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Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination

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Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination

Rigel C. Oliveri

62 Vand. L. Rev. 55 (2009)

In the face of federal inability to effectively police our national borders and to remove unauthorized immigrants, many local governments have recently sought to take measures into their own hands by passing anti-illegal immigrant (“AII”) ordinances. These ordinances usually contain a combination of provisions restricting housing, employment, and public benefits for unauthorized immigrants, among other things.

This Article focuses on AII provisions that are targeted at private rental housing, which typically take the form of sanctions against landlords who rent to unauthorized immigrants. Faced with penalties for renting to unauthorized immigrants, landlords have the clear incentive to screen their tenants’ immigration status. However, given the difficulty of ascertaining legal status (and the absence of any reliable mechanism for doing so), landlords are instead likely to resort to short-cuts, such as refusing to rent to “foreign-seeming” people and discriminating based on accent, surname, appearance, or other ethnic markers. As a result, these restrictions are likely to (1) cause landlords to violate the federal Fair Housing Act, which prohibits discrimination on the basis of national origin, and (2) lead to discrimination against all ethnic minority groups whose members look or sound “foreign,” regardless of their immigration or citizenship status. In addition to the violations of federal fair housing law that are likely to occur, there are significant public policy arguments against immigration-related housing restrictions.

Federal intervention is therefore necessary. Congress must act to prevent municipalities from enacting and enforcing such restrictions. Moreover, Congress must itself resist pressure to enact immigration-related housing restrictions as a matter of national policy. But this is not enough. Historic and current levels of housing discrimination against national origin minorities and

immigrants indicate that these groups are already in need of greater protection, yet the law contains significant gaps in coverage. Both alienage and legal status remain permissible bases for discrimination under the Fair Housing Act. As long as this is the case, discrimination against national origin minorities who are citizens and legally present noncitizens is encouraged to continue. Thus, the Fair Housing Act should be amended to contain explicit protection for both alienage and legal status.

Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination

*Rigel C. Oliveri**

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Asking landlords to enforce immigration laws makes about as much sense as requiring grocers to demand a green card before selling a gallon of milk.

—Editorial, CHI. TRIB., OCT. 16, 2006¹

INTRODUCTION

In recent years, few topics have been as controversial and polarizing as illegal immigration. Federal efforts at policing the border between the United States and Mexico are widely regarded as ineffectual, and efforts to locate and deport unauthorized immigrants have scarcely made a dent in the population of approximately 12 million estimated to be living in the United States.² In the wake of these failures, attempts at local and private enforcement of immigration laws have proliferated.³ Many local governments have

1. Editorial, *Mayberry I.N.S.*, CHI. TRIB., Oct. 16, 2006, at A18.

2. JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 2 (2006), <http://pewhispanic.org/files/reports/61.pdf>.

3. See, e.g., Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1365 (1999) (noting the increase in state and local involvement in immigration law); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 785–96 (2008) (describing private enforcement of immigration laws in the areas of employment, housing, and transportation); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 569 (2008) (noting the rise of state and local efforts to control immigration); Peter Spiro, *Learning to Live With Immigration Federalism*,

recently sought to take measures into their own hands by passing anti-illegal immigrant (“AII”) ordinances. These ordinances typically contain a combination of provisions: they make English the “official language” of the municipality, eliminate gathering places for day laborers, penalize employers for hiring unauthorized immigrants, restrict unauthorized immigrants’ access to public benefits, and prevent unauthorized immigrants from renting housing.⁴

Attempts by subnational governments to pass such measures have received much attention in the scholarly literature, primarily because of the questions they raise about the appropriate allocation of immigration enforcement authority between federal, state, and local governments.⁵ Most of the treatment, however, fails to engage in a substantive analysis of the provisions themselves; to the extent it does, it tends to lump the individual provisions of the AII measures together.⁶ Nonetheless, the various areas implicated by AII ordinances—housing, employment, public assembly, public benefits, and municipal administration—operate within different legal frameworks and raise different sets of concerns.

