

# IMMIGRATION AND THE CONSTITUTIONALITY OF LOCAL SELF HELP: ESCONDIDO'S UNDOCUMENTED IMMIGRANT RENTAL BAN

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*And they had hoped to find a home, and they found only hatred.*

—John Steinbeck<sup>1</sup>

## I. INTRODUCTION

The City of Escondido sits about eighteen miles east of the California coast, just north of the heart of San Diego County.<sup>2</sup> Once the home of ranches, farms and citrus groves, Escondido now has “all the benefits of city living.”<sup>3</sup> In the words of City promoters, “Escondido has a unique feeling of authentic Old California because of its history, heritage and hometown appeal, while still possessing a feel of casual sophistication.”<sup>4</sup>

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<sup>1</sup> JOHN STEINBECK, *THE GRAPES OF WRATH* 233 (Penguin Books 2002) (1939). Steinbeck also provides a colorful account of the formation of the United-States-Mexico Border:

Once California belonged to Mexico and its land to Mexicans; and a horde of tattered feverish Americans poured in. And such was their hunger for land that they took the land—stole Sutter's land, Guerrero's land, took over the grants and broke them up and growled and quarreled over them, those frantic hungry men; and they guarded with guns the land they had stolen.

*Id.* at 231.

<sup>2</sup> NAT'L LATINO RES. CTR., CAL. STATE UNIV. SAN MARCOS, *MISSION PARK COMMUNITY SURVEY: ESCONDIDO, CALIFORNIA* 8 (2006) [hereinafter *MISSION PARK SURVEY*].

<sup>3</sup> Escondido Public Library Pioneer Room, *The History of Escondido*, <http://www.ci.escondido.ca.us/library/pioneer/history.htm> (last visited Mar. 18, 2007).

<sup>4</sup> Escondido Community Profile 2004–2005, <http://www.ci.escondido.ca.us/econdev/profile/index.html> (last visited Mar. 15, 2007) (emphasis omitted).

But while the City may claim to “celebrate[] its history and Hispanic influence,”<sup>5</sup> in 2006, Escondido, along with several other United States cities, stepped into the spotlight of the national immigration debate by passing legislation to ban home rentals to undocumented immigrants.<sup>6</sup> As predicted,<sup>7</sup> the legislation met swift legal challenge by local landlords, immigrants and civil rights groups, who claimed the rental ban was both unconstitutional and in violation of various state and federal laws.<sup>8</sup> Under mounting fiscal pressure and faced with the dim hope of success, Escondido stipulated to a permanent injunction of the rental ban,<sup>9</sup> thereby ending its stint in local legislative activism.

The City’s decision to abandon Ordinance No. 2006-38 R (“Escondido Ordinance” or “Ordinance”)<sup>10</sup> may have spared Escondido a legal dogfight and prevented the eviction of many of its residents, but for observers, legal scholars and similarly situated municipalities, what remains missing is an in-depth constitutional analysis of the Escondido Ordinance—an analysis that could guide, and hopefully discourage, other cities considering similar undocumented immigrant crackdowns in the future. This Note evaluates the Escondido Ordinance under three constitutional provisions likely to be at the center of any legal action challenging local immigration laws: the Equal Protection Clause, Contracts Clause, and doctrine of federal preemption. Part II charts the history of immigration to the United States. As will be shown, local efforts to regulate immigration are far from novel and discrimination against certain immigrant groups is hardly unprecedented. Part III describes the passage and content of the Escondido Ordinance. Part IV discusses and attempts to resolve the federal constitutional issues raised by Escondido’s rental ban. Specifically, the Ordinance is evaluated under the Equal Protection Clause, Contracts Clause and doctrine of federal preemption. In addition, an argument is made for revisiting the scrutiny standard used by the Supreme Court in certain equal protection challenges brought by undocumented immigrants. Finally, Part V examines the efficacy and effects of the Ordinance, with an

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

<sup>6</sup> J. Harry Jones & David E. Graham, *Escondido Council OKs Immigration Ordinance*, SAN DIEGO UNION-TRIB., Oct. 5, 2006, at A1.

<sup>7</sup> Teri Figueroa, *Escondido Rental Ordinance Likely to Land in Court*, N. COUNTY TIMES, Oct. 7, 2006, available at [http://www.nctimes.com/articles/2006/10/08/news/top\\_stories/22\\_04\\_4710\\_7\\_06.txt](http://www.nctimes.com/articles/2006/10/08/news/top_stories/22_04_4710_7_06.txt).

<sup>8</sup> See Complaint ¶¶ 59–150, *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (No. 06 CV 2434 JAH (NLS)) [hereinafter *Complaint*].

<sup>9</sup> J. Harry Jones, *Escondido Councilman Learns Hard Political Truths Quickly*, SAN DIEGO UNION-TRIB., Feb. 4, 2007, at N1; Order Re: Stipulated Final Judgment and Permanent Injunction at 2, *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (No. 06 CV 2434 JAH (NLS)) [hereinafter *Stipulated Final Judgment*].

<sup>10</sup> Jones, *supra* note 9.

eye to the long-term challenges the Ordinance raises for the City and, indeed, the nation as a whole.

## II. IMMIGRATION IN THE UNITED STATES: A BRIEF HISTORY

Local efforts to regulate immigrants find their roots deep in American history. Likewise, discrimination against certain immigrant groups stretches back to the earliest days of the republic. Accordingly, it is important to situate the Escondido Ordinance in the larger history of immigration to the United States.

### A. BEGINNINGS: IMMIGRATION LAW AND POLICY 1776–1850

On July 4, 1776, the Continental Congress, speaking for disgruntled colonists on the eve of the American Revolution, issued a list of complaints against King George III.<sup>11</sup> Among the named grievances, the Congress cited the King's actions "to prevent the population of these States . . . obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither."<sup>12</sup>

As the words of the Congress suggested, young America was not only a "nation of immigrants," it was a nation that encouraged unimpeded immigration—at least of the brilliant and accomplished.<sup>13</sup> The authors of the Constitution said little of immigration, perhaps reflecting the belief that a country in the process of severing its colonial past needed "new loyal citizens to aid state-building."<sup>14</sup> Between 1780 and 1882, Congress enacted only piecemeal immigration legislation, leaving passage to the States largely unfettered.<sup>15</sup> The few federal immigration and naturalization laws passed in this period focused more on citizenship, health and the public treasury than preventing foreigners from landing on the eastern seaboard.<sup>16</sup> Citizenship eligibility was limited to free white males, and, under the Alien

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<sup>11</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776); ROGER DANIELS, GUARDING THE GOLDEN DOOR 6 (2004).

<sup>12</sup> THE DECLARATION OF INDEPENDENCE, *supra* note 11; *see also* DANIELS, *supra* note 11, at 6.

<sup>13</sup> DANIELS, *supra* note 11, at 6; *see also* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 116 (1997).

<sup>14</sup> SMITH, *supra* note 13, at 155.

<sup>15</sup> *See id.* at 156.

<sup>16</sup> *See id.* at 159. Smith explains that many of the federal immigration laws in the late 1700s were the product of internal and international forces. After the 1792 Haitian rebellion, large numbers of diverse European refugees began to flock to the shores of the United States. Federalists in the United States feared disruption by arriving radical European dissidents, while Jeffersonians felt similar anxieties for incoming European aristocracy. In a somewhat rare display of political unity, the Federalists and Jeffersonians agreed to implement restrictions on immigration and naturalization. *Id.*

Friends Act, the government reserved the right to arbitrarily arrest and deport “dangerous” unnaturalized immigrants in times of peace.<sup>17</sup> Still, in what was to become a trend in immigration law into the 1800s, Congress focused its efforts on providing health and sanitation standards for ships carrying passengers to the United States.<sup>18</sup> In 1819, for instance, Congress enacted a series of laws requiring shipping companies to provide adequate conditions for United States-bound immigrants making the passage.<sup>19</sup>

Rather than a comprehensive system of federal immigration legislation, the federal government shared its regulatory power with the states.<sup>20</sup> The representatives’ decision (or failure) to give Congress an exclusive power over naturalization in the United States Constitution meant that states possessed concurrent jurisdiction to regulate those arriving from abroad.<sup>21</sup> But again, such regulation was minimal. In the 1780s, for example, several eastern states barred the entry of foreign convicts and required masters of vessels to post bond for immigrants likely to become paupers after arrival.<sup>22</sup>

The tradition of open, largely unimpeded migration to the States remained virtually unchanged well into the 1800s, and even the system of concurrent state and federal immigration laws survived until the 1830s.<sup>23</sup> In *New York v. Miln*, the Supreme Court upheld a New York law that required ship masters to report passenger information to state authorities in order to identify immigrants likely to become public charges.<sup>24</sup> In so holding, the Court suggested that immigration regulation fell distinctly within the domain of state power:

Can any thing fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance? It is not intended by this remark to cast any reproach upon foreigners who may arrive in this country. But

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<sup>17</sup> *Id.* at 159, 162.

<sup>18</sup> *See id.* at 168.

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

<sup>20</sup> SMITH, *supra* note 13, at 119.

<sup>21</sup> DAVID M. REIMERS, UNWELCOME STRANGERS: AMERICAN IDENTITY AND THE TURN AGAINST IMMIGRATION 8–9 (1998); SMITH, *supra* note 13, at 119. Concurrent state and federal jurisdiction over naturalization was expressly affirmed by the Pennsylvania Circuit Court in *Collet v. Collet*, 6 F. Cas. 105 (C.C.D. Pa. 1792) (“[T]he States, individually, still enjoy a concurrent authority [to naturalize citizens].”).

<sup>22</sup> REIMERS, *supra* note 21, at 9.

<sup>23</sup> SMITH, *supra* note 13, at 227.

