdf>; HAZLETON, PA, ORDINANCE 2006-18 (September 21, 2006), available at <http://www.aclupa.org/downloads/hazletonsecondordinance.pdf>, as amended by HAZLETON, PA, ORDINANCE 2006-40 (December 28, 2006), available at [http://www.aclupa.org/files/pdfs/immigrants/hazleton\\_thirdordinance.pdf](http://www.aclupa.org/files/pdfs/immigrants/hazleton_thirdordinance.pdf), and HAZLETON, PA, ORDINANCE 2007-6 (March 21, 2007), available at <http://www.aclupa.org/downloads/hazletonord607.pdf>. Ordinance 2006-13 provides the following, in relevant part:

No Person shall hereafter occupy, allow to be occupied, advertise for occupancy, solicit occupants for, or let to another person for occupancy any Rental Unit within the City for which an application for license has not been made and filed with the Code Enforcement Office and for which there is not an effective license.

HAZLETON, PA, ORDINANCE 2006-13 § 6a.

Application for occupancy permits . . . shall specifically require the following minimum information . . .

. . . .  
Proper identification showing proof of legal citizenship and/or residency

§ 7. Ordinance 2006-18 provides the following, in relevant part:



Farmers Branch, the Hazleton Ordinances prohibited individuals from harboring undocumented immigrants<sup>145</sup> and required occupants of the city's rental properties to show proof of legal citizenship or residency.<sup>146</sup>

The *Hazleton* court was the first to perform an equal protection analysis.<sup>147</sup> Initially, the equal protection claim arose because the language of the IIRA allowed the city to consider race when enforcing the ordinance, as long as race was not the sole or primary reason.<sup>148</sup> In response, Hazleton amended the IIRA by striking the “solely or primarily” language to create a facially neutral ordinance.<sup>149</sup> Plaintiffs, a group of legal and illegal immigrants<sup>150</sup> and Latino organizations, pursued their challenge.<sup>151</sup>

The district court held there was no equal protection violation because the Hazleton Ordinances lacked the requisite discriminatory intent.<sup>152</sup> Citing the Third Circuit's interpretation of *Personnel Administrator of Massachusetts v. Feeney*, the court noted the Supreme Court's standard for proving discriminatory intent: “To prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decisionmaker [sic] . . . adopted the policy at issue ‘because of,’ not merely ‘in spite of,’ its ad-

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It is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City. . . .

. . . .  
A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.

HAZLETON, PA, ORDINANCE 2007-6 § 4(A)–(B)(2).

It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor 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.

(1) For the purposes of this section, to let, lease, 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 law, shall be deemed to constitute harboring. To suffer or permit the occupancy of the dwelling unit by 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 law, shall also be deemed to constitute harboring.

§ 5(A)–(A)(1).

<sup>145</sup> HAZLETON, PA, ORDINANCE 2006-18 § 5A.

<sup>146</sup> HAZLETON, PA, ORDINANCE 2007-6 § 7b(1)(g).

<sup>147</sup> *Lozano v. City of Hazleton (Hazleton)*, 496 F. Supp. 2d 477, 538–42 (M.D. Pa. 2007) *aff'd in part*, 620 F.3d 170 (3d Cir. 2010).

<sup>148</sup> *Id.* at 538.

<sup>149</sup> *Id.* at 539.

<sup>150</sup> Once again, the tenant plaintiffs were allowed to participate in the lawsuit on an anonymous basis. *Id.* at 548; *see also* *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1043 (S.D. Cal. 2006) (allowing plaintiffs to participate as “Jane Doe” plaintiffs).

<sup>151</sup> *Hazleton*, 496 F. Supp. 2d at 540.

<sup>152</sup> *Id.*

verse effects upon an identifiable group.”<sup>153</sup> Testimony regarding the legislative history of the Hazleton Ordinances did not sway the court, nor did the mayor’s testimony acknowledging that the Ordinance could potentially have a discriminatory effect,<sup>154</sup> and the court concluded that the plaintiffs could not prove that the statute was amended “to mask a discriminatory motive.”<sup>155</sup> Finally, the court held that because the Hazleton Ordinances did not implicate a fundamental right or create a suspect class, the City’s purpose for passing the legislation was rationally related to a legitimate state interest: namely, “limiting the social and public safety problems caused by the presence of people without legal authorization in the City.”<sup>156</sup>

Ultimately, the district court enjoined the enforcement of the Hazleton Ordinances based on preemption by federal immigration laws,<sup>157</sup> and viola-

<sup>153</sup> *Id.* (citing *Pryor v. NCAA*, 288 F.3d 548, 562 (3d Cir. 2002)).

<sup>154</sup> *Id.* at 540–41.

<sup>155</sup> *Id.* The *Hazleton* court noted, but was not persuaded by, testimony at the trial court level:

At trial, plaintiffs’ attorney asked Louis Barletta, the mayor of Hazleton, whether he would ‘reconsider’ the ordinances if evidence appeared that they would have a ‘discriminatory effect.’ The mayor responded that he did ‘not believe that it will have a discriminatory effect,’ ‘but would in fact ‘have the opposite’ impact. When asked if he would repeal the ordinances if evidence indicated that they would have a discriminatory effect, the mayor responded that ‘I believe if the ordinances are legal, I believe we have the right to enforce them. As long as they’re legal, that is my concern.’ When asked if he would enforce the ordinances if they were declared legal but had a discriminatory effect, the mayor declared that ‘if they were legal, and I believe they had a discriminatory effect, I would not present it. If they are legal, and I believe they do not have a discriminatory effect, I would pass the ordinance.’ An opinion that the ordinances were legal from a court, despite a finding by experts that they were likely discriminatory, would not cause the mayor to change his resolve to enforce the ordinances, since ‘[e]ven experts have their own biases and opinions.’ Defendant also apparently passed the amendments more quickly than is usually the case for such legislation, foregoing second and third readings of the statute.

*Id.* (citations omitted).

<sup>156</sup> *Id.* at 542.