This Article focuses on AII provisions targeted at private rental housing, which typically sanction landlords who rent to unauthorized immigrants and may also require that all prospective tenants have their immigration status verified prior to entering into a residential lease. My analysis reveals that it is difficult (if not impossible) for landlords to verify the immigration status of every potential tenant they encounter. They are instead likely to resort to shortcuts, such as discriminating based on accent, surname, appearance, or other ethnic markers. As a result, I argue that these restrictions: (1) will cause

29 CONN. L. REV. 1627, 1640–42 (1997) (observing the dramatic expansion of the role played by states and localities in immigration law and policy).

4. Not every AII ordinance contains all of these types of provisions, but all contain some combination of the above. There are many other state laws that could fall under the description of “Anti-Illegal Immigrant” legislation, including those which limit eligibility for in-state tuition and require proof of legal residency in order to obtain a driver’s license. Because this Article focuses on municipal ordinances, these state laws will not be addressed in any significant detail.

5. See generally Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Pham, *supra* note 3; Rodríguez, *supra* note 3; Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; Spiro, *supra* note 3.

6. Two notable exceptions are Pham, *supra* note 3, at 785–96, and Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1041–45 (2007). Both discuss the various types of provisions. Their treatment of the housing issues, while good, is brief and only accounts for a fraction of each paper. Peter Schuck also addresses the substantive policy issues surrounding state action on immigration-related matters, but he focuses only on employer sanctions, employment-based admissions, and cooperative law enforcement. Schuck, *supra* note 5, at 64.

landlords to violate the federal Fair Housing Act, which prohibits discrimination on the basis of national origin and (2) will lead to discrimination against all ethnic minority groups whose members look or sound "foreign," regardless of immigration or citizenship status. Although fair housing laws frequently pit landlords against tenants, in this situation the interests of the two groups are aligned: national origin minorities do not wish to be discriminated against, and landlords do not wish to be put in the untenable position of attempting to comply with AII ordinances that put them at risk of violating the Fair Housing Act.

In addition to the likelihood that AII ordinances will result in violations of federal fair housing law, there are also significant public policy arguments against immigration-related housing restrictions. These rights-oriented and practical arguments stem from the importance of housing, the nature of the landlord-tenant relationship, the ways in which the results of AII housing measures will conflict with the measures' stated goals, and the unique harms that housing discrimination creates.

Because of these problems, I conclude that federal intervention is necessary. To protect national origin minorities and other legally present noncitizens from housing discrimination, and to keep landlords in compliance with fair housing law, Congress must act to prevent municipalities from enacting and enforcing such restrictions. Further, given the policy problems inherent in immigration-related housing restrictions, Congress itself must resist pressure to enact them into federal law.

But this is not enough. Historic and current levels of housing discrimination—both private and municipal—against national origin minorities and immigrants indicate that these groups are already in need of greater protection. Yet the law contains significant gaps in coverage that can prevent these groups from obtaining equal access to housing. Both alienage (whether a person is a citizen of the United States) and legal status (whether a person is legally present in the United States, and, if so, under what conditions) remain permissible bases for discrimination under the Fair Housing Act. As long as this is the case, landlords may attempt to take immigration enforcement into their own hands by refusing to rent to people who they believe to be unauthorized immigrants, or whose legal status they deem insufficient. This will invariably lead to continued discrimination against "foreign-seeming" national origin minorities (regardless of their citizenship) and legally present noncitizens. Thus, the Fair Housing Act should be amended to contain explicit protection for both alienage and legal status. Put another way, not only should private

landlords not be forced to consider these factors when renting housing, they should in fact be *prevented* from taking them into account.

Part I discusses the AII ordinances generally in terms of their history, housing contents, and current status. Part II analyzes the probable effects of the housing provisions and how these outcomes violate the Fair Housing Act. Part III addresses additional public policy arguments against AII housing restrictions. Part IV offers suggestions for how the law can address the situation, both in terms of counteracting the AII ordinances and in terms of more proactive reforms to protect national origin minorities who are citizens and legally present noncitizens from housing discrimination.