<sup>24</sup> *New York v. Miln*, 36 U.S. 102, 130, 152–53 (1837).

if all power to guard against these mischiefs is taken away, the safety and welfare of the community may be very much endangered.<sup>25</sup>

When the “fearsome general” Andrew Jackson ascended to the presidency in 1828, the seeds of change in American immigration law were planted.<sup>26</sup> Although Jacksonian Democrats worked to maintain the steady stream of immigrant voters, Jackson ushered in a new era of scientific racism and westward expansion that would steer immigration policy into the twentieth century.<sup>27</sup> Jacksonian leaders espoused “Anglo Saxon” superiority, purportedly rooted in discernable biological differences, and used their ideological convictions to justify the United States’ Manifest Destiny to bound over new frontiers in the west.<sup>28</sup> In 1848, Mexico was defeated in the Mexican-American War and forced to surrender vast tracts of land in the southwest as part of the Treaty of Guadalupe Hidalgo.<sup>29</sup> The United States acquired what are now California, Arizona, New Mexico, and Texas,<sup>30</sup> thereby creating what would later become “the most frequently crossed international border in the world.”<sup>31</sup>

For the 100,000 or so Mexicans living on the surrendered lands at the time of the Treaty of Guadalupe Hidalgo, the transition was perhaps softened by temporary liberal naturalization laws.<sup>32</sup> The reprieve was short lived. By the 1850s, California and other western states were passing special laws and taxes hostile to Mexican and Chinese immigrants, the latter having only recently begun arriving in droves on the west coast.<sup>33</sup>

At the federal level, the 1850s signaled the end of concurrent state and federal jurisdiction over immigration law. In *The Passenger Cases*, the Supreme Court struck down laws enacted in Boston and New York that imposed special taxes on aliens and passengers arriving from foreign ports.<sup>34</sup> Relying on the federal commerce power, the Court made clear that the era of joint state and federal control over immigration had come to a close:

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<sup>25</sup> *Id.* at 148.

<sup>26</sup> SMITH, *supra* note 13, at 201.

<sup>27</sup> *Id.* at 204–05.

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

<sup>29</sup> DANIELS, *supra* note 11, at 177–78.

<sup>30</sup> Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 522 (2006).

<sup>31</sup> *Id.* at 519.

<sup>32</sup> DANIELS, *supra* note 11, at 177–78. Those seeking to become United States citizens simply had to recite an oath of allegiance. *Id.* at 178.

<sup>33</sup> SMITH, *supra* note 13, at 226; DANIELS, *supra* note 11, at 12.

<sup>34</sup> *Smith v. Turner (The Passenger Cases)*, 48 U.S. 283, 392, 400, 409 (1849).

A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution. . . . [T]he power “to regulate commerce with foreign nations, and among the several States,” by the Constitution, is exclusively vested in Congress.<sup>35</sup>

#### B. FEDERAL CONTROL AND EXCLUSION

In the years that followed *The Passenger Cases*, the Chinese immigrant population in the United States—particularly in California and along the west coast—increased by the tens of thousands.<sup>36</sup> Seen as “unassimilable, dirty, disease-carrying, [and] culturally and biologically unsuitable,” Chinese immigrants sparked passionate, if not virulent, reactions among western congressional representatives, who lobbied federal authorities to limit or eliminate immigration from the Far East.<sup>37</sup> In 1875, their efforts paid off. With the approval of the western representatives, labor interests<sup>38</sup> and, indeed, the President,<sup>39</sup> Congress passed the Immigration Act of 1875, “the first federal law restricting immigration in the nation’s history.”<sup>40</sup> Although relatively narrow in scope, the Immigration Act of 1875 barred the entry of “coolie” laborers, prostitutes, and immigrants under “contract or agreement . . . for lewd and immoral purposes.”<sup>41</sup>

As the country edged closer to the twentieth century, economic downturn and continued immigration by the “wrong sort” caused the anti-immigrant sentiments of the 1850s to amplify.<sup>42</sup> Rogers M. Smith writes, “It was, in short, the era of the militant WASP, whose concerns to protect and enhance his cultural hegemony were . . . pronounced in citizenship laws . . . .”<sup>43</sup> Riding on the crest of widespread opposition to Chinese im-

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<sup>35</sup> *Id.* at 396, 400 (citation omitted); *see also* *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

<sup>36</sup> DANIELS, *supra* note 11, at 16.

<sup>37</sup> SMITH, *supra* note 13, at 325–26.

<sup>38</sup> DANIELS, *supra* note 11, at 16–17. According to Daniels, workers’ organizations, such as the National Labor Union, originally supported voluntary Chinese immigration and equal protection for those already on American soil. *Id.* Labor’s friendly stance shifted in the 1870s, after Chinese workers were used to replace striking workers on the east coast. *Id.* Now allied with the anti-Chinese western congressional representatives, labor remained essentially “anti-immigrant” until the end of the twentieth century. *Id.*

<sup>39</sup> *Id.* at 17. President Ulysses S. Grant railed against the evils of the Chinese in his 1874 annual message. *Id.* President Grant suggested in his message that legislation prohibiting or restricting Chinese immigration would be supported and enforced by the executive. *Id.*

<sup>40</sup> SMITH, *supra* note 13, at 326.

<sup>41</sup> Immigration Act of 1875, ch. 141, 18 Stat. 477.

<sup>42</sup> DANIELS, *supra* note 11, at 30.

<sup>43</sup> SMITH, *supra* note 13, at 348.

migration, in 1882, Congress passed the Chinese Exclusion Act,<sup>44</sup> which halted the entry of Chinese laborers for ten years.<sup>45</sup> In the preamble to the Act, Congress echoed the fears of the anti-Chinese lobbyists: “[I]n the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof . . . .”<sup>46</sup>

The Chinese Exclusion Act was but one in a series of laws designed to strengthen immigration restrictions in the late nineteenth and early twentieth centuries.<sup>47</sup> In 1891, Congress passed legislation to prevent the entry of the diseased, the insane, polygamists and those previously convicted of immoral crimes.<sup>48</sup> In addition, the 1891 act created a federal immigration bureaucracy, the Bureau of Immigration, and opened Ellis Island as a receiving station in 1892.<sup>49</sup>

In 1911, the Dillingham Commission completed the first major federal study of immigration in the nation’s history.<sup>50</sup> The Commission’s forty-two-volume report recommended that Congress impose literacy tests and racial quotas geared towards reducing the number of undesirable entrants.<sup>51</sup> Congress adopted the Commission’s recommendations in 1917 amidst a “nationalistic xenophobia” fueled by the outbreak of the First World War.<sup>52</sup>

By the 1920s, it became clear that “[t]he issue . . . was how not whether to radically restrict immigration.”<sup>53</sup> Congress feared a mass exodus from those in European countries displaced by the First World War, and voices in labor, eugenics and southwest politics called for a complete ban on Mexican immigration.<sup>54</sup> Congress responded with the Immigration

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<sup>44</sup> *Id.* at 358–59. Smith cites the results of a California referendum concerning Chinese immigration, in which 154,638 voted against Chinese immigration, compared to a mere 883 in favor of it. *Id.* at 358.

<sup>45</sup> Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

<sup>46</sup> *Id.* at 58.

<sup>47</sup> SMITH, *supra* note 13, at 363.

<sup>48</sup> *Id.*

<sup>49</sup> DANIELS, *supra* note 11, at 29.

<sup>50</sup> *Id.* at 45.

<sup>51</sup> *Id.* According to the Commission, these supposedly undesirable immigrants chiefly came from Eastern and Southern Europe. *Id.*

<sup>52</sup> *Id.* at 47; *see also* Act of Feb. 5, 1917, ch. 29, 39 Stat. 874. In reality, the Act went further than the Commission’s suggestions. In addition to the literacy test, Congress increased the head tax on incoming immigrants and barred from entry entirely “natives of islands not possessed by the United States adjacent to the Continent of Asia . . . or who are natives of any country, province, or dependency situate on the Continent of Asia.” *Id.* at 876.

<sup>53</sup> REIMERS, *supra* note 21, at 20.

<sup>54</sup> *Id.* at 20, 22.

Act of 1924, which limited “the annual quota of any nationality” to 2% “of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890.”<sup>55</sup> The new law also created a system of visas, complete with photographs, required of all immigrants, and reentry fees for those who left and wished to return.<sup>56</sup> For Mexican immigrants used to crossing between Mexico and the United States unchecked, the new system was particularly harsh.<sup>57</sup>

In 1929, the United States plunged headlong into the Great Depression.<sup>58</sup> Without employment or federal assistance and facing an increasingly restrictive immigration system, many immigrants avoided the United States voluntarily.<sup>59</sup> As a result, only 528,000 immigrants came to the United States during the 1930s<sup>60</sup>—roughly one-eighth of the number that arrived in the previous decade.<sup>61</sup>

### C. IMMIGRATION AFTER WORLD WAR II

As Allied Forces pushed closer to victory in World War II, the system of harsh immigration restrictions in the United States experienced significant changes.<sup>62</sup> In 1943, Congress officially repealed the Chinese Exclusion Acts.<sup>63</sup> That same year, Mexico and the United States agreed to a worker exchange program, in which Mexico would send hundreds of thousands of agricultural workers to aid in wartime food production.<sup>64</sup>

From the 1950s to the early 1970s, immigration law largely paralleled “the great victories for more democratic and inclusive policies” won by more progressive forces.<sup>65</sup> In 1952, Congress passed the Immigration and Nationality Act, which abolished racial and ethnic restrictions on immigra-

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<sup>55</sup> Immigration Act of 1924, ch. 190, 43 Stat. 153, 159. Daniels argues that legislators in the southwest actually supported Mexican immigration, which they saw as vital to supplying much needed cheap labor for the agricultural industry. DANIELS, *supra* note 11, at 52. Indeed, the Immigration Act of 1924 may reflect this interest, since Congress included among “non-quota immigrants” those born in the “Republic of Mexico.” Immigration Act of 1924, ch. 190, 43 Stat. 153, 155.

<sup>56</sup> DANIELS, *supra* note 11, at 53.

<sup>57</sup> *Id.*

<sup>58</sup> REIMERS, *supra* note 21, at 23.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> DANIELS, *supra* note 11, at 5.

<sup>62</sup> *Id.* at 81.

<sup>63</sup> Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

<sup>64</sup> DANIELS, *supra* note 11, at 90.