<sup>157</sup> *Id.* at 518. The Court held that the employment provisions in the IIRA were expressly preempted by the Immigration Reform and Control Act of 1986 (the “IRCA”). *Id.* The IRCA contains an express preemption provision stating that the “[P]rovisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens” (citing 8 U.S.C. § 1324a(h)(2) (2006)). This provision, however, does not apply to a state or local law that imposes licensing sanctions. *Id.* at 519. According to legislative history, “licensing” refers to revoking a local license for a violation of an IRCA provision, as opposed to violating the local law. *Id.* at 520. In the IIRA, the revocation of the employer’s local business license was a sanction for violating the IIRA. *Id.* Thus, the IRCA expressly preempted the employment provisions of the IIRA. *Id.*

The court also held that the employment provisions of the IIRA were implicitly preempted by the IRCA because the scope of the federal law indicated a congressional intent to “occupy the field exclusively.” *Id.* at 521 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)). The district court held that the IRCA was a comprehensive illegal alien employment statute that left no room for the IIRA. *See id.* at 523 (explaining trial court’s findings). Moreover, because the IIRA contained additional requirements and regulations in comparison to the IRCA, these additions were either in direct conflict or were a mere duplication of the provisions of the IRCA. *Id.* at 523.

tions of the Due Process Clause,<sup>158</sup> the Fair Housing Act (FHA),<sup>159</sup> and Pennsylvania state law.<sup>160</sup> Notably, regarding the FHA, the court held that the Hazleton Ordinances violated federal housing laws because they denied undocumented immigrants equal access to housing.<sup>161</sup> Moreover, the court held that the Hazleton Ordinances violated federal immigration law because they required city employees to make determinations of immigration status.<sup>162</sup> According to federal law, these decisions are reserved to immigration judges alone.<sup>163</sup> Finally, the court also held that the Hazleton Ordinances violated § 1981, which gives all persons the same right to contract as white citizens.<sup>164</sup> Citing *Plyler v. Doe*, the *Hazleton* court stated that “all persons” included undocumented immigrants,<sup>165</sup> and therefore the Hazleton Ordinances violated § 1981 by prohibiting undocumented immigrants from entering into rental leases.<sup>166</sup>

There was no evidence before the Court on how the Hazleton Ordinances would affect the citizen children of the undocumented immigrants targeted by the legislation.<sup>167</sup> In September 2010, the Third Circuit upheld the lower court’s holding that the Hazleton Ordinances were pre-empted by the Federal Immigration Reform and Control Act.<sup>168</sup>

## V. AN EQUAL PROTECTION ANALYSIS

### A. AN ARGUMENT FOR STRICT SCRUTINY

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<sup>158</sup> *Id.* at 537–38. The Hazleton Ordinances violated the Due Process Clause of the Fourteenth Amendment because of inadequate notice and hearing provisions. *Id.* at 537. The ordinance did not require notice to employees or tenants when a complaint was filed against them and gave insufficient notice to employers or landlords about which documents were needed for a hearing. *Id.* at 536. Further, the ordinance provided that the Pennsylvania courts were to be the final appellate court for a hearing. *Id.* The federal courts, however, not the state courts, have sole jurisdiction to determine immigration status. *Id.*

<sup>159</sup> *Id.* at 546 (citing 42 U.S.C. § 1981 (2006)).

<sup>160</sup> *Id.* at 554. The district court held that the Hazleton Ordinances violated the Pennsylvania municipality laws because the city exceeded its police power by enacting the ordinances. *Id.*

<sup>161</sup> *Id.* at 531.

<sup>162</sup> *Id.* at 533.

<sup>163</sup> *Id.* (citing 8 U.S.C. § 1229a(a)(1) (2006)).

<sup>164</sup> *Id.* at 546 (citing 42 U.S.C. § 1981 (2006)).

<sup>165</sup> *Id.* at 547 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982)).

<sup>166</sup> *Id.* at 548.

<sup>167</sup> *Id.* at 514.

<sup>168</sup> *Lozano v. City of Hazleton*, 620 F.3d 170, 219–20, 224 (3d Cir. 2010). The Third Circuit reversed the district court on the issue of plaintiffs’ standing to challenge the IIRA’s private cause of action. *Id.* at 182–83. The Third Circuit held that none of the plaintiffs met the standing requirements. *Id.*

Under a strict scrutiny analysis, the governmental actor responsible for the challenged legislation must justify the legislation by demonstrating that it is “narrowly tailored” to achieve a “compelling governmental interest.” Strict scrutiny analysis is far more exacting and more likely to result in protection for the plaintiff class than rational basis scrutiny, which requires only that the challenged legislation be rationally related to a legitimate governmental interest.<sup>169</sup> As previously stated, equal protection claims can be afforded strict scrutiny through either of two avenues, both of which potentially apply to the citizen children of undocumented immigrants.

### 1. Equal Access to Housing Is at least a Quasi-Fundamental Right

The first avenue to heightened scrutiny under the Equal Protection Clause is the identification of a fundamental right burdened by governmental legislation.<sup>170</sup> The Supreme Court case *Lindsey v. Normet* is often cited for the proposition that the right to housing is not a fundamental right under the United States Constitution.<sup>171</sup> A careful reading of the case, however, demonstrates that the Court’s holding was not so broad.

*Lindsey* was a class action alleging violations of the Due Process and Equal Protection Clauses<sup>172</sup> and seeking declaratory relief from Oregon’s Forcible Entry and Wrongful Detainer Law, which provided for an expedited and limited trial, among other things, following a tenant’s failure to pay rent and notice from the landlord.<sup>173</sup> The Court summarily rejected the appellant-class’s claim that the case merited heightened scrutiny:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. *We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality*, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the pay-

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<sup>169</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (explaining burden required by rational basis analysis); see also *supra*, note 79 and accompanying text.

<sup>170</sup> *Rodriguez*, 411 U.S. at 29.

<sup>171</sup> 405 U.S. 56 (1972).

<sup>172</sup> *Id.* at 59–60. Specifically, the Lindseys attacked three separate provisions in the Oregon law requiring: (1) that the tenant go to trial within six days of filing the petition, otherwise the tenant must post security for the payment of any rent that would accrue during the period of the continuance; (2) that the judge or jury consider only whether the allegations in the original complaint were true; and (3) that a defendant who lost a suit and wanted to appeal was required to obtain two sureties providing security for twice the rental value of the property from the time the action was commenced to final judgment. *Id.* at 63–65.

<sup>173</sup> *Id.* at 64.

ment of rent or otherwise contrary to the terms of the relevant agreement.<sup>174</sup>

The Court found that the assurance of adequate housing was a benefit conferred and regulated by the legislature, not the judiciary,<sup>175</sup> and applying rational basis scrutiny, the court found that the Oregon statute was constitutionally sound under the Equal Protection Clause.<sup>176</sup>

The *Lindsey* Court did not extend its analysis to equal access to housing.<sup>177</sup> Instead, it held that the right to housing *of a particular quality* was not fundamental.<sup>178</sup> Thus *Lindsey* does not foreclose the possibility that all American citizens, without exception, have a fundamental and general right of equal access to housing.

If the Court is hesitant to deem housing a fundamental right, then the Court should follow its reasoning in *Plyler*, wherein the Court considered the significant social benefits of education and determined that legislation burdening children's access to education is invalid unless it furthers some *substantial* goal:

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 a child, mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance."

. . . .

By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.<sup>179</sup>

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<sup>174</sup> *Id.* at 74 (emphasis added).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* ("Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.")

<sup>177</sup> *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 221–224.

Housing is no less important than education. Equal access to housing is a threshold requirement for citizens and undocumented immigrants to benefit from secondary public school education. Without the ability to establish residence within a school district's boundaries, a child may not attend a public school.<sup>180</sup> It would stretch credibility to believe the *Plyler* Court intended its decision to be evaded in this manner; equal access to housing deserves *at least* the same rigorous scrutiny that the Supreme Court applied in *Plyler* to the issue of education.