I. THE AII ORDINANCES

A. Background

The first of the contemporary crop of municipal AII ordinances was proposed in April 2006, in San Bernardino, California.⁷ The ordinance's housing provisions were brief:

Illegal aliens are prohibited from leasing or renting property. Any property owner/renter/tenant/lessee in control of property, who allows an illegal alien to use, rent or lease their property shall be in violation of this section, irrespective of such person's intent, knowledge or negligence, said violation hereby being expressly declared a strict liability offense.⁸

Violation of the ordinance was punishable by a fine of not less than \$1,000 per day. The ordinance failed on a four to three council vote, and supporters subsequently unsuccessfully fought to have it placed on the ballot for a popular vote.⁹ A few months after the San Bernardino measure failed, Hazleton, Pennsylvania became the first

7. San Bernardino, Cal., Illegal Immigration Relief Act Ordinance (proposed April 2006), available at http://firecoalition.com/downloads/San_Bernardino_Illegal_Immigration_Ordinance.doc. During the 1990s, some states passed what might be considered precursors to these AII ordinances. The most well known of these state laws is California's Proposition 187, a ballot initiative which eliminated most public benefits for unauthorized immigrants and forbade their attendance at public schools. 1994 Cal. Legis. Serv. Prop. 187 (West) (approved Nov. 8, 1994), *overturned in significant part by* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995).

8. Illegal Immigration Relief Act Ordinance, *supra* note 7.

9. Ashley Powers, *Petition Would Force Vote on Illegal Immigrant Curbs*, L.A. TIMES, Apr. 27, 2006, at B4; James Sterngold, *San Bernardino Seeking "Relief": Struggling City's Proposal Targets Illegal Immigrants*, S.F. CHRON., Jun. 11, 2006, at A4.

municipality to actually adopt an AII ordinance.¹⁰ Hazleton's ordinance is much longer and more detailed than the San Bernardino measure, and its language became the model upon which most subsequent ordinances were based.

As of this writing, approximately 105 localities in twenty-nine states have considered Hazleton-style AII ordinances.¹¹ Of these localities, forty-two have passed AII ordinances containing housing restrictions. Six of these housing ordinances have been challenged in court from: Hazleton; Valley Park, Missouri; Farmers Branch, Texas; Cherokee County, Georgia; Escondido, California; and Riverside, New Jersey.¹² Enforcement of all AII ordinances was essentially put "on hold" pending the outcome of litigation over Hazleton's ordinance in the case of *Lozano v. City of Hazleton*.¹³ The suit was widely viewed as a test case for these types of laws.¹⁴ On July 26, 2007, the Middle District of Pennsylvania struck down Hazleton's ordinance on a variety of grounds, most of them related to federal preemption and due process concerns.¹⁵ As a result, most of the housing AII ordinances

10. Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance (July 13, 2006), available at <http://clearinghouse.wustl.edu/detail.php?id=5472> (hereinafter Hazleton Ordinance).

11. The Fair Immigration Reform Movement maintains a database of AII ordinances, available at <http://www.immigrantsolidarity.org/Documents/Nov06OverviewLocalOrdinances/OverviewofRecentLocalImmigrationOrdinancesandResolutions.pdf> (last visited Jan. 22, 2009).

12. Farmers Branch, Tex., Ordinance 2903 (May 22, 2007), available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202903.pdf> [hereinafter Farmers Branch Ordinance]; Cherokee County, Ga., Ordinance 2006-03 (Dec. 5, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-GA-0001-0003.pdf> [hereinafter Cherokee County Ordinance]; Valley Park, Mo., Ordinance 1715 (Sept. 26, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0009.pdf> [hereinafter Valley Park Ordinance 1715], amended by Valley Park, Mo., Ordinance 1721 (Feb. 14, 2007), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0015.pdf> [hereinafter Valley Park Ordinance 1721]; Escondido, Cal., Ordinance 2006-38, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-CA-0001-0002.pdf> [hereinafter Escondido Ordinance]; Riverside, N.J., Ordinance 2006-16, Illegal Immigration Relief Act Ordinance, amended by Riverside, N.J., Ordinance 2006-19, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0005.pdf>, and Riverside, N.J., Ordinance 2006-26, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0006.pdf> [hereinafter Riverside Ordinance 2006-26]. Because these six ordinances are the most well documented and because they are fairly representative of the ordinances that have been passed around the country, they will be the primary focus of this Article.