<sup>65</sup> SMITH, *supra* note 13, at 476.



tion.<sup>66</sup> The Displaced Persons acts of 1948 and 1950 and the Refugee Relief Act of 1953 led to the entry of roughly 600,000 displaced Europeans into the United States.<sup>67</sup> Finally, at the peak of pro-immigration support in the 1960s,<sup>68</sup> Congress passed the Immigration and Nationality Act Amendments of 1965.<sup>69</sup> The 1965 Amendments replaced the national origins quotas with “a worldwide quota based on a multi-category visa preference system.”<sup>70</sup> Immigrants now “compete[d] on a first-come, first-served basis for the limited immigrant visas without regard to country of origin.”<sup>71</sup>

#### D. REFOCUSING IMMIGRATION POLICY: TARGETING MEXICAN IMMIGRANTS

To be sure, the increasingly liberal laws of the 1950s and 1960s did not eliminate restriction and discrimination entirely. The 1952 Immigration and Nationality Act contained provisions originally included in the “Wetback Bill” passed by Congress on March 20, 1952.<sup>72</sup> Among other provisions, the “Wetback Bill” strengthened the Border Patrol’s enforcement capabilities by extending the Border Patrol’s area of operation and doing away with warrant requirements for vehicle searches.<sup>73</sup> Additional restrictions on Mexican immigration surfaced in the 1965 Act. Before 1965, the Western Hemisphere was unaffected by the system of national quotas.<sup>74</sup> However, after 1965, immigration from the Western Hemisphere, including Mexico, was capped at 120,000.<sup>75</sup>

Tighter restrictions on the Western Hemisphere changed the face of immigration to the United States. Despite the ceiling imposed in the 1965 Act, after 1960, “more immigrants came from Mexico than from any other

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<sup>66</sup> DANIELS, *supra* note 11, at 115.

<sup>67</sup> REIMERS, *supra* note 21, at 26.

<sup>68</sup> *Id.* at 29. Daniels also writes of the general support for more liberal immigration reform on both sides of the aisle. While Democrats attacked what they saw as discriminatory, antiquated legislation, Republicans invoked ideals rooted in the nation’s past, particularly the notion of the United States as a haven for immigrants. DANIELS, *supra* note 11, at 129.

<sup>69</sup> Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101, 1151–1156, 1181–1182, 1201, 1254–1255, 1259, 1322, 1351).

<sup>70</sup> Charles J. Ogletree, Jr., *America’s Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. REV. 755, 760 (2000).

<sup>71</sup> Charles B. Keely, *Effects of the Immigration Act of 1965 on Selected Population Characteristics of Immigrants to the United States*, 8 DEMOGRAPHY 157, 159 (May 1971).

<sup>72</sup> See Immigration and Nationality Act of 1952, ch. 108, 66 Stat. 26; DANIELS, *supra* note 11, at 120.

<sup>73</sup> DANIELS, *supra* note 11, at 120.

<sup>74</sup> REIMERS, *supra* note 21, at 68.

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

nation.”<sup>76</sup> Just looking at legal immigration figures, some 430,000 arrived from Mexico during the 1960s, followed by 680,000 in the 1970s.<sup>77</sup> During the 1980s, the number of legal immigrants from Mexico reached upwards of three million.<sup>78</sup> Concurrently, tougher restrictions on Mexican immigration simply meant that for many Mexican migrants, “it was now more difficult to enter the United States legally.”<sup>79</sup> “Thus in closing . . . ‘the front door,’ American policy fostered ‘back door’ illegal immigration.”<sup>80</sup> Although the statistics are in dispute, by some estimates, as many as twelve million immigrants entered the United States from Mexico as temporary visitors during the 1980s alone.<sup>81</sup>

The rising tide of undocumented Mexican immigrants soon pushed reform to the forefront.<sup>82</sup> As record numbers crossed illegally into the southwest, local and federal officials voiced fears over “mounting social costs of providing health care and education for migrants and their families.”<sup>83</sup> In 1978, Congress created the Select Commission on Immigration and Refugee Policy, whose 1981 report named illegal immigration the most significant problem facing the nation.<sup>84</sup> Moreover, recession in the mid-1980s led legislators to seek trade liberalization with Mexico for the benefit of American businesses.<sup>85</sup> Following years of debate both on and off of Capitol Hill,<sup>86</sup> Congress passed the Immigration Reform and Control Act of 1986 (IRCA).<sup>87</sup> Although the IRCA granted amnesty to undocumented immigrants who had lived in the United States for a designated period, the IRCA also imposed sanctions on employers who hired undocumented immigrants and concentrated Border Patrol agents along the United States-Mexico border.<sup>88</sup> The IRCA did succeed in legalizing large numbers of

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<sup>76</sup> DANIELS, *supra* note 11 at 180–81.

<sup>77</sup> Jorge Durand et al., *Mexican Immigration to the United States: Continuities and Changes*, 36 LATIN AM. RES. REV. 107, 107 (2001).

<sup>78</sup> *Id.*

<sup>79</sup> REIMERS, *supra* note 21, at 69.

<sup>80</sup> *Id.* (quoting Aristide Zolberg).

<sup>81</sup> Durand, *supra* note 77, at 108.

<sup>82</sup> DANIELS, *supra* note 11, at 220.

<sup>83</sup> Richard C. Jones, *Immigration Reform and Migrant Flows: Compositional and Spatial Changes in Mexican Migration After the Immigration Reform Act of 1986*, 85 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 715, 715 (1995).

<sup>84</sup> DANIELS, *supra* note 11, at 219–20.

<sup>85</sup> Jones, *supra* note 83, at 716.

<sup>86</sup> *Id.*

<sup>87</sup> Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

<sup>88</sup> Jones, *supra* note 83, at 716.

Mexican immigrants, but about one million remained undocumented as of 1992.<sup>89</sup>

Public response to increasing numbers of Mexican immigrants—both legalized and undocumented—was less than positive. Polls revealed that most Americans believed that the bulk of recent immigrants were in the country illegally and, further, that most Americans opposed immigration and favored restriction.<sup>90</sup> Public opinion and increased Mexican immigration prompted various attempts to crack down on immigrants throughout the southwest, particularly California. In the early 1990s, concerned Californians formed a vehicle blockade at the United States-Mexico border, where they shined headlights on potential border crossers.<sup>91</sup> Meanwhile, uniformed members of the so called “U.S. Citizens Patrol” walked the terminals at the San Diego International Airport in order to deter the entry of undocumented immigrants.<sup>92</sup> Even the federal government participated in the southwest border crackdown. “Operation Gatekeeper” increased the number of border patrol agents in San Diego and caused the construction of a new, fourteen-mile-long fence equipped with high-intensity lights.<sup>93</sup>

Perhaps the most comprehensive, and controversial, response came in 1994, when California voters passed Proposition 187, a bold, nativist piece of legislation that sought to eliminate public health, welfare and educational benefits for undocumented immigrants.<sup>94</sup> Though short-lived,<sup>95</sup> Proposition 187 again brought racism, nativism and xenophobia into the spotlight of the immigration debate, and eventually sparked reform at the federal level.<sup>96</sup> In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, which increased numbers of Border Patrol agents in the field, imposed employer sanctions for the hiring of un-

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<sup>89</sup> Durand, *supra* note 77, at 108. Mexicans comprised roughly three-quarters of the 3.2 million immigrants legalized under the IRCA. *Id.*

<sup>90</sup> REIMERS, *supra* note 21, at 29.

<sup>91</sup> Yoxall, *supra* note 31, at 526.

<sup>92</sup> REIMERS, *supra* note 21, at 38.

<sup>93</sup> *Id.* at 71; Yoxall, *supra* note 31, at 526–27.

<sup>94</sup> KENT A. ONO & JOHN M. SLOOP, *SHIFTING BORDERS: RHETORIC, IMMIGRATION, AND CALIFORNIA’S PROPOSITION 187* 3 (2002) [hereinafter “ONO & SLOOP”].

<sup>95</sup> See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995): The California voters’ overwhelming approval of Proposition 187 reflects their justifiable frustration with the federal government’s inability to enforce the immigration laws effectively. No matter how serious the problem may be, however, the authority to regulate immigration belongs exclusively to the federal government and state agencies are not permitted to assume that authority.

*Id.*

<sup>96</sup> ONO & SLOOP, *supra* note 94, at 3–5.

documented immigrants, and restricted public benefits to newly arrived immigrants.<sup>97</sup>

Further, tougher immigration reform was ushered in by the terrorist attacks on September 11, 2001.<sup>98</sup> In October of 2001, Congress enacted the USA Patriot Act, which increased Border Patrol funding and personnel along the northern border and enabled agents to deny entry to immigrants who “endorse or espouse terrorist activity.”<sup>99</sup> In 2002, Congress passed the Enhanced Border Security and Visa Entry Reform Act and the Homeland Security Act, which created additional immigration restrictions and overhauled the immigration/customs bureaucracy.<sup>100</sup>

Despite major federal reform, citizens and politicians in cities throughout the United States—particularly those with large or growing immigrant populations—were dissatisfied. As one Pennsylvania mayor lamented, “Small cities can no longer sit back and wait for the federal government to do something.”<sup>101</sup> The public and critics of all stripes viewed federal immigration law as “a broken system.”<sup>102</sup> In a recent *Time* Magazine poll, 82% of those surveyed felt that the federal government was not doing enough along its borders to keep illegal immigrants out.<sup>103</sup>

But rather than the private vigilantism that marked the mid-1990s, in more recent years, the trend seems to have shifted to local and municipal legislative self-help.<sup>104</sup> In Pennsylvania, Texas, Delaware, Illinois, Ten-

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<sup>97</sup> Austin T. Fragomen, Jr., *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: An Overview*, 31 INT’L MIGRATION REV. 438, 438–39, 442, 447 (1997).

<sup>98</sup> April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1149–50 (2004).

<sup>99</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 346 (codified as amended at 8 U.S.C. 1182 (a)(3)(B)(i)(VII)).

<sup>100</sup> McKenzie, *supra* note 98, at 1149–50; Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (providing for increased funding, training, and information sharing); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (creating the Department of Homeland Security and abolishing the INS).

<sup>101</sup> *Pa. City Defends Illegal Immigrant Law in Court: First Federal Trial Tests Local vs. Federal Control over Immigrants*, MSNBC.COM, Mar. 12, 2007, <http://www.msnbc.msn.com/id/17576996/?GT1=9145> (last visited Mar. 12, 2007) (quoting Mayor Lou Barletta).

<sup>102</sup> DANIELS, *supra* note 11, at 240.

<sup>103</sup> *TIME* Poll: *Let Them Stay, But Get Tough*, *TIME*, Apr. 2, 2006, available at <http://www.time.com/time/nation/article/0,8599,1179336,00.html>.