## 2. Citizen Children of Undocumented Immigrants: A Suspect Class

If a fundamental right is not implicated, then strict scrutiny is triggered only if the challenged legislation discriminates on the basis of a suspect class—a group targeted by the government based upon a “deep-seated prejudice.”<sup>181</sup> In the past, Supreme Court case law has supported the designation of a class as “suspect” when: (1) the classification was irrelevant to any proper legislative goal; or, (2) the legislation imposed special disabilities upon a disfavored group for reasons beyond its control, resulting in caste-like treatment.<sup>182</sup> The latter category specifically forbids the creation of varying tiers of American citizenship with unequal rights and privileges. Thus, the creation of second-class citizens is prohibited in the United States.

Whether the plaintiffs qualify as a suspect class is one of the most contentious issues in equal protection claims. In *San Antonio Independent School District v. Rodriguez*, the majority held that the designation of a suspect class hinges on two criteria: (1) whether the conduct results in discrimination and (2) whether the resulting classification may legally be regarded as suspect.<sup>183</sup> In other words, because legislation will always impose a burden on some class of individuals, the legislation is subject to strict scrutiny only if the burden falls disproportionately upon a suspect class.<sup>184</sup>

With respect to the Housing Ordinances, the first prong in the suspect class analysis is easily met: the municipalities intentionally drafted the Housing Ordinances to exclude the class of renters whose immigration sta-

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<sup>180</sup> *Id.* at 240 n.4 (Powell, J., concurring).

<sup>181</sup> *Id.* n.14 (1982).

<sup>182</sup> *Id.* (citing previous Supreme Court decisions to support the proposition that “Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish”).

<sup>183</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

<sup>184</sup> *Id.* at 33.

tus is in question.<sup>185</sup> Even if most city officials were careful to proclaim that the proposed legislation was in no way based on race or national origin, the legislative history and newspaper accounts of events surrounding the ordinances demonstrate discrimination against undocumented immigrants.<sup>186</sup>

While undocumented immigrants may not qualify as a suspect class *per se*,<sup>187</sup> there is another legally significant byproduct of the discrimination embodied in the Housing Ordinances: the right of equal access to housing held by the citizen children of these immigrants.<sup>188</sup> As required by the *Rodriguez* court, this classification can be defined in absolute and functional terms: citizen children are minors with full American citizenship born to parents who are undocumented immigrants.<sup>189</sup>

While it is difficult to document the numbers of citizen children in the United States, the Pew Hispanic Center estimates that there are 3.1 million children born in the United States to undocumented immigrants,<sup>190</sup> and that

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<sup>185</sup> HAZLETON, PA., ORDINANCE 2006-18 (Sept. 21, 2006); FARMERS BRANCH, TEX., ORDINANCE 2952 (Jan. 22, 2008), FARMERS BRANCH, TEX., ORDINANCE Ordinance 2903 (May 12, 2007), FARMERS BRANCH, TEX., ORDINANCE 2892 (Nov. 13, 2006); ESCONDIDO, CAL., ORDINANCE 2006-38R (Oct. 18, 2006).

<sup>186</sup> *E.g.*, Deborah Barfield Berry, *Officials: Immigrant Hostility Fuels Discriminatory Housing Laws*, USA TODAY, Sept. 28, 2007, <http://www.usatoday.com/news/nation/2007-09-28-housing-localawsN.htm>; Julia Preston, *Judge Voids Ordinance on Illegal Immigrants*, NY TIMES, July 27, 2007, at A14, available at <http://www.nytimes.com/2007/07/27/us/27hazelton.html>; *NBC Nightly News: Town's Mayor Tackles Illegal Immigration* (NBC Television broadcast Aug. 23, 2006), available at <http://www.msnbc.msn.com/id/14487620/> (video and transcript); Mark Schurmann, *Escondido City Council Drops Anti-Immigrant Ordinance*, NEW AM. MEDIA, Dec. 15, 2006, [http://news.new-america-media.org/news/view\\_article.html?article\\_id=f17425077a5d7f89a54717946c23996f](http://news.new-america-media.org/news/view_article.html?article_id=f17425077a5d7f89a54717946c23996f).

<sup>187</sup> Discrimination on the basis of race or national origin automatically triggers strict scrutiny. *See Rodriguez*, 411 U.S. at 105 (Marshall, J., dissenting) (“[R]ace, nationality or alienage is ‘in most circumstances irrelevant’ to any constitutionally acceptable legislative purpose.” (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also* *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (race); *McLaughlin v. Florida*, 379 U.S. 184, 191–92 (1964) (race); *Loving v. Va.*, 388 U.S. 1, 9 (1967) (race); *Oyama v. California*, 332 U.S. 633, 644–46 (1948) (national origin); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national origin).

<sup>188</sup> This article does not purport to extend this analysis to the illegal parents of immigrant children. Supreme Court jurisprudence makes clear that governmental entities may strive to craft legislation that furthers the federal interest of prohibiting illegal immigration. *See DeCanas v. Bica*, 424 U.S. 351 (1976) (upholding the prohibition of employment of undocumented immigrants by the States because it mirrored federal objectives and furthered a legitimate state goal); *Rodriguez*, 411 U.S. at 55 (declining to strike down the Texas public school financing system as unconstitutional based on an alleged wealth suspect classification).

<sup>189</sup> *Rodriguez*, 411 U.S. at 19 n.49.

<sup>190</sup> *See* JAMES D. KREMER ET AL., DORSEY & WHITNEY LLP, REPORT TO THE URBAN INSTITUTE, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA’S IMMIGRATION ENFORCEMENT POLICY 19–20 (2009) (citing JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE

over ninety percent of the children age six and under who were born to undocumented immigrant parents are citizen children.<sup>191</sup> Among children ages eleven to seventeen who were born to undocumented immigrant parents, an estimated seventy-two percent are citizen children.<sup>192</sup> The suspect class is large and growing.

The Federal Fair Housing Act (FHA), while not establishing housing as a fundamental constitutional right, created a comprehensive statutory scheme that forbids discriminatory rental practices by landlords.<sup>193</sup> If any of the 3.1 million citizen children of undocumented immigrants were at the age of majority and were to seek housing in Escondido, California; Farmers Branch, Texas; or Hazleton, Pennsylvania, the FHA would not permit landlords to discriminate against them in the manner set forth by the Housing Ordinances.<sup>194</sup> The only factual distinction here is that these children are not yet of the age where they are legally able to contract.<sup>195</sup> Instead, citizen children must depend on their parents or guardians to secure housing. If the those adults are illegally present in the United States, and if the Housing Ordinances survive the equal protection challenge, then the Court will, in effect, have impermissibly burdened a distinct group of citizens. Indeed, this group of minor children is the most legally vulnerable to this sort of legislative attack.<sup>196</sup> In his *Plyler* concurrence, Justice Powell expressed

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AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 7–8 (March 7, 2006), *available at* <http://pewhispanic.org/files/reports/61.pdf>, *available at* <http://www.dorsey.com/> (go to “Resources” link at top of the page; type “citizen children” in keyword bar at right, select “news and analysis” from “Type” drop-down menu, select “Immigration” from “Practices” drop-down menu, click “Search Resources.”)