13. 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

14. See, e.g., Julia Preston, *City's Immigration Restrictions Go On Trial*, N.Y. TIMES, Mar. 13, 2007, at A13 (describing Hazleton litigation as "a test case about the power of cities to crack down on illegal immigration").

15. At the time of this writing, Hazleton was appealing the case to the U.S. Court of Appeals for the Third Circuit. American Civil Liberties Union of Pennsylvania, Challenge to Hazleton's Anti-Immigrant Ordinance, <http://www.aclupa.org/issues/immigrantsrights/hazleton/index.htm> (last visited Jan. 1, 2009).

have either been enjoined by courts or repealed by local legislatures.¹⁶ For reasons discussed, *infra*, however, it is likely that we have not seen the last of local attempts to institute immigration-related housing restrictions.

B. Housing Provisions

The housing provisions in each Hazleton-style ordinance were enacted under the municipalities' zoning and code enforcement power. The housing provisions typically contain two basic components: (1) an enforcement procedure that relies on outside complaints and landlord sanctions and (2) a pre-authorization procedure requiring all prospective tenants to be screened for legal status before they can enter into a lease agreement.

16. As of this writing, the status of the AII ordinances in the five other municipalities in which litigation occurred is as follows: Valley Park: *Gray v. City of Valley Park*, No. 4:07CV00881-ERW, 2007 WL 2303952, at *1 (E.D. Mo. Aug. 8, 2007) (dismissing housing-related aspects of the case), and *Reynolds v. City of Valley Park*, No. 4:06CV01487-ERW, 2006 WL 3331082, at *9 (E.D. Mo. Nov. 15, 2006) (involving a housing ordinance that the city amended in July 2007, removing all reference to immigration, and case was dismissed as moot in August 2007); Cherokee County: *Robert Stewart, Inc. v. Cherokee County*, No. 1:07-cv-00015-TCB (N.D. Ga. filed Jan. 4, 2007) (entering consent order for permanent injunction against ordinance), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-GA-0001-9000.pdf>; Escondido: *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1060 (S.D. Cal. 2006) (entering a temporary restraining order in November 2006, which lead city to voluntarily withdraw ordinance on December 14, 2006); Riverside: *Riverside Coal. of Bus. Pers. & Landlords v. Township of Riverside*, No. 1:06-cv-05521-RMB-JS (D.N.J. filed May 11, 2007) (involving an ordinance that the city repealed in September 2007, after which plaintiffs agreed to dismiss the case), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-9000.pdf>, and *Assembly of God Church Riverside v. Township of Riverside*, No. 1:06-cv-03842-RMB-AMD (D.N.J. filed Nov. 2, 2007) (following the repealed ordinance in September 2007, plaintiffs filed a summary judgment motion and request for attorneys' fees), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0002-9000.pdf>; Farmers Branch: *Villas at Parkside Partners v. City of Farmers Branch*, Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 3:07-CV-0061-L, 2007 WL 1836844, at *5 (N.D. Tex. June 26, 2007) (denying city's motion to dismiss without prejudice), and *Villas at Parkside Partners v. City of Farmers Branch*, Nos. 3:06-CV-2371-L, 3:07-CV-0061-L, 2008 WL 2201980, at *19 (N.D. Tex. May 28, 2008) (granting plaintiffs motion for partial summary judgment and entering permanent injunction). While the case was pending, Farmers Branch enacted a new version of its AII ordinance, Ordinance 2952 (Jan. 22, 2008), available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf>, which cures many of the deficiencies noted in the court's June 2007 order. The new ordinance was challenged by the ACLU and the Mexican American Legal Defense and Education Fund, and a preliminary injunction was granted. See Press Release, ACLU, Farmers Branch, Texas Anti-Immigrant Ordinance Is Blocked While Challenge Continues (Sept. 22, 2008), available at <http://www.aclu.org/immigrants/discrim/36876prs20080922.html>. The Farmers Branch City Council, which plans to appeal, has declared that the ordinance is not to take effect pending the outcome of the litigation.