<sup>104</sup> Muzaffar A. Chishti, *Enforcing Immigration Rules: Making the Right Choices*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 451, 465–66 (2006–07). Of course, this is not to say that private vigilantism is a thing of the past. For a discussion of recent border vigilantism, including the Minuteman Project, see Yoxall, *supra* note 31, at 517.

nessee and other states across the country,<sup>105</sup> city authorities proposed or enacted bans on hiring and renting to illegal immigrants in the name of public welfare.<sup>106</sup> On August 16, 2006, the City of Escondido, California decided to implement a similar ban.<sup>107</sup> Ordinance 2006-38, which stirred up local controversy<sup>108</sup> and almost immediate legal challenge,<sup>109</sup> is at once an echo of the nation's early approach toward immigration and a new frontier for an ongoing debate over United States immigration policy.

### III. ESCONDIDO ORDINANCE NO. 2006-38 R

In a heated public hearing on August 16, 2006, members of the Escondido City Council voted to draft a ban on renting property to undocumented immigrants.<sup>110</sup> The content of the Ordinance was largely based on a report by City Attorney Jeffrey Epp,<sup>111</sup> which cited the presence of undocumented immigrants as a significant cause in the deterioration of the

<sup>105</sup> See Database of Recent Local Ordinances on Immigration as of January 16, 2007, Fair Immigration Reform Movement, [http://www.aif.org/lac/11607\\_ordinances.doc](http://www.aif.org/lac/11607_ordinances.doc) (last visited Jan. 16, 2007) (listing local governments that have passed or are considering ordinances targeting immigrants).

<sup>106</sup> John L. Micek, *State GOP Leaders Decide They Have to Return to Principles: Hazelton's Barletta Speaks Out About Illegal Immigrant Ordinance*, MORNING CALL (Allentown, Pa.), Feb. 10, 2007, at A9; Jake Batsell, *Filing for May 12 Election Starts Monday*, DALLAS MORNING NEWS, Feb. 11, 2007, at 1B; Summer Harlow, *Immigration, Local Laws Debated at Widener*, THE NEWS J. (Wilmington, Del.), Feb. 8, 2007, at 2B; Charles Sheehan & George Houde, *Hot Issues Underscore Races in the Suburbs: Battle Lines Drawn in Carpentersville, Prospect Heights*, CHICAGO TRIB., Feb. 7, 2007, at 4; *Chamber Opposes Metro Immigration Ordinances*, NASHVILLE BUSINESS J., Nov. 20, 2006, available at [http://www.bizjournals.com/nashville/stories/2006/11/20/daily6.html?from\\_rss=1](http://www.bizjournals.com/nashville/stories/2006/11/20/daily6.html?from_rss=1).

<sup>107</sup> David Fried, *Escondido Votes to Draft Ban on Renting to Illegal Immigrants*, N. COUNTY TIMES, Aug. 16, 2006, available at [http://www.nctimes.com/articles/2006/08/17/news/inland/16\\_01\\_168\\_16\\_06.txt](http://www.nctimes.com/articles/2006/08/17/news/inland/16_01_168_16_06.txt).

<sup>108</sup> Quinn Eastman, *Anti-Illegal Immigrant Group Rallies in Escondido*, N. COUNTY TIMES, Nov. 3, 2006, available at [http://www.nctimes.com/articles/2006/11/04/news/top\\_stories/20\\_26\\_2211\\_3\\_06.txt](http://www.nctimes.com/articles/2006/11/04/news/top_stories/20_26_2211_3_06.txt). In addition to local controversy, passage of the Escondido Ordinance stirred up racism and nativism among certain North County residents. In a comments section accompanying the above article, a reader using the alias "American Patriot" wrote:

Warning to illegal aliens. Americans are tired of you taking advantage of our country and we are mobilizing in force to find you and deport you. Americans are waking up and we will put a stop to this invasion and send you all packing. I am locating employers who give jobs to illegal aliens in my area and reporting them to ICE until they stop it. I am reporting suspected illegal aliens I see living in houses in my area. I am not against IMMIGRANTS. I am against the slimy sneaky Mexican scum that is coming here illegally. You are ALL criminals (sic). I don't care if you are a woman or a child. You all must GO HOME NOW.

*Id.* (Reader Comment no longer available).

<sup>109</sup> See Complaint, *supra* note 8.

<sup>110</sup> Fried, *supra* note 107.

<sup>111</sup> J. Harry Jones, *Law Against Renting to Illegal Migrants Ready for Escondido Council Vote*, SAN DIEGO UNION-TRIB., Sept. 29, 2006, available at <http://www.signonsandiego.com/news/northcounty/20060929-1644-bn29escon.html>.

“overall appearance and living conditions in neighborhoods” in the City.<sup>112</sup> “At the end of a contentious, late-night meeting” on October 4, 2006, the City Council passed Ordinance No. 2006-38 R,<sup>113</sup> “An Ordinance of the City of Escondido, California Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido.”<sup>114</sup>

The Escondido Ordinance began with a list of “Findings,” which outlined relevant federal immigration law and echoed the text of the City Attorney report. Notably, the Ordinance contained findings that:

The harboring of illegal aliens in dwelling units in the City, and crime committed by illegal aliens harm the health, safety, and welfare of legal residents in the City . . . . The regulations of the City regarding housing . . . often depend on reporting by residents and neighbors [of] . . . unlawful conditions . . . . Because illegal aliens do not wish to call attention to their presence, such individuals are less likely to report such conditions . . . .<sup>115</sup>

The Ordinance also stated the City’s dissatisfaction with federal immigration law and enforcement:

The state and federal government lack the resources to properly protect the citizens of the City of Escondido from the adverse effects of the harboring of illegal aliens, and the criminal activities of some illegal aliens.<sup>116</sup>

The second section of the Ordinance defined an “illegal alien” as “[a]n alien who is not lawfully present in the United States” under 8 U.S.C. § 1101 et seq. and stated that the City would not consider a person as an “illegal alien” until confirmation of immigration status is received from federal authorities.<sup>117</sup>

Section three—the heart of the Escondido Ordinance—set forth the substantive amendments to the Escondido Municipal Code.<sup>118</sup> Under section three, persons and businesses that owned dwelling units were prohib-

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<sup>112</sup> Letter from Jeffrey R. Epp, Escondido City Attorney, to Honorable Mayor & Members of the City Council of the City of Escondido (Oct. 4, 2006), available at <http://www.signonsandiego.com/news/northcounty/images/060929esconreport.pdf> [hereinafter “Epp Letter”].

<sup>113</sup> David Fried, *Escondido Council Approves Illegal Immigrant Rental Ban*, N. COUNTY TIMES, Oct. 5, 2006, available at [http://www.nctimes.com/articles/2006/10/05/news/top\\_stories/3\\_00\\_0010\\_4\\_06.txt](http://www.nctimes.com/articles/2006/10/05/news/top_stories/3_00_0010_4_06.txt).

<sup>114</sup> Escondido, Cal., Ordinance No. 2006-38 R (Oct. 18, 2006) [hereinafter “Escondido Ordinance”].

<sup>115</sup> *Id.* at 1.

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Id.* at 3.

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

ited from “harbor[ing] 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.”<sup>119</sup> Harboring, the Ordinance explained, included “let[ting], leas[ing], or rent[ing] a dwelling unit to an illegal alien.”<sup>120</sup>

The City empowered City officials, businesses, and even individual residents to enforce the Ordinance by filing a written complaint that described the alleged undocumented immigrants and the circumstances surrounding the perceived violations.<sup>121</sup> Upon receiving a “valid” complaint—one alleging a violation not “solely or primarily on the basis of national origin, ethnicity, or race”—the City verified the renter’s immigration status with federal authorities by submitting identity documents provided by the property owner sufficient to prove the tenant’s citizenship or lawful immigrant status.<sup>122</sup> The property owner was required to submit such documentation within five days of receiving a request from the City.<sup>123</sup>

If the renter was determined to be undocumented, the property owner was provided written notice of the violation and granted ten business days to “correct” it.<sup>124</sup> Failure to correct a violation resulted in the suspension of the property owner’s business license, thereby preventing the property owner from collecting rent from any other occupant of the dwelling unit.<sup>125</sup> Additional violations subjected the property owner to fines.<sup>126</sup>

A separate violation occurred for each day of harboring and for each adult undocumented immigrant harbored ten days after receiving notice from the City.<sup>127</sup> In practice, multiple violations could result in fines of up to \$1,000 per day, jail time, or both.<sup>128</sup>

#### IV. EQUAL PROTECTION: THE ESCONDIDO ORDINANCE UNDER *PLYLER V. DOE*

Congress passed the Fourteenth Amendment on June 13, 1866 amidst intense debate over how to best rebuild the country after the Civil War and

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

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> Complaint, *supra* note 8, ¶ 32.

<sup>124</sup> Escondido Ordinance, *supra* note 114, at 5.

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 3.

<sup>128</sup> Complaint, *supra* note 8, ¶ 34.

combat the discriminatory laws that threatened to restore de facto slavery in the southern states.<sup>129</sup> Section 1 of the Fourteenth Amendment provides that “No State . . . shall deny to any person within its jurisdiction the equal protection of the laws.”<sup>130</sup> Because of the specific reference to “persons,” not “citizens,” the Supreme Court has long relied on the Equal Protection Clause and strict scrutiny to strike down state laws that discriminate against lawfully-admitted, non-citizen immigrants.<sup>131</sup>

The status of undocumented immigrants under Equal Protection is less clear. Although the Court has explicitly stated that the safeguards of the Fourteenth Amendment flow to undocumented immigrants,<sup>132</sup> it has not articulated a clear standard under which allegedly discriminatory state laws affecting the undocumented will be evaluated. The Court’s most explicit pronouncement on undocumented immigrants and Equal Protection came in 1982, when the Court used the Clause to strike down a Texas law that denied state funding to school districts for educating undocumented immigrant children.<sup>133</sup> *Plyler v. Doe* arguably established a sort of heightened scrutiny test for evaluating state laws that discriminate against certain undocumented immigrants—a test that could and should be used to strike down housing ordinances like the one passed in Escondido.

#### A. *PLYLER V. DOE*

In 1975, the Texas legislature revised the State Education Code to authorize local school districts to deny enrollment and eliminate state funding for the education of undocumented immigrant children.<sup>134</sup> Two years later, a class of “certain school-age children of Mexican origin . . . who could not establish that they had been legally admitted into the United States” filed suit against the district and the state on federal preemption and equal protection grounds.<sup>135</sup> After making its way through the district court and the Fifth Circuit, *Plyler v. Doe* was eventually appealed to the Supreme Court, the majority of which held the Texas revisions unconstitutional under the Equal Protection Clause.<sup>136</sup>

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<sup>129</sup> See PAUL BREST ET AL., PROCESS OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 241–48 (4th ed. 2000).