<sup>191</sup> *Id.* at 20.

<sup>192</sup> *Id.*

<sup>193</sup> Fair Housing Act, 42 U.S.C. §§ 3604 (2006) (addressing “[d]iscrimination in the sale or rental of housing and other prohibited practices”).

<sup>194</sup> 42 U.S.C. § 3604(a)–(b) (2006).

<sup>195</sup> RESTATEMENT (SECOND) OF CONTRACTS § 14a (1981) (noting that most states have enacted statutes that lowered the age of majority, the age at which an individual can legally enter into contracts, from twenty-one to eighteen); *see also id.* § 14 cmt. a, tbl. (providing a list of the relevant state statutes lowering age of majority).

<sup>196</sup> *Plyler v. Doe*, 457 U.S. 202, 219–220 (1982) (“The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their ‘parents have the ability to conform their conduct to societal norms,’ and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases ‘can



that legislation that punishes undocumented immigrant children deserves to be analyzed under a heightened standard, where the state action must have a “fair and substantial” relation to a “substantial” governmental interest.<sup>197</sup> If legislation targeting undocumented immigrant children is deserving of heightened scrutiny, then it follows that *at least* the same level of scrutiny is owed to legislation affecting citizen children.

The *Rodriguez* court explicitly recognized that groups “saddled with . . . disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process . . .” warrant designation as a suspect class and deserve the protection of strict scrutiny by the courts.<sup>198</sup>

Citizen children bear the mark of such disabilities and powerlessness. The Housing Ordinances deprive them of equal access to housing, and as a corollary, also deprive them of access to a free secondary public school education as guaranteed by the United States Supreme Court in *Plyler*.<sup>199</sup> Citizen children may not vote, and neither can their undocumented parents.<sup>200</sup> Labor laws regulate citizen children’s employment before they are

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affect neither their parents conduct nor their own status.’ Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.” (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) (citations omitted))).

<sup>197</sup> *Id.* at 238–39 (“These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State’s interests be substantial and that the means bear a ‘fair and substantial relation’ to these interests.” (citation omitted)).

<sup>198</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>199</sup> The *Plyler* Court decision held that children are entitled to a secondary public school education, regardless of their immigration status, if the state provides such education to other children. *Plyler*, 457 U.S. at 230. The Court, however, clarified that the States are permitted to withhold access to secondary public school education if the child is not domiciled within the school district. *Id.* at 226 n.22, 240 n.4. By refusing residence to citizen children as a result of their parents’ or guardians’ status, municipalities have cleverly bypassed the holding in *Plyler*. See *infra* Part III.C.

State action has also attempted to limit *Plyler*’s impact on post-secondary education. Recently, a California appellate court ruled that undocumented immigrants must pay out-of-state tuition at California public universities whether or not they (1) graduated from a California high school and (2) attended a California high school for three or more years. *Martinez v. Regents of the Univ. of Cal.*, 83 Cal. Rptr. 3d 518 (Ct. App.), *petition for review granted*, 198 P.3d 1 (Cal. 2008) (No. S167791).

<sup>200</sup> U.S. CONST. amend. XXVI, § 1 (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”)

sixteen.<sup>201</sup> Moreover, the employment options for sixteen year olds without high school diplomas are generally limited to the most menial low-income jobs. Without disposable income, citizen children have no funds to influence policymakers (through campaign contributions) or registered voters (through paid political advertising); citizen children have no voice in the political process whatsoever. This powerlessness is exactly what the United States Supreme Court described in its definition of a suspect class.<sup>202</sup>

Finally, citizen children are increasingly subject to deportation if their parents or guardians are repatriated. Immigration and Customs Enforcement (ICE) regulations do carve out a deportation exception for citizen children, but the exception applies only if the citizen children can prove their legal immigration status.<sup>203</sup> If these children do not have relatives who legally reside in the United States, then they have two choices: become a ward of the State, an outcome that would further strain State resources in difficult economic times; or return with their parents to their parents' country of origin.<sup>204</sup> Citizen children who accompany their repatriated parents usually have difficulty assimilating because they have grown up as American children, and have learned American cultural norms.<sup>205</sup> These children also forego some or all of their American secondary public school education and may find themselves behind their American peers should the children return to the United States in the future. The minor citizen children will have been thoroughly punished for the "sins" of their parents, and deprived of the full rights and privileges that accompany their lawfully obtained American citizenship.<sup>206</sup>

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<sup>201</sup> Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–1- 219 (20068) (For nonagricultural operations, the Act restricts the hours that children under age sixteen can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous. For agricultural operations, it prohibits the employment of children under age 16 during school hours and in certain jobs deemed too dangerous. Children employed on their families' farms are exempt from these regulations).

<sup>202</sup> See, e.g., *Plyler*, 457 U.S. at 218 (supporting proposition that suspect classifications that place special disabilities on certain disfavored groups create a "class or caste" system that is both subordinating and unconstitutional).

<sup>203</sup> DEP'T OF HOMELAND SEC., REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 11 (2009), available at [www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_09-15\\_Jan09.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-15_Jan09.pdf).

<sup>204</sup> The increasing number of ICE enforcement actions has caused more and more citizen children to face this difficult decision. See DORSEY & WHITNEY LLP, REPORT TO THE URBAN INSTITUTE, SEVERING A LIFELINE: THE NEGLECT OF CITIZEN CHILDREN IN AMERICA'S IMMIGRATION ENFORCEMENT POLICY 48–50 (2009), available at [www.dorsey.com/files/upload/DorseyProBono\\_SeveringLifeline\\_web.pdf](http://www.dorsey.com/files/upload/DorseyProBono_SeveringLifeline_web.pdf).

<sup>205</sup> *Id.* at 81–90.

<sup>206</sup> The United States Supreme Court has decried unfair legislative discrimination against illegally present minor children. See, e.g., *Plyler*, 457 U.S. at 220 ("Visiting . . . condemnation on the head of

B. THE HOUSING ORDINANCES DO NOT WITHSTAND SCRUTINY UNDER  
A RATIONAL BASIS STANDARD OF REVIEW

If the Supreme Court declines to certify citizen children as a suspect class, then the Housing Ordinances could survive an equal protection challenge only if the Ordinances bear a rational relationship to a legitimate state interest.<sup>207</sup> The burden of proof on the municipalities under this analysis is, of course, greatly reduced; nonetheless, even if rational basis scrutiny is applied, the Housing Ordinances must be deemed unconstitutional because of their inevitable harm to citizen children.