1. Complaint-Driven Enforcement Procedures

Most of the municipalities rely on a complaint mechanism to enforce their ordinances. The complaint mechanism allows anyone to file a complaint with the municipality stating that he suspects a resident of a dwelling unit is an unauthorized immigrant. Hazleton's ordinance, for example, provides that:

An enforcement action shall be initiated by means of a written signed complaint to the Hazleton Code Enforcement Office submitted by any official, business entity or resident of the City. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the action constituting the violation, and the date and location where such actions occurred.¹⁷

Once the enforcement office receives a complaint, the city notifies the landlord, who then has a matter of days to provide the city with identifying information about the particular resident.¹⁸ The city forwards this information to the federal government to verify the resident's immigration status.¹⁹ If the city learns that the resident is not legally authorized to be in the United States, it will inform the landlord, who then has a relatively short period—typically a few days—to cure the violation by convincing the resident to leave the unit voluntarily or by instituting an eviction action.²⁰ If a landlord must undertake formal eviction procedures, the landlord will bear the court and administrative costs himself, which typically run around \$200 per eviction.

If the landlord fails to remove or take steps to remove the resident within the allotted time, his rental license for the unit will be suspended and he will be prevented from collecting rent.²¹ Significant

17. Hazleton Ordinance, *supra* note 10, § 5(B)(1). This language is similar to the language commonly used in municipal ordinances for the reporting of suspected violations of the property maintenance code. Other ordinances with similar complaint procedures include those enacted by Cherokee County, Escondido, Riverside, and Valley Park.

18. *Id.* § 5(A)(3) (landlord must provide information within three days); *see also* Cherokee County Ordinance, *supra* note 12, § 18-504(c) (within five days); Valley Park Ordinance 1715, *supra* note 12, § 5(A)(3) (within three days); Riverside Ordinance 2006-26, *supra* note 12, § 166-5(A)(3) (within three days).

19. Hazleton Ordinance, *supra* note 10, § 5(B)(3). As discussed in Section III.B.3 *infra*, there is no federal database in existence which is capable of quickly verifying the legal status of every person in the United States—citizen and noncitizen, immigrant and non-immigrant visitor—for the purpose of determining whether they can enter into a residential lease.

20. Cherokee County Ordinance, *supra* note 12, § 18-504(d) (five days); Valley Park Ordinance 1715, *supra* note 12, § 5(B)(4) (five days); Hazleton Ordinance, *supra* note 10, § 5(B)(4) (five days); Escondido Ordinance, *supra* note 12, § 16E-2(d) (ten days); Riverside Ordinance 2006-26, *supra* note 12, § 166-5(B)(4) (seven days).

21. Hazleton Ordinance, *supra* note 10, § 5(B)(4).

finer are imposed for each separate subsequent violation.²² A separate violation occurs each *day* that an unauthorized adult remains in the unit, and for *each* such individual in the unit, starting on the day after the landlord receives the violation notice.²³ A separate violation also occurs each day beyond the allotted time that the landlord fails to provide identifying data for a resident after a request from the Code Enforcement Office.²⁴ A few municipalities also allow incarceration as a potential penalty.²⁵

Most Hazleton-style AII ordinances contain a “safe harbor” provision for the landlord. Upon the landlord’s own initiative (i.e., not in response to a complaint) the landlord may seek verification of any tenant’s or prospective tenant’s immigration status.²⁶ The landlord does so by providing the city with information about a tenant or applicant. The city contacts the federal government, which carries out the verification in the same way that it does in response to a complaint.²⁷ If a person’s immigration status is verified as lawful, this will shield the landlord from future liability with respect to that tenant (if, for example, the tenant’s status later changes to unauthorized, or if the initial verification was incorrect).