<sup>130</sup> U.S. CONST. amend. XIV, § 1.

<sup>131</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

<sup>132</sup> See *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896).

<sup>133</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>134</sup> *Id.* at 205.

<sup>135</sup> *Id.* at 206–08.

<sup>136</sup> *Id.* at 230.



The majority opinion, delivered by Justice Brennan, began by declaring that undocumented immigrants are “‘person[s] within [Texas’s] jurisdiction’” under the Fourteenth Amendment.<sup>137</sup> Accordingly, under long-standing precedent,<sup>138</sup> the Equal Protection Clause applied even to “aliens whose presence in this country is unlawful.”<sup>139</sup> Next, the Court set forth the basic framework for equal protection analysis: state statutes that “disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right’” must be shown to be “precisely tailored to serve a compelling governmental interest.”<sup>140</sup> The Court defined “suspect” classes as those groups who, for reasons beyond their control, “have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”<sup>141</sup> Despite this expansive definition, undocumented immigrants were deemed not to be a “suspect class.”<sup>142</sup> Unlike most suspect classes, the Court reasoned:

[E]ntry into [the undocumented immigrant] class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.<sup>143</sup>

Although “[t]he Court did not expressly articulate a level of scrutiny . . . it appear[ed] that the Court was using intermediate scrutiny<sup>144</sup> in evaluating the discrimination against undocumented alien children with regard to education.”<sup>145</sup> The children of such undocumented immigrants had no say in choosing whether to enter the United States illegally.<sup>146</sup> Thus, a state’s decision to “direct[] the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”<sup>147</sup> In addition, the Court highlighted the societal and individual importance of public education,<sup>148</sup> but ultimately held that education was not a fundamental right.<sup>149</sup> Rather, education lay somewhere between a fundamental right

<sup>137</sup> *Id.* at 210.

<sup>138</sup> *Id.* (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing*, 163 U.S. at 238; *Yick Wo*, 118 U.S. at 369).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 216–17.

<sup>141</sup> *Id.* at 218 n.14 (citations omitted).

<sup>142</sup> *Id.* at 219 n.19.

<sup>143</sup> *Id.*

<sup>144</sup> Other commentators have labeled the level of review in *Plyler* “rational basis with bite.” Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 1011 (1995).

<sup>145</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 747 (2d ed. 2002).

<sup>146</sup> *Id.*

<sup>147</sup> *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

<sup>148</sup> *Id.* at 221.

<sup>149</sup> *Id.* at 223.

and a state-granted privilege,<sup>150</sup> the deprivation of which from a “discrete group of innocent children . . . must be justified by a showing that it [reasonably] furthers some substantial state interest.”<sup>151</sup>

The state interest offered by the Texas school district was the preservation of scarce educational resources for lawful residents.<sup>152</sup> The Court dismissed the district’s argument outright: “The state must do more than justify its classification with a concise expression of an intention to discriminate.”<sup>153</sup> The Court then suggested and dismissed three other possible state interests that might have supported the Texas code revisions. First, Texas’s interest in “protect[ing] itself from an influx of illegal immigrants” could not justify the code revisions because most undocumented immigrants enter the United States in search of jobs, not free education.<sup>154</sup> Thus, implementing a ban or increased cost on education for undocumented immigrant children “constitute[d] a ludicrously ineffectual attempt to stem the tide of illegal immigration.”<sup>155</sup> Next, the Court tackled the suggestion that undocumented immigrant children are appropriately singled out because they impose special burdens on state resources.<sup>156</sup> The Texas school district, however, offered no evidence to support the claim that excluding undocumented immigrant children would improve the quality of public education.<sup>157</sup> Rather, “undocumented children are ‘basically indistinguishable’ from legally resident alien children.”<sup>158</sup> Finally, the Court dismissed the possibility that undocumented immigrant children are more likely to move out of state after receiving the benefits of a free public education.<sup>159</sup> Again, the Texas school district failed to offer any relevant supporting evidence.<sup>160</sup> To the contrary, the Court noted that many children who would be excluded by the Texas code revisions “will become lawful residents or citizens of the United States.”<sup>161</sup>

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<sup>150</sup> *Id.* at 223, 226.

<sup>151</sup> *Id.* at 230.

<sup>152</sup> *Id.* at 227.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 228.

<sup>155</sup> *Id.* (citation omitted).

<sup>156</sup> *Id.* at 229.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* (citations omitted).

<sup>159</sup> *Id.* at 229–30.

<sup>160</sup> *Id.* at 230.

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

B. THE ESCONDIDO ORDINANCE UNDER *PLYLER*

Like the Texas code revisions, the Escondido Ordinance would likely require, and fail, application of the intermediate scrutiny test articulated by the *Plyler* Court. Though not directed specifically at undocumented children, the Escondido Ordinance would substantially impact such children, whose illegal entry into this country was not of their own volition. The health, safety, and welfare threats cited in the Escondido Ordinance were based in part on a study released in 2006 by the National Latino Research Center at California State University, San Marcos.<sup>162</sup> The study focused on the predominantly Latino Mission Park neighborhood of Escondido, and found that of those surveyed, 72% reported having children age seventeen or younger.<sup>163</sup> Further, 35% of Mission Park residents were under the age of seventeen in 2006.<sup>164</sup> Because many Mission Park parents are newly arrived immigrants,<sup>165</sup> the City's call for evictions would have the effect of punishing large numbers of undocumented children "on the basis of a legal characteristic over which [they] can have little control."<sup>166</sup>

Furthermore, housing, though not a recognized fundamental right,<sup>167</sup> carries both personal and societal importance similar to education.<sup>168</sup> "[C]ontinuous residence" in the United States is required for naturalization,<sup>169</sup> which is in turn a prerequisite for much civic participation.<sup>170</sup> Without the ability to rent or lease property, residence, naturalization and civic participation<sup>171</sup> for many undocumented immigrants would be virtually impossible.<sup>172</sup> Moreover, because residency generally must be estab-

<sup>162</sup> See Epp Letter, *supra* note 112, at 1–2; MISSION PARK SURVEY, *supra* note 2.

<sup>163</sup> MISSION PARK SURVEY, *supra* note 2, at 13, 32.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 15.

<sup>166</sup> *Plyler*, 457 U.S. at 220.

<sup>167</sup> CHEMERINSKY, *supra* note 145, at 762.

<sup>168</sup> See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (noting "the importance of decent, safe, and sanitary housing").

<sup>169</sup> U.S. Citizenship and Immigration Services, Naturalization, <http://www.uscis.gov/naturalization> (last visited Mar. 10, 2007). Even an immigrant who entered the country illegally might in the future be granted U.S. citizenship. *Plyler*, 457 U.S. at 226.

<sup>170</sup> See, e.g., California Secretary of State, Voter Registration, [http://www.sos.ca.gov/elections/elections\\_vr.htm](http://www.sos.ca.gov/elections/elections_vr.htm) (last visited Mar. 22, 2007); U.S. CONST. art. 1, §§ 2, 3; U.S. CONST. art. II, § 1.

<sup>171</sup> In the words of Justice Blackmun, "a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler*, 457 U.S. at 233 (Blackmun, J., concurring).

<sup>172</sup> Although home ownership is still possible for illegal immigrants, a number of obstacles exist to make such an option difficult for Mexican immigrants and the Latino community as a whole. The Mission Park Survey found that "[o]bvious barriers to Latino homeownership include low incomes and high housing costs, but other important barriers can be attributed to poor consumer education, discrimination, and lack of outreach to the Latino market." MISSION PARK SURVEY, *supra* note 2, at 18. Ac-

lished before a minor may partake in free public education,<sup>173</sup> the Escondido Ordinance would have the residual effect of making education impossible for undocumented immigrant children whose parents rent their homes. As the *Plyler* Court noted, “We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”<sup>174</sup>

Therefore, like *Plyler*, the large amount of undocumented children potentially affected by the Escondido Ordinance and the importance of housing to naturalization, civic participation and, indeed, education, warrants intermediate scrutiny. That is, the Escondido Ordinance would fail unless Escondido authorities could show that the Ordinance reasonably furthers some substantial City interest. But, as with the Texas code provisions in *Plyler*, the interest cited in the Escondido Ordinance appears to be little more than “a concise expression of an intention to discriminate.”<sup>175</sup> Undocumented immigrants and their children are specifically singled out for discriminatory treatment in order to improve “the health, safety and welfare of *legal* residents in the City.”<sup>176</sup> Furthermore, the City cannot justify the Ordinance as a tool to curb illegal immigration because, as the *Plyler* court found, the impetus to crossing illegally into the United States is employment, not housing.

Neither can the City cite to any “special burdens”<sup>177</sup> imposed by undocumented immigrant renters on the overall deterioration in Escondido housing, welfare or safety. The study relied upon in drafting the Ordinance was limited to one neighborhood with a large population of Latino immigrants.<sup>178</sup> City officials cannot reasonably rely on a study of a demographically and socio-economically unique sector of the City to justify significant legal change that would affect Escondido as a whole.

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cordingly, 85% of Mission Park residents rent their homes, while 15% live in owner-occupied homes. *Id.* at 31.

<sup>173</sup> 78A C.J.S. *Schools & School Dists.* § 712 (2008).

<sup>174</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

<sup>175</sup> *Id.* at 227.

<sup>176</sup> Escondido Ordinance, *supra* note 114, at 1 (emphasis added).

<sup>177</sup> *Plyler*, 457 U.S. at 229.

<sup>178</sup> MISSION PARK SURVEY, *supra* note 2, at 30. Eighty-one percent of Mission Park residents who participated in the survey were born in Mexico. *Id.* at 30. While only 39% of Escondido’s population is Hispanic or Latino, 71% of Mission Park residents identified themselves as Latino in the 2000 United States Census. *Id.* at 9–10, 13.

C. *PLYLER* REVISITED? ADDITIONAL CONSIDERATIONS IN DETERMINING THE APPROPRIATE LEVEL OF SCRUTINY FOR LAWS THAT DISCRIMINATE AGAINST UNDOCUMENTED IMMIGRANTS

Although it is unclear whether the Supreme Court would be willing to revisit the standard set forth in *Plyler*, the proliferation of local anti-undocumented immigrant ordinances, like that in Escondido, provides the opportunity to take *Plyler* a step further.