1. Facially Neutral Statutes After *Employment Division v. Smith*

In 1990, the Supreme Court departed from decades of jurisprudence by ruling that the standard of review for a neutral, “generally applicable” law is limited to rational basis scrutiny.<sup>208</sup> Decided under the Free Exercise Clause, *Employment Division v. Smith* involved the use of peyote, a controlled substance under Oregon law, by two members of a Native American church as part of their religious observances.<sup>209</sup> After the two church members were fired for drug use, the State of Oregon refused to pay them employment benefits.<sup>210</sup> The two challenged the refusal of benefits as a violation of the Free Exercise Clause.<sup>211</sup> Justice Scalia, writing for the majority, held that the Oregon statute was constitutional and the denial of benefits was valid because a generally applicable law that requires or prohibits cer-

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an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.” (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))). The injustice only increases when the discrimination targets minor citizen children.

<sup>207</sup> See *Rodriguez*, 411 U.S. at 44 (1973) (applying rational basis scrutiny to equal protection claim involving no suspect class).

<sup>208</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, (107 Stat.) 1448, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). Prior to *Smith*, a constitutional challenge brought under the First Amendment Religion Clauses; U.S. Const., amend. I was analyzed using strict scrutiny. See *id.* at 907 (Blackmun, J., dissenting).

<sup>209</sup> *Id.* at 874 (majority opinion). Oregon law prohibits the knowing or intentional possession of a “controlled substance” unless the substance has been prescribed by a medical practitioner. *Id.* (citing OR. REV. STAT. § 475.992(4) (1987)). A “controlled substance” is a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. *Id.*; see also 21 U.S.C. §§ 811–12 (2006); OR. REV. STAT. § 475.005(6) (1987). Possession of a controlled substance is a Class B felony. 494 U.S. at 874.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

tain conduct is constitutional so long as it is not specifically directed at a religious practice either by name in the law or through direct corroboration in legislative history.<sup>212</sup> Concurring in part and in judgment with the majority in a later opinion, Justice Scalia elaborated on this standard, explaining that facially neutral statutes are not held to a strict scrutiny standard unless it is “design[ed], construct[ed] or enforce[d]” in an impermissible, discriminatory manner.<sup>213</sup>

While *Smith* was later pre-empted by Congress through the Religious Freedom Restoration Act of 1993, which itself was later ruled unconstitutional by the Supreme Court in *City of Boerne v. Flores*,<sup>214</sup> the majority’s reasoning reflects a move by the Court to narrow its review of state actions for constitutional violations. With respect to the Equal Protection Clause, this change would bring the Court closer to a “duty to protect” interpretation.

## 2. The Housing Ordinances Have a Disparate Impact on Latino Immigrants and Their Citizen Children on the Basis of Race or National Origin

Despite the facial neutrality of the Housing Ordinances, they disproportionately affect, if not target, one group of individuals: undocumented immigrants from Latin American countries. The *Oyama* Court concluded that when a facially neutral statute is written so that it impermissibly targets one group of immigrants, such as lawfully present Japanese landowners, the statute deserves “some” heightened scrutiny.<sup>215</sup> The *Oyama* Court was influenced by the fact that, under federal immigration laws at that time, Japanese residents could never obtain full American citizenship.<sup>216</sup>

The circumstances relevant to Japanese Americans in *Oyama* are present in today’s immigration laws with respect to undocumented immi-

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<sup>212</sup> *Id.* at 878; *see also* *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 557–58 (1993) (Scalia, J., concurring) (“In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from benefits); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment.” (citations omitted)).

<sup>213</sup> *Lukumi Babalu Aye*, 508 U.S. 520, 557–58 (1993) (Scalia, J., concurring).

<sup>214</sup> *Smith*, 494 U.S. 872 (1980) (pre-empted by Congressional statute, Religious Freedom Restoration Act of 1993, U.S.C. §§2000bb-2000bb-4 (Nov. 16, 1993), subsequently held unconstitutional as applied to states and local governments by *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See supra*, note 178 for the procedural history of the *Smith* decision..

<sup>215</sup> *Oyama v. California*, 332 U.S. 633, 646 (1948).

<sup>216</sup> *Id.* at 635 n.3.

grants. Despite the longtime existence of this “substantial ‘shadow population’” of undocumented immigrants,<sup>217</sup> current immigration laws essentially bar the road to citizenship for any immigrant who has been “unlawfully present” in the United States for an aggregate period of 1 year or more, or who has been ordered removed and then returned without being lawfully admitted.<sup>218</sup> In other words, to obtain lawful status as a permanent resident, an immigrant must first be lawfully present in the United States.<sup>219</sup> This requirement forces an undocumented immigrant who is already in the United States to leave and return to his or her country of origin to begin the visa process, a process that can take several years to complete<sup>220</sup> even if the individual has close relatives living in the United States as lawful permanent residents.<sup>221</sup> In September 2008, for example, no visas were available for a lawful permanent resident’s Mexican spouse or children.<sup>222</sup> Similarly, the immigration laws and the visa process do not consider whether the undocumented immigrant or visa applicant is the parent or guardian of a lawfully present citizen child, and citizen children may not petition for the lawful admission of their parents into the United States until the children reach the age of 21.<sup>223</sup>

The practical effect of the immigration laws and the visa backlog is that for undocumented immigrants, visas are non-existent. Like the Japanese residents in *Oyama*, current immigration laws effectively bar undocumented immigrants from obtaining United States citizenship. The results are no different for undocumented immigrants who are the parents or guardians of citizen children.

### 3. The Municipalities May Not Evade the *Plyler* Decision.

In *Plyler*, the Supreme Court explicitly granted immigrant children access to a secondary public school education, regardless of their immigration status.<sup>224</sup> The *Plyler* decision recognized that even if education is not a fundamental right guaranteed by the Constitution,<sup>225</sup> and even if undocumented immigrant children are not a suspect class,<sup>226</sup> the specter of a poorly

<sup>217</sup> *Plyler v. Doe*, 457 U.S. 202, 218 (1982).

<sup>218</sup> 8 U.S.C. § 1182(a)(9)(C) (2006).

<sup>219</sup> § 1255(a).

<sup>220</sup> DORSEY & WHITNEY, LLP, *supra* note 204, at 74.

<sup>221</sup> *Id.* at 24.

<sup>222</sup> *Id.*

<sup>223</sup> § 1151(b)(2)(A)(i).

<sup>224</sup> *Plyler v. Doe*, 457 U.S. 202, 230 (1982); See *infra* Part III(C).

<sup>225</sup> *Plyler*, 457 U.S. at 221.