A cloud of uncertainty hangs over the Equal Protection Clause;<sup>179</sup> it “has been crisscrossed by a bewildering array of theories, precedents, and convictions—all under the name of equality.”<sup>180</sup> Most significantly for purposes of this Note, certain scholars have struggled with the Court’s classification of groups for equal protection analysis.<sup>181</sup> In classifying undocumented immigrants as a non-suspect group, the *Plyler* Court may have caused an additional snag in the Court’s equal protection jurisprudence.

The *Plyler* Court defined a “suspect” class as a group who, by no choice of its own, “ha[s] historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”<sup>182</sup> Yet choice alone does not disqualify a group from suspect classification. Immigrants, whose presence in the United States is usually volitional, have been considered a suspect class since the early 1970’s.<sup>183</sup> Indeed, “[a]llies as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”<sup>184</sup> Thus, in order to disqualify undocumented immigrants from receiving the benefits of heightened scrutiny, the *Plyler* Court held that the fact that undocumented immigrants are “in this country in violation of federal law is not a ‘constitutional irrelevancy.’”<sup>185</sup> In effect, the Court carved out a separate and distinct group from one already recognized for suspect classification based on a prior, non-felonious criminal act.<sup>186</sup> However, this criterion does not alter the analysis in equal pro-

<sup>179</sup> Kristen M. Schuler, Note, *Equal Protection and the Undocumented Immigrant: California’s Proposition 187*, 16 B.C. THIRD WORLD L.J. 275, 303 (1996) (“Supreme Court equal protection jurisprudence regarding the status of non-citizens, both documented and undocumented, is anything but settled.”).

<sup>180</sup> Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379, 387–88 (1983).

<sup>181</sup> *Id.* at 388.

<sup>182</sup> *Plyler v. Doe*, 457 U.S. 202, 217 n. 14 (citations omitted).

<sup>183</sup> See generally *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>184</sup> *Id.* at 372 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 & n.4 (1938)).

<sup>185</sup> *Plyler*, 457 U.S. at 223.

<sup>186</sup> Although illegal entry into the United States is usually prosecuted as a misdemeanor, Republican legislators in the House and Senate have recently suggested making illegal entry and presence in

tection jurisprudence.<sup>187</sup> In short, prior, non-felonious criminal activity, like entering or remaining illegally in the United States, is not a valid impediment to protection under the Fourteenth Amendment.<sup>188</sup>

In addition, the *Plyler* Court's classification seems to overlook the extent to which race—a suspect class—and immigration status are conflated in local immigration legislation and debate. Specifically, undocumented immigrants are often “portray[ed] . . . in racialized terms, pointing almost solely to Mexicana, Mexicanos, Chicanas, and Chicanos.”<sup>189</sup> The extent and seriousness of the ties between race and illegal immigration can be seen in the recent 33% membership increase in hate groups,<sup>190</sup> which have placed a stronger emphasis on undocumented immigrants and have collapsed the “furor over immigration policies”<sup>191</sup> into their more familiar racist discourse. In a telling example, one writer described a recent anti-immigration rally held by the National Knights of the Ku Klux Klan in Russellville, Alabama, in which one Klansman exclaimed, “Let’s get rid of the Mexicans!”<sup>192</sup> Examples like this reveal the difficulties in attempting to cleanly separate race and alienage, even when that alienage is “illegal.”

Finally, undocumented immigrants are arguably in greater need of suspect classification than immigrants who enter or remain in the country legally. As one commentator has noted, “undocumented aliens have a greater history of discrimination and less political power than resident

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the United States a felony. *GOP Leaders to Remove Felony Charges for Illegal Immigrants*, FOX NEWS, Apr. 13, 2006, <http://www.foxnews.com/story/0,2933,191429,00.html>.

<sup>187</sup> See *O’Brien v. Skinner*, 414 U.S. 524, 531 (1974).

<sup>188</sup> This conclusion also appears to be more consistent with the language the *Plyler* Court used earlier in the opinion. In discussing jurisdiction under the Fourteenth Amendment, for instance, the Court stressed the fact that there was no meaningful way to distinguish between lawful and unlawful entrants:

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. Given such presence, he is subject to the full range of obligations imposed by the State’s civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.

*Plyler*, 457 U.S. at 215.

<sup>189</sup> ONO & SLOOP, *supra* note 94, at 99. Although Ono and Sloop’s comments are directed specifically at the rhetoric surrounding Proposition 187, their statement is equally applicable in the broader debate over illegal immigration, or as it has otherwise been termed, the “brown invasion of America.” See Charles Bowden, *Exodus: Border-Crossers Forge a New America*, MOTHER JONES, Sept.–Oct. 2006, available at <http://www.motherjones.com/news/feature/2006/09/exodus.html>.

<sup>190</sup> Chip Berlet, *The Hard Edge of Hatred*, THE NATION, Aug. 15, 2006, available at [http://www.thenation.com/doc/20060828/new\\_nativism](http://www.thenation.com/doc/20060828/new_nativism).

<sup>191</sup> *Id.* (quoting Mark Potok of the Southern Poverty Law Center).

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

aliens. Their status is also more immutable than lawfully present aliens who, some day, may qualify for citizenship.”<sup>193</sup>

## V. THE CONTRACTS CLAUSE

An additional, albeit weaker, ground for challenging the Escondido Ordinance is rooted in the Contracts Clause. Article I, § 10 of the United States Constitution provides that “No state shall . . . pass any . . . law impairing the obligation of contracts.”<sup>194</sup> Largely unused in the first third of the twentieth century,<sup>195</sup> the Contracts Clause has traditionally acted as a bar to state laws that, although otherwise legitimate exercises of police power,<sup>196</sup> interfere with the performance of existing contracts.<sup>197</sup> In *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*,<sup>198</sup> the Court set forth the current three-part test for evaluating state or local laws under the Contracts Clause.<sup>199</sup>

First, it must be determined whether the state or local law in fact acts “as a substantial impairment of a contractual relationship.”<sup>200</sup> Under *General Motors Corp. v. Romein*,<sup>201</sup> this prong has three components: “whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.”<sup>202</sup> Whether an impairment is substantial depends on its “severity,” namely, the extent to which the impairment interferes with the ability of “individuals to order their personal and business affairs according to their particular needs and interests.”<sup>203</sup> A state or local statute is likely unconstitutional if “the statute in question . . . nullifies express terms of the [party’s] contrac-

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<sup>193</sup> Manheim, *supra* note 144, at 944 n.31. Similarly, Kristen M. Schuler writes, “[A]s one commentator has stated, ‘[i]f a person’s status as an alien is not a problematic basis for differential treatment under equal protection, then, *a fortiori*, a person’s status as an *undocumented* alien is not a problematic basis.’” Schuler, *supra* note 179, at 305 (citation omitted and emphasis added).

<sup>194</sup> U.S. CONST. art. 1, § 10.

<sup>195</sup> CHEMERINSKY, *supra* note 145, at 606. From 1897 until 1937, the Supreme Court used the due process clause of the Fifth and Fourteenth Amendments to protect the freedom of contract. Because these provisions protected both existing and future contracts, “the contracts clause was made superfluous.” *Id.*

<sup>196</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978).

<sup>197</sup> CHEMERINSKY, *supra* note 145, at 605.

<sup>198</sup> 459 U.S. 400 (1983).

<sup>199</sup> CHEMERINSKY, *supra* note 145, at 612.

<sup>200</sup> *Energy Reserves Group*, 459 U.S. at 411 (citations and internal quotation marks omitted).

<sup>201</sup> 503 U.S. 181 (1992).

<sup>202</sup> *Id.* at 186.

<sup>203</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

tual obligations and imposes a completely unexpected liability in potentially disabling amounts.”<sup>204</sup>

After a finding of substantial impairment, the inquiry turns to whether the State or locality can cite “a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.”<sup>205</sup> In other words, the state or local law must be exercised as a part of those powers “necessarily reserved” to the states “to safeguard the welfare of their citizens.”<sup>206</sup>

In *United States Trust Co. v. New Jersey*, the Court noted that although “States must possess broad power to adopt general regulatory measures,” the mere “existence of an important public interest is not always sufficient” to justify the impairment of a private contract.<sup>207</sup> Thus, under the final prong, the legislation “must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.”<sup>208</sup> In *Allied Structural Steel Co.*, the Court struck down a Minnesota law that imposed a fee on employers who terminated a pension plan or closed an office located in the state.<sup>209</sup> *Allied Structural Steel* maintained and funded a pension plan, which, under existing agreement, could be amended or terminated at the election of the company.<sup>210</sup> The Court declared the Minnesota law unconstitutional because it was not sufficiently tailored to a legitimate state interest and, further, “worked a severe, permanent, and immediate change in [contractual] relationships—irrevocably and retroactively.”<sup>211</sup>

Using the Supreme Court’s framework, the Escondido Ordinance would fail, or at least stumble through, a Contracts Clause inquiry. The Escondido Ordinance constitutes a substantial interference with existing contractual obligations. Under its terms, landlords are prohibited from “harboring,” which it defines as “let[ting], leas[ing], or rent[ing] a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact” that the tenant is undocumented, and further mandates that a landlord evict such tenant upon notice from the City.<sup>212</sup> Because the Ordinance could contra-

<sup>204</sup> *Id.* at 247.

<sup>205</sup> *Energy Reserves Group*, 459 U.S. at 411–12 (citing *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977)); *Allied Structural Steel*, 438 U.S. at 247, 249).

<sup>206</sup> *U.S. Trust Co. of N.Y.*, 431 U.S. at 21 (citation omitted).

<sup>207</sup> *Id.* at 21–22.

<sup>208</sup> *Id.* at 22 (citation omitted).

<sup>209</sup> 438 U.S. at 238, 250.

<sup>210</sup> *Id.* at 237.

<sup>211</sup> *Id.* at 250.

<sup>212</sup> Escondido Ordinance, *supra* note 114, at 3. The Ordinance uses a more neutral terminology; it requires that the landlord “correct” any violation. *Id.* at 5.



dict existing lease<sup>213</sup> agreements, it impedes the ability of “individuals”—landlords and tenants—“to order their personal and business affairs according to their particular needs and interests.”<sup>214</sup> As a case in point, Roy and Mary Garrett, the landlords who filed the Complaint against the City of Escondido, penned their own eviction and termination clauses, which made no provision for expedited evictions of tenants based on immigration status.<sup>215</sup> Moreover, by imposing fines, compliance and reporting requirements for landlords, and threatening business license suspension for non-compliance,<sup>216</sup> the City of Escondido abruptly made existing lease agreements too expensive to enforce as written. Landlords would be forced to breach leases and rental agreements with their tenants in order to avoid the City’s penalties.

To the City’s credit, the purported purpose of the Ordinance likely fits within the definition of an important and legitimate public interest. Escondido lawmakers may be correct that issues of health and safety arise when undocumented immigrants, who often reside in substandard housing, fail to report violations for fear of “call[ing] attention to their presence.”<sup>217</sup> The City’s methods, however, are far from reasonable. Most importantly, a close reading of the Ordinance reveals that Escondido is concerned with the “health, safety, and welfare of *legal* residents in the City.”<sup>218</sup> Unlike undocumented immigrants, legal residents have no reason to hesitate in reporting housing violations. Thus, a ban on renting to undocumented immigrants changes nothing; with or without undocumented immigrants, legal residents will presumably report housing violations that affect their own “health, safety, and welfare.” Furthermore, if curbing unsatisfactory housing conditions is the true aim, a number of other legislative options exist that are of “a character appropriate to the public purpose.”<sup>219</sup> For instance, the City could adopt a modified version of the so-called sanctuary policies, which prevent city officials from reporting the citizenship status of those arrested by local police.<sup>220</sup> Escondido officials enforcing housing laws

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<sup>213</sup> See *Rider v. City of San Diego*, 959 P.2d 347, 354 (Cal. 1998). Blacks Law Dictionary defines a lease as “[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent.” BLACKS LAW DICTIONARY (8th ed. 2004).

<sup>214</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

<sup>215</sup> Complaint, *supra* note 8, ¶¶ 13–18.

<sup>216</sup> Escondido Ordinance, *supra* note 114, at 4–5.

<sup>217</sup> *Id.* at 1–2.

<sup>218</sup> *Id.* at 1 (emphasis added).

<sup>219</sup> *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 22 (1977).

<sup>220</sup> See *New York City’s “Sanctuary” Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims*, 108th Cong. 44 (2003).

could simply avoid inquiries into the citizenship status of those reporting violations.

The problem with relying on the Contracts Clause to invalidate the Escondido Ordinance lies in the paucity of recent Supreme Court cases that have struck down state and local laws for impeding contracts.<sup>221</sup> Indeed, *Allied Structural Steel*—the only case since 1934 to hold a state law unconstitutional for interfering with a private contract—has not been followed by the Court for the past twenty years.<sup>222</sup> Accordingly, the Equal Protection Clause and, as will be shown, federal preemption are more significant barriers to the survival of the Escondido Ordinance.

## VI. THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION

The doctrine of federal preemption provides that “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”<sup>223</sup> Rooted in the Supremacy Clause of Article VI of the United States Constitution,<sup>224</sup> preemption of state laws occurs when express preemptive language is found in the federal statute or when the Congressional intent to preempt is implied in the “structure and purpose” of the federal statute.<sup>225</sup> Implied preemption is further divided into “conflict pre-emption, where ‘compliance with both federal and state regulations is a physical impossibility,’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’”<sup>226</sup> and field preemption, in which the overarching “scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”<sup>227</sup>

### A. THE ESCONDIDO ORDINANCE POTENTIALLY CONFLICTS WITH FEDERAL HOUSING REGULATIONS

The first potential source of federal preemption of the Escondido Ordinance is the system of federal housing regulations enacted by Congress to govern the operation of the United States Department of Housing and Ur-

<sup>221</sup> CHEMERINSKY, *supra* note 145, at 606.

<sup>222</sup> *Id.* at 613–14.

<sup>223</sup> *Free v. Bland*, 369 U.S. 663, 666 (1962) (citations omitted).

<sup>224</sup> U.S. CONST. art. VI, § 2 (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

<sup>225</sup> *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (citations omitted).

<sup>226</sup> *Id.* (citations omitted).

<sup>227</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

ban Development (“HUD”). Among other services, HUD provides assistance to low income renters in finding and procuring affordable housing.<sup>228</sup> Under 12 U.S.C. § 1701s, the secretary of HUD is authorized to make payments to certain home and apartment owners on behalf of “qualified” low income tenants.<sup>229</sup> Most significantly, HUD makes a prorated version<sup>230</sup> of the federal Rent Supplement Program available to a “mixed family”<sup>231</sup>—“a family whose members include those with citizenship or eligible immigration status, and those without citizenship or eligible immigration status.”<sup>232</sup> In other words, households that include undocumented immigrants are eligible for federal housing subsidies as long as at least one adult member of the household is a citizen or an eligible, lawfully admitted immigrant.<sup>233</sup>

These federal housing regulations could potentially conflict with provisions of the Escondido Ordinance, which prohibit renting, leasing, suffering, or “permit[ting] the occupancy of [a] 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.”<sup>234</sup> A landlord who rents to one of the 1991 Escondido households receiving rental assistance under federal law<sup>235</sup> would be simultaneously violating local law if the dwelling unit was occupied by a “mixed family.” The Escondido Ordinance would essentially penalize a benefit established and administered by the federal government.

#### B. *DE CANAS V. BICA*: THE ESCONDIDO ORDINANCE AND FEDERAL IMMIGRATION LAW

Immigration is often regarded as the quintessential example of field preemption,<sup>236</sup> given that “Congress has so completely occupied the field

<sup>228</sup> U.S. Dep’t of Hous. & Urban Dev., Renting, <http://www.hud.gov/renting/index.cfm> (last visited Mar. 14, 2007).

<sup>229</sup> 12 U.S.C. § 1701s (2006).

<sup>230</sup> Proration is described in 24 C.F.R. § 5.520(b) (1999).

<sup>231</sup> *Id.* § 5.520(a).

<sup>232</sup> *Id.* § 5.504(b).

<sup>233</sup> Memorandum from William O. Russell, III, Deputy Assistant Secretary for Public Housing and Voucher Programs, to All Regional Directors, Public Housing Agencies, and Housing Field Office Directors (Mar. 11, 2004), *available at* [http://www.fairhousing.com/index.cfm?method=page.display&pagename=hud\\_resources\\_russell](http://www.fairhousing.com/index.cfm?method=page.display&pagename=hud_resources_russell).

<sup>234</sup> Escondido Ordinance, *supra* note 114, at 3.

<sup>235</sup> San Diego Housing Commission, Housing Services by Area, <http://sdhc.org/giAffordHsgRes1.html> (last visited Mar. 11, 2007).

<sup>236</sup> *See, e.g.,* CHEMERINSKY, *supra* note 145, at 385; Michael P. DiNatale, Comment, *Patients Beware: Preemption of Common Law Claims Under the Medical Device Amendments*, 39 J. MARSHALL L. REV. 75, 82 (2005) (“In general, courts will find field preemption in those areas where the federal

of immigration that there is no room for supplemental state regulation.”<sup>237</sup> Case law locates the federal power over immigration in two sources: “the extra-constitutional concept of inherent sovereignty [and] the textual authority to declare war”<sup>238</sup> and regulate naturalization. Furthermore, states lack “power over immigration in the first place,” and are restricted in “any power they may possess if its exercise intrudes on a federal domain.”<sup>239</sup>

Despite the “strength” of federal preemption in the immigration context, the Court has recognized that a balance must be struck between national policy and local concerns.<sup>240</sup> Indeed, “the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.”<sup>241</sup> Rather, state and local laws that deal with immigrants must satisfy the three-part test set forth by the Court in *De Canas v. Bica*: first, it must be determined whether the legislation at issue is “a constitutionally proscribed regulation of immigration.”<sup>242</sup> States and cities are found to regulate immigration when their laws have more than “some purely speculative and indirect impact on immigration.”<sup>243</sup> Second, if the law does not constitute a regulation of immigration, it will still be preempted if “Congress intended to ‘occupy the field’ which the statute attempts to regulate.”<sup>244</sup> Finally, a state or local law will be preempted if “it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>245</sup>

The Escondido Ordinance would have likely failed two of the three *De Canas* preemption tests. Under the first test, the Escondido Ordinance has more than a “purely speculative and indirect impact on immigration”<sup>246</sup>; it constitutes an elaborate “scheme to detect and report the presence and ef-

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government has exclusive authority, such as immigration and foreign policy, where Congress intended to eliminate dual federal and state legislation, or where there is a comprehensive regulatory scheme.”).

<sup>237</sup> Manheim, *supra* note 144, at 960. This is especially true with regard to civil immigration legislation, which has been described as “a pervasive regulatory scheme.” Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 977 (2004).

<sup>238</sup> Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817, 821 (2004).

<sup>239</sup> Manheim, *supra* note 144, at 946.

<sup>240</sup> *Id.* at 961.

<sup>241</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (emphasis added).

<sup>242</sup> *Id.*; see also *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995).

<sup>243</sup> *De Canas*, 424 U.S. at 355.

<sup>244</sup> *Wilson*, 908 F. Supp. at 768; see also *De Canas*, 424 U.S. at 358.

<sup>245</sup> *De Canas*, 424 U.S. at 363 (citations omitted).

<sup>246</sup> *Id.* at 355.

fect the removal of illegal aliens.”<sup>247</sup> Not only does the Escondido Ordinance place additional conditions on the residence of undocumented immigrants, the Ordinance effectively deputizes a new cadre of immigration enforcement officials made up of City officials, local business entities, and, indeed, private Escondidans.<sup>248</sup> Further, the Escondido Ordinance introduces a new meaning for “harboring”<sup>249</sup> not otherwise contained in the Immigration and Nationality Act (“INA”).<sup>250</sup>

The Escondido Ordinance would also likely fail a preemption challenge under the second *De Canas* test because Congress has occupied the field of civil immigration laws regulating “illegal presence.”<sup>251</sup> The sheltering of undocumented immigrants is already governed by the Immigration and Nationality Act, which provides penalties for persons who, “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, conceals, harbors, or shields from detection, such alien in any place, including any building.”<sup>252</sup> Although the federal “harboring” provision has been construed broadly,<sup>253</sup> “nothing in immigration law prevents rental or sale of property to the undocumented.”<sup>254</sup> Thus, the Escondido Ordinance would tread in an area preempted by federal law by imposing restrictions that Congress, “in its balancing of international objectives, decided not to make.”<sup>255</sup>

Similar conclusions were reached in *Lozano v. City of Hazelton*,<sup>256</sup> which involved an ordinance almost identical to the one passed by the City of Escondido. Hazelton, a small city in northeastern Pennsylvania, passed an ordinance that prohibited the housing of undocumented immigrants and required renters to acquire “occupancy permits,” which could only be obtained with proof of citizenship.<sup>257</sup> The district court found the ordinance preempted by federal immigration law because it conflicted with the “discretion of . . . federal officials to remove persons from the country who are

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<sup>247</sup> *Wilson*, 908 F. Supp. at 769.