<sup>226</sup> *Id.* at 219 n.19.

educated underclass of non-citizens directly contradicts our constitutional principles.<sup>227</sup> The *Plyler* Court stated that Texas's attempt to prevent undocumented immigrants from accessing secondary public school education was unconstitutional, even under rational basis scrutiny.<sup>228</sup>

The *Plyler* decision's only limitation on a child's ability to access secondary education was that the child must be domiciled within the school district he or she wishes to attend.<sup>229</sup> As Justice Powell wrote, "[o]f course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection."<sup>230</sup> In light of Justice Powell's statement, the Housing Ordinances appear to be a clever evasion of the right to access education that was enunciated in *Plyler*: without the ability to establish a domicile within the municipality, a child may not attend the municipality's public schools. Not only will the Housing Ordinances block undocumented immigrant children's access to secondary schools, as was the case in *Plyler*, they will also block citizen children's access to secondary schools.

There is nothing in the legislative history of any of the Housing Ordinances to reflect that the city councils had this goal in mind. The legislative history and concurrent newspaper accounts do reflect, however, that the municipalities were zealous in their goal to rid their communities of undocumented immigrants.<sup>231</sup> Through their zealous anti-immigrant legislation, the municipalities are also ridding their schools of citizen children. The *Plyler* court found it repugnant to "fundamental conceptions of justice" that an uneducated, shadowy underclass of undocumented immigrant children could be allowed to exist.<sup>232</sup> It can be no less repugnant to allow the formation of an uneducated, shadowy underclass of *citizen* children.

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<sup>227</sup> *Id.* at 221–23 ("[D]enial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. . . . 'In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'" (quoting *Brown v. Board of Educ.*, 347 U.S. 483 (1954)) (citation omitted)).

<sup>228</sup> *Id.* at 220 ("It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States.").

<sup>229</sup> *Id.* at 240 n.4 (Powell, J., concurring).

<sup>230</sup> *Id.*

<sup>231</sup> See discussion *supra* Part IV.

<sup>232</sup> *Plyler*, 457 U.S. at 220.

#### 4. Citizen Children Should Not Bear the Burden of Their Parents' Immigration Status.

The Supreme Court has consistently mandated that children should not suffer for the “sins” of their parents.<sup>233</sup> This principle is seen throughout American jurisprudence: children are neither punished as severely as adults for crimes they commit,<sup>234</sup> nor are they forced to accompany their parents to incarceration if they do not have alternate guardians.<sup>235</sup> In *Plyler*, the Court went to great lengths to explain that children should not be deprived of their constitutional rights because of the illegal behavior of their parents.<sup>236</sup>

The same societal ills that moved the *Plyler* Court to allow equal access to education are present, and to a far greater extent, when the class affected is citizen children. Just as the lack of education imparts an inescapable stigma for children, the lack of housing will create its own stigma of inferiority. The effect, however, does not end with inadequate housing. The Housing Ordinances also deprive citizen children access to education because these municipalities can presumably lock their school doors to children who are not domiciled in their districts. If the Housing Ordinances are enforced as currently drafted, with no exception for citizen children, the will Ordinances deprive citizen children of two important benefits of citizenship and inevitably reduce these children to second-class citizens.

#### 5. The Housing Ordinances Lack a Rational Basis Justification

The Supreme Court has recognized that when legislation creates “recurring constitutional difficulties,” intermediate scrutiny is required.<sup>237</sup> Even under rational basis scrutiny, however, the facial neutrality of the Housing Ordinances is not sufficient to overcome an equal protection challenge. The threat to the right to equal access to housing, when compounded

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<sup>233</sup> See, e.g., *Cope v. Cope*, 137 U.S. 682, 685 (1891); *Gaines v. Relf*, 53 U.S. 472, 597 (1851); *Brewer v. Blougher*, 39 U.S. 178, 193 (1840).

<sup>234</sup> E.g., TEX. FAM. CODE ANN. §§ 51.01-51.19 (2008); FLA. STAT. § 958.04 (2008); GA. CODE ANN. §§ 42-7-1 to -9 (2009).

<sup>235</sup> See, e.g., Lucinda Cory, *A Historical Perspective on Bankruptcy*, ON THE DOCKET (U.S. Bankr. Ct. Dist. R.I.), April 2000, at 6-7; Jill Lepore, *Annals of Finance*, “I.O.U.,” THE NEW YORKER, Apr. 13, 2009, at 34.

<sup>236</sup> *Plyler*, 457 U.S. at 220.

<sup>237</sup> *Id.* at 217.

by unequal access to education, implicates an “absolute and enduring” concern of American jurisprudence.<sup>238</sup>

A court would necessarily balance the state’s interest in the Housing Ordinances against the constitutional difficulties they create. Unlike the legislation in *Rodriguez*, however, the Housing Ordinances do not simply dilute the value of a benefit or right that is still conferred to all who are similarly situated,<sup>239</sup> nor do they simply withdraw an optional government benefit from all who are similarly situated.<sup>240</sup> Instead, the Housing Ordinances effectively deprive citizen children of equal access to housing and education, benefits that are otherwise guaranteed to all citizens by federal statute or controlling case law.<sup>241</sup> This outcome is a constitutional violation that defeats any argument that the Ordinances have a legitimate purpose rationally related to the proposed legislation. Any other result will not only create an underclass, it will recreate the type of second-class American citizenship that the Civil Rights Act abolished in 1964.<sup>242</sup>

The Housing Ordinances cannot be justified with economic arguments. The Housing Ordinances do not implicate a benefit that the municipalities provide to the public through the depletion of tax monies. Instead, the Housing Ordinances purport to regulate a “good,” adequate housing, which the undocumented immigrant is paying for without a government subsidy.<sup>243</sup> Subtracting the economic concern, which otherwise might be dispositive given the state of the American economy today, the municipalities’ interest in enacting this legislation becomes dubious and thus, less legitimate.

Similarly, the Housing Ordinances cannot be justified as a local matter beyond the federal government’s reach. The federal government has preempted state autonomy to regulate certain benefits associated with hous-

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<sup>238</sup> *Plyler*, 457 U.S. at 218 n.16 (stating that governmental action must be justified by a substantial State interest “[o]nly when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases”).

<sup>239</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966)).

<sup>240</sup> *Plyler*, 457 U.S. at 238.

<sup>241</sup> *Id.* at 224 (education); *See* 42 U.S.C § 3604 (2006) (housing).

<sup>242</sup> *See* § 1981(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, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).