<sup>248</sup> Escondido Ordinance, *supra* note 114, at 3.

<sup>249</sup> *See id.*

<sup>250</sup> 8 U.S.C. § 1324 (2006).

<sup>251</sup> Alison Fee, Note, *Forbidding States From Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L.J. 93, 103–04 (1998).

<sup>252</sup> 8 U.S.C. § 1324(a)(1)(A)(iii) (2006).

<sup>253</sup> *See United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (construing “harbor” to mean “afford shelter to”).

<sup>254</sup> Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and Latcrit Theory*, 55 FLA. L. REV. 511, 520 (2003).

<sup>255</sup> Pham, *supra* note 237, at 995.

<sup>256</sup> 496 F. Supp. 2d 477 (M.D. Pa. 2007).

<sup>257</sup> *Id.* at 496.

removable.”<sup>258</sup> Furthermore, the Hazelton ordinance placed a greater burden on undocumented immigrants than federal law “by prohibiting them from residing in the city although they may be permitted to remain in the United States.”<sup>259</sup>

Precisely the same can be said of the Escondido Ordinance.

## VII. EFFICACY AND IMPACT

Constitutional infirmities aside, the Escondido Ordinance raises daunting practical and policy concerns.

### A. ENFORCEMENT

To begin with, it is unclear how “any official, business entity, or resident of the City”<sup>260</sup> could be expected to enforce accurately the Ordinance without prior exposure to the “hundreds of pages of complicated regulations concerning different ways people can be lawfully present in the United States.”<sup>261</sup> The concerns voiced over “whether local officials will have the proper training and expertise required to enforce . . . immigration regulations”<sup>262</sup> are amplified when considering private residents who have little to rely on beyond mere intuition.

Using private citizens to identify probable violations raises additional enforcement questions. For one, how will the City determine whether a reported violation is “based solely or primarily on the basis of national origin, ethnicity, or race”?<sup>263</sup> The law sets forth no threshold or standard for testing the primary reason behind a report and provides no safeguard to ensure the Ordinance is not used as a tool for harassing residents of perceived Mexican ancestry. In a state where “immigrant” and “Mexican” are conflated,<sup>264</sup> this latter concern poses a real threat to 42% of the City’s population.<sup>265</sup>

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<sup>258</sup> *Id.* at 530.

<sup>259</sup> *Id.* at 532.

<sup>260</sup> *Id.* at 537 (citation and internal quotations omitted).

<sup>261</sup> McKenzie, *supra* note 98, at 1161.

<sup>262</sup> *Id.*

<sup>263</sup> Escondido Ordinance, *supra* note 114, at 4. In *Lozano*, the plaintiffs initially brought an equal protection challenge to a similar provision in the ordinance that allowed the city to “consider race, ethnicity or national origin in determining whether a complaint under the Ordinance is ‘valid.’” *See Lozano*, 496 F. Supp. 2d at 538 (citation omitted).

<sup>264</sup> REIMERS, *supra* note 21, at 33.

<sup>265</sup> MISSION PARK SURVEY, *supra* note 2, at 9–10.

Even the citizens of Escondido, especially the elderly and the poor, are put at risk by the enforcement provisions. Almost 13% of Escondido residents are age sixty-two or older<sup>266</sup> and nearly 3,000 families in the City live below the poverty line.<sup>267</sup> Whether these residents are among the roughly 34,000 foreign-born Escondidans,<sup>268</sup> from whom landlords are more likely to demand documentation of immigration status, having to prove lawful presence in the United States could pose significant burdens.<sup>269</sup>

#### B. RAISING THE POTENTIAL FOR COSTLY LITIGATION

The City's (probable) underlying goals in passing Ordinance 2006-38 are outweighed by the potential costs, namely expensive and inevitable litigation. Escondido may have truly hoped to cure overcrowding and public health and safety, but the underlying purpose of the Ordinance was almost undoubtedly political—to show that at a time of local and national immigration debate,<sup>270</sup> Escondido took a hard-line stance. That the Ordinance was little more than a political statement is evidenced by the fact that after agreeing to forego enactment of the Ordinance,<sup>271</sup> the City Council passed a resolution “reaffirm[ing] its opposition to illegal immigration.”<sup>272</sup> By rushing headlong into legislation, the City exposed itself to potential legal challenge, which, in fact, was presented shortly after the Ordinance was passed.<sup>273</sup> For the City and its taxpayers, the statement was not worth the price.<sup>274</sup>

In addition, the Escondido Ordinance could have led to claims against local landlords for violations of the Fair Housing Act, which makes it

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<sup>266</sup> U.S. CENSUS BUREAU, TABLE DP-1: PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS (Escondido, Cal.) 1 (2000), <http://censtats.census.gov/data/CA/1600622804.pdf>.

<sup>267</sup> *Id.* at 3.

<sup>268</sup> *Id.* at 2.

<sup>269</sup> In addition to financial difficulties, many citizens may not be able to supply within five days a passport, certificate of citizenship, or any other valid proof of citizenship under federal law. *See, e.g.*, 8 C.F.R. § 341.1 (1987).

<sup>270</sup> Jennifer Virgil, *Proposal for Sanctuary City Sparks Rally*, SAN DIEGO UNION-TRIB., Sept. 24, 2006, at B2; *The NewsHour with Jim Lehrer: Immigrants Protest Across the U.S.* (PBS television broadcast May 1, 2006), available at [http://www.pbs.org/newshour/bb/law/jan-june06/immigration2\\_05-01.html](http://www.pbs.org/newshour/bb/law/jan-june06/immigration2_05-01.html).

<sup>271</sup> *See* Stipulated Final Judgment, *supra* note 9.

<sup>272</sup> Paul Eakins, *Escondido Council OKs Illegal Immigration Resolution; Measure Creates No New Ordinance or Policy*, N. COUNTY TIMES, Jan. 10, 2007, available at [http://www.nctimes.com/articles/2007/01/11/news/inland/1\\_00\\_311\\_10\\_07.txt](http://www.nctimes.com/articles/2007/01/11/news/inland/1_00_311_10_07.txt).

<sup>273</sup> *See* Complaint, *supra* note 8.

<sup>274</sup> Memorandum from the Mexican American Legal Defense and Education Fund 7 (2006), <http://www.maldef.org/publications/pdf/LEGAL%20AND%20POLICY%20ANALYSIS.pdf> [hereinafter “MALDEF Analysis”].

unlawful “[t]o refuse to . . . rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>275</sup> Landlords hoping to avoid penalties for renting to undocumented immigrants would be encouraged to profile prospective tenants based on race or perceived national origin.<sup>276</sup> Such “reluctan[ce] to [rent to] individuals from certain ethnic backgrounds . . . could have the unlawful effect of discriminating on the basis of national origin.”<sup>277</sup>

### C. LOOKING LONG TERM

Escondido City officials may have believed that banning undocumented renters would rid Escondido of undocumented immigrants entirely, thereby improving local health, safety and welfare. However, if the real motivation for coming to the United States is employment, chances are undocumented immigrants would have stayed in Escondido despite the ban. In nearby Encinitas, for instance, wealthy residents used health concerns to evict an encampment of immigrant workers residing in the City.<sup>278</sup> But rather than abandon Encinitas, the immigrant workers simply established other encampments in different parts of the City.<sup>279</sup> Like their Encinitas counterparts, undocumented immigrants in Escondido would have likely found a way to remain in town—albeit in worse living conditions—so long as they could procure employment. Far from curing the “adverse effects of the harboring of illegal aliens,” Escondido officials would have exacerbated them.

Conversely, if undocumented immigrants were forced out of Escondido and into neighboring cities, the Escondido Ordinance could have had the effect of creating a legislative race to the bottom, in which municipalities compete to enact the harshest, most restrictive anti-undocumented immigrant laws or risk being overrun by those banished from other cities. Escondido may protect the health, safety, and welfare of its residents, “but it cannot shift its burdens onto sister [cities].”<sup>280</sup> “In the area of immigration, if in no other area, the nation must act in unison.”<sup>281</sup>

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<sup>275</sup> 42 U.S.C. § 3604(a) (2006).

<sup>276</sup> MALDEF Analysis, *supra* note 274, at 8.

<sup>277</sup> Legal Analysis of Proposed City of Hazleton Illegal Immigration Relief Act Ordinance, Congressional Research Service 7, June 29, 2005, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0006.pdf>.

<sup>278</sup> Schuler, *supra* note 179, at 300–04.

<sup>279</sup> *Id.* at 301.

<sup>280</sup> Manheim, *supra* note 144, at 1017.

<sup>281</sup> *Id.*



## VIII. CONCLUSION

On May 15, 2006, President George W. Bush addressed the nation about the ongoing debate over undocumented immigration:

We're a nation of laws, and we must enforce our laws. We're also a nation of immigrants, and we must uphold that tradition, which has strengthened our country in so many ways.<sup>282</sup>

The President's comments highlight the competing trends in United States immigration history. Americans, like the citizens of Escondido, continue to hold fast to idealistic tradition and the view of America as a "nation of immigrants." As history shows, however, federal and state governments have passed discriminatory anti-immigrant legislation since the earliest days of the republic. The Escondido Ordinance and others like it simply represent the latest trend in discriminatory government action. Using Escondido as a case study, it seems likely that local immigration ordinances that deprive undocumented immigrants of housing are likely to face significant, perhaps insurmountable constitutional challenges. Perhaps of greater importance, ordinances like that in Escondido pose significant enforcement problems, have the potential to embroil cities and their residents in expensive litigation and create challenges for the nation as a whole. As the events in Escondido and Hazelton show, cities seeking to legislate controversial and divisive political views would do well to first consider the costs.

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<sup>282</sup> George W. Bush, U.S. President Televised National Address Regarding Immigration Reform (May 15, 2006), available at <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.