<sup>243</sup> This article will not address a corollary concern: citizen children may be entitled to government subsidized public housing, regardless of the immigration status of their parents.



ing.<sup>244</sup> The FHA imposes the right of equal access to housing,<sup>245</sup> for example, and case law enforces the application of the benefit as conferred by Congress.<sup>246</sup> Therefore striking down the Housing Ordinances as unconstitutional on the basis of equal protection will not impermissibly interfere with a power typically reserved to the states.<sup>247</sup>

Moreover, the Housing Ordinances cannot be justified as a necessary local regulation of immigration. While “States do have some authority to act with respect to illegal aliens,” those actions must be consistent with federal objectives *and* “further[] a legitimate state goal.”<sup>248</sup> In *Plyler*, the Supreme Court struck down a local regulation of immigration because the state actor could not demonstrate that federal immigration laws sought to conserve educational resources.<sup>249</sup> Similarly, the Housing Ordinances, which cannot be justified on economic grounds and are generally inconsistent with the federal anti-discrimination policy demonstrated in the FHA, merely reflect an interest in excluding undocumented immigrants from local communities and do not align with federal objectives or existing federal immigration laws, which are silent on the issue of housing for undocumented immigrants.<sup>250</sup>

Thus, while it is generally acknowledged that federal immigration laws are in need of an overhaul,<sup>251</sup> the municipalities may not step in to

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<sup>244</sup> 42 U.S.C. § 3615; *see also* *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977); *Nev. Fair Hous. Ctr., Inc. v. Clark*, 565 F. Supp. 2d 1178, 1182 (D. Nev. 2008); *Gibson v. County of Riverside*, 181 F. Supp. 2d 1057, 1084 (C.D. Cal. 2002).

<sup>245</sup> 42 U.S.C. § 3604(a) (2006).

<sup>246</sup> *See, e.g.*, *United States v. District of Columbia*, 538 F. Supp. 2d 211 (D.D.C. 2008) (youth home’s failure to provide reasonable accommodations for disabled tenant violated FHA’s reasonable access provision); *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339 (S.D. Fla. 2007) (ordinance barring substance abuse treatment facility violated FHA’s equal access provision); *see also supra* note 77.

<sup>247</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

<sup>248</sup> *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (explaining the holding in *DeCanas v. Bica*, 424 U.S. 351, 361 (1976), wherein “the State’s program reflected Congress’ intention to bar from employment all aliens except those possessing a grant of permission to work in this country”).

<sup>249</sup> *Id.* at 225-26.

<sup>250</sup> *See* 8 U.S.C. §§ 1101-1178 (2006).

<sup>251</sup> *See* Commentary, *Obama Failing to Lead on Immigration Reform*, SAN DIEGO UNION TRIBUNE, Nov. 19, 2009, at B6, available at <http://www.themorningsun.com/articles/2009/11/21/opinion/srv0000006884430.txt>; Jared Polis, Commentary, *Immigration Reform Urgently Needed*, DESERET MORNING NEWS, June 25, 2009, at G01, available at <http://www.cnn.com/2009/POLITICS/06/25/polis.immigration/index.html> available at <http://www.cnn.com>; Editorial, *The Right Time for Immigration Reform*, S.F. CHRON., Nov. 22, 2009, at E10, available at [http://articles.sfgate.com/2009-11-22/opinion/20872526\\_1\\_immigration-reform-illegal-immigrants-congress](http://articles.sfgate.com/2009-11-22/opinion/20872526_1_immigration-reform-illegal-immigrants-congress). President Obama signed the Children’s Health Insurance Program Reauthorization Act, which provides quality health care to 11 million kids—4 million who were previously uninsured—and removes barriers preventing legal immi-

ameliorate a perceived problem either in defiance of Congress, or where Congress has already spoken.<sup>252</sup> The decisions regarding the Ordinances in Escondido, Farmers Branch, and Hazelton have already demonstrated that federal law preempts these local regulations, and the decisions thus foreclose the possibility that immigration policy justifications could overcome an equal protection challenge.

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grant children from being covered. *See* H.R. 2, 111th Cong. (2009) (passed House Jan. 14, 2009; passed Senate Jan. 29, 2009; signed by president Feb. 4, 2009), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2eh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2eh.txt.pdf). Presuming the current Obama administration would reform immigration law, it is instructive to reference Obama's legislative record as a Senator and his campaign positions as a presidential candidate. As a senator from Illinois, President Obama attempted to introduce three amendments to the (failed) 2007 Comprehensive Immigration reform Act of 2007. *See* Comprehensive Immigration Reform Act, S. 1348, 110th Cong. (2007). None of the amendments addressed the issue of housing. *Id.* The amendments did, however, purport to change immigration laws in a way that would attempt to keep families together. *Id.* § 763 (allowing certain immigrants special privileges for the sake of family unity). Obama opposed S. 1348 because it would end family-based admission standards. His amendments were aimed at limiting or minimizing the effect of the changed standards: ". . . [P]arents of U.S. citizens would no longer be counted as immediate families . . . most parents seeking to join their children and grandchildren in the United States would be denied green cards. The rest of the current family preferences—siblings, adult children, and many parents—would be eviscerated . . . We are Americans. We do not have a caste or class based society, and we do not need a caste or class based immigration system." 153 Cong. Rec. S7153-02 (daily ed. June 6, 2007) (statement of Senator Barrack Obama). Candidate Obama reiterated this legislative intent in his campaign for President by recognizing the burdens placed on immigrant families by the current statutory scheme, *Immigration, Organizing for America*, [http://www.barackobama.com/issues/Immigration/index\\_campaign.php](http://www.barackobama.com/issues/Immigration/index_campaign.php) (last visited Feb. 12, 2010) ("Despite a sevenfold increase in recent years, immigration raids only netted 3,600 arrests in 2006 and placed all the burdens of a broken system onto immigrant families."), announcing an intent to keep families together, *id.* ("Obama and Biden believe we must fix the dysfunctional immigration bureaucracy and increase the number of legal immigrants to keep families together and meet the demand for jobs that employers cannot fill"), and increase the opportunities for legal immigration by lower skilled workers and those already present within United States borders, *id.* ("Obama and Biden support a system that allows undocumented immigrants who are in good standing to pay a fine, learn English and go to the back of the line for the opportunity to become citizens"). From these articulations of Obama's approach to immigration, there is no support for the municipalities' enhanced exercise of immigration authority through the Housing Ordinances.

<sup>252</sup> *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1055–57 (S.D. Cal. 2006); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 517–32 (M.D. Pa. 2007), *aff'd in part*, 620 F.3d 170 (3d Cir. 2010); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866–96 (N.D., Tex. 2008). Under Supremacy Clause, state action may be foreclosed by express language in congressional enactment, by implication from depth and breadth of congressional scheme that occupies legislative field, or by implication because of conflict with congressional enactment. U.S. CONST. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. 1 (1824); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869–74 (2000); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982),.

6. Does the Equal Protection Clause Install the Legislature as a “Platonic Guardian” of this Constitutional Right?

The United States Supreme Court has taken great care to ensure that the courts do not violate the separation of powers doctrine by assuming a legislative role under the guise of an equal protection analysis.<sup>253</sup> In the context of equal rights for racial minority citizens, however, and now in the context of citizen children born to undocumented immigrant parents, the legislature has historically been a poor guardian.

In the seminal case *Heart of Atlanta Motel v. United States*, the Supreme Court struck down racial segregation and discrimination by private actors in violation of Title II of the Civil Rights Act of 1964, which governs business practices in the rental of inns, motels, and other establishments that provide lodging.<sup>254</sup> The *Heart of Atlanta* Court declined to limit the reach of Title II to businesses more explicitly engaged in interstate commerce.<sup>255</sup> Rejecting the limitation, the Court held that “[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.”<sup>256</sup>

The Court applied rational basis scrutiny to assess whether Title II was constitutional<sup>257</sup> and found that Congress did have a rational basis for

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<sup>253</sup> *Plyler*, 457 U.S. at 242–43 (Burger, C.J., dissenting) (“Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’ We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today.” (citations omitted)).

<sup>254</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). Title II specifically provides that: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation, as defined in this section without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000(a) (2006). It specifically implicates those types of businesses considered to be places of public accommodation whose “operations affect commerce or segregation by it is supported by State action.” § 2000(b).

<sup>255</sup> *Id.* at 259 (citing *United States v. Women’s Sportswear Mfg. Ass’n*, 366 U.S. 460, 464 (1949)).

<sup>256</sup> *Id.* In his concurrence, Justice Black emphasized that the *Heart of Atlanta Motel* was a large facility located near the Atlanta interstate which relied primarily on interstate business. *Id.* at 274 (Black, J., concurring). “It advertises extensively by signs along interstate highways and in various advertising media. As a result of these circumstances approximately 75% of the motel guests are transient interstate travelers. It is thus an important facility for use by interstate travelers who travel on highways. . . .” *Id.*

<sup>257</sup> *Id.* at 258 (majority opinion).

determining that racial discrimination negatively affected interstate commerce.<sup>258</sup> Citing evidence presented during congressional debates, the Court found it clear that “racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.”<sup>259</sup> The testimony further elaborated on the various difficulties faced by blacks in an increasingly mobile society:

[T]he fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, . . . and that these conditions *had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself ‘dramatic testimony to the difficulties’ Negroes encounter in travel.* These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is ‘no question that this discrimination in the North still exists to a large degree’ and in the West and Midwest as well.<sup>260</sup>

The extent of the racial discrimination noted by the Court in *Heart of Atlanta* was a direct result of legislative inaction in the face of great deprivation. Prior landmark civil rights cases, such as *Brown v. Board of Education*<sup>261</sup> and *Sweatt v. Painter*,<sup>262</sup> all pre-dated the 1964 Civil Rights Act.<sup>263</sup> Without judicial intervention, state laws fostering racial discrimination would have continued to deprive a suspect class of American citizens the full enjoyment of the rights and privileges guaranteed to them under the United States Constitution.<sup>264</sup>

Under the Housing Ordinances, citizen children face the same type of deprivation with respect to their constitutional rights. As in *Heart of Atlanta*, judicial intervention is necessary to safeguard the rights and privileges guaranteed to citizen children under the United States Constitution.

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<sup>258</sup> *Id.* at 253 (citing Hearings on S.1732 before the S. Commerce Comm., 88th Cong. 744 (1964)).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 252–53 (citing Hearings on S.1732 Before Senate Commerce Comm., 88th Cong. 744 (1964)) (emphasis added) (citations omitted).

<sup>261</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (mandating desegregation of public secondary schools).

<sup>262</sup> *Sweatt v. Painter*, 339 U.S. 629 (1959) (holding that the University of Texas Law School violated the Equal Protection Clause when it improperly discriminated against the black plaintiff and denied him admission).

<sup>263</sup> 42 U.S.C. § 2000(a) (2006).

<sup>264</sup> U.S. CONST. amend. XIV, § 1; U.S. CONST. art. IV, § 2, cl. 1.

### 7. The Value of Natural-Born American Citizenship

Only “natural born citizens” can become president of the United States.<sup>265</sup> The value of natural born citizenship, which is obtained by birth on American soil, is demonstrated by the Birther Movement, a grassroots organization that advocates for the “strict adherence to the Constitution of the United States of America, regardless [of] the momentary passions of the body politic.”<sup>266</sup> The Birthers recently gained attention by challenging the legitimacy of the Obama presidency by claiming that President Obama provided inadequate proof of his birth in Hawaii.<sup>267</sup> From the Birthers’ perspective, the United States is in a constitutional crisis because President Obama is not a “natural born citizen,” and as such, cannot be a legitimate President.<sup>268</sup> Whether or not one is sympathetic to the far-fetched claims espoused by the Birthers, it cannot be ignored that this movement places a high value on natural born citizenship. Indeed, the constitutionally requirement of natural born citizenship suggests that this value may not be entirely misplaced. The value of this type of citizenship is severely depreciated, however, by the Housing Ordinances.<sup>269</sup> Surely this devaluation of natural born citizen children’s American citizenship cannot be effected by the municipalities, no matter the description of their “legitimate state interest.”

## VI. CONCLUSION

The Equal Protection Clause exists to protect the politically powerless from overreager legislation that cuts too broadly. The Housing Ordinances are a perfect example of emotion overcoming good governance. Future constitutional litigation over these types of ordinances must begin with the unequal protection suffered by citizen children.

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<sup>265</sup> U.S. CONST. art. II, § 1, cl. 4 (“No person except a natural born citizen, or a citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President . . .”).

<sup>266</sup> The Birthers, BIRTHERS.ORG (follow “About” hyperlink) (last visited Nov. 29, 2009).

<sup>267</sup> The Birthers, *supra* note 267 (follow “Forged Documents” hyperlink) (including the allegation that Obama’s Hawaiian birth certificate is a forgery). The Birthers further argue that Obama may have been born on foreign soil because of Hawaiian laws that recognized a “Certification of Live Birth” from foreign countries, including Kenya. *Id.*

<sup>268</sup> *Id.* (follow “Natural Born” hyperlink).

<sup>269</sup> The Birthers define natural born citizens as those persons who were born on American soil with at least one parent being a citizen. *Id.* The Birthers have adopted an originalist understanding of the term “natural born citizen” by citing the legal treatise *The Law of Nations* for the authoritative definition of “natural born citizen” used at the time of the founding of the United States. *Id.* The Birthers believe the treatise was relied upon by the authors of the Constitution, including John Jay. *Id.*

While no one would argue that the immigration laws in the United States are functioning at an adequate level, municipalities may not step in to correct an area of the law that Congress has reserved for itself, especially with such disregard for the constitutional rights of citizens. The legislation that municipalities are crafting in city council sessions with limited debate has the effect of creating second-class citizenship. Citizen children will first be deprived of equal access to housing, which in turn will act as bar to a secondary public school education. The rights and benefits of United States citizenship must prevent this result. As in *Plyler v. Doe*, if the municipality cannot craft a workable alternative in which citizen children are not affected by the housing barrier placed on their undocumented immigrant parents, then the legislation must fail, even under rational basis scrutiny. The “shadowy underclass” of undocumented immigrant residents, which gave the Supreme Court pause in *Plyler*, would in fact become a shadowy sub-class of American citizens. The Equal Protection Clause does not permit this result.