2. Pre-authorization

Some AII ordinances require registration or “pre-authorization” before individuals can even enter into a residential lease. For example, under Valley Park’s ordinance, landlords must apply to the City for an occupancy permit each time they rent out a unit and when the

22. *Id.* § 5(B)(8) (imposing \$250 fine per violation). Other municipalities imposed similar or harsher penalties. Farmers Branch Ordinance, *supra* note 12, § 6 (imposing a fine of \$500 per violation); Valley Park Ordinance 1715, *supra* note 12, § 5(B)(8) (imposing \$250 fine per violation); Escondido Ordinance, *supra* note 12, § 16E-2(g) (imposing a fine of up to \$1,000 per day by referring to the penalties permitted under Escondido Municipal Code 16-249); Riverside Ordinance 2006-26, *supra* note 12, § 166-5(B)(7) (imposing a fine of at least \$1,000 and up to \$2,000 per offense).

23. Hazleton Ordinance, *supra* note 10, § 5(A)(2). There appears to be a discrepancy here, as the ordinance gives the landlord five days to cure the violation before his rental license is suspended, but only one day before the fines start accruing. Compare *id.* § 5(A)(2), with *id.* § 5(B)(4).

24. *Id.* § 5(A)(3).

25. Escondido Ordinance, *supra* note 12, § 16E-2(h) (referring to the penalties permitted under Escondido Municipal Code 16-249, which allows for imprisonment for up to six months); Riverside Ordinance 2006-26, *supra* note 12, § 166-5(B)(7) (allowing for a term of imprisonment not to exceed 90 days).

26. Hazleton Ordinance, *supra* note 10, § (5)B(9).

27. It is not clear what information the landlord must provide to the City in order for the landlord-initiated verification to take place, but presumably it is similar to the information that the landlord must supply in response to a complaint.

proposed occupancy of a unit changes.²⁸ The application requires the landlord to set forth the “names, ages, citizenships, and relationships” of each proposed resident, as well as additional “identifying information that shall be required by the City.”²⁹ If any prospective tenant is a noncitizen, the city will verify with the federal government whether that person is lawfully present in the United States before it will issue an occupancy permit.³⁰

Under Hazleton’s ordinance, the prospective tenants themselves are required to apply to the city for an occupancy permit for each person who will reside in the dwelling.³¹ Applicants must provide “proper identification showing proof of legal citizenship and/or residency.”³² This part of the statute does not contain a procedure by which the city verifies the person’s status with the federal government, and it is not clear whether city employees will make some determination about the applicant’s legal status.³³

The Farmers Branch ordinance mandates that landlords “require as a prerequisite to entering into any lease or rental arrangement, including any lease or rental renewals or extensions, the submission of evidence of citizenship or eligible immigration status.”³⁴ It further prohibits landlords “from allowing the occupancy of any unit by any family which has not submitted the required evidence of citizenship or eligible immigration status.”³⁵ The statute does not specify who evaluates this evidence and makes the final decision as to whether a person’s immigration status is sufficient to allow rental, though it appears these decisions are left to the landlord.³⁶

28. Valley Park Ordinance 1721, *supra* note 12, § 2(a).

29. *Id.*

30. *Id.*

31. Hazleton, Pa., Ordinance 2006-13 § 7(b)(1) (Aug. 15, 2006), *available at* <http://clearinghouse.wustl.edu/detail.php?id=5472>.

32. *Id.* § 7(b)(1)(g).

33. Hazleton has another ordinance, 2006-40, that amends the complaint procedure ordinance, 2006-18, which states, “At no point shall any City official attempt to make an independent determination of any alien’s legal status, without verification from the federal government.” Hazleton, Pa., Ordinance 2006-40 § 7(E) (Dec. 13, 2006), *available at* <http://clearinghouse.wustl.edu/detail.php?id=5472>. In light of this, it appears that such a query would be submitted to the federal government.

34. Farmers Branch Ordinance, *supra* note 12, § 3(B).

35. *Id.* § 3(B)(4)(ii).

36. *See Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 771 (N.D. Tex. 2007) (“[B]efore a landlord can even enter into a lease or rental agreement, the landlord must take the necessary first step of requiring the submission of documentation related to citizenship or immigration status.”).

Under all pre-authorization provisions, if a landlord rents to a person who does not have an occupancy permit, he is subject to fines that can accrue rapidly.³⁷

C. Preemption: Hazleton and Beyond

The few courts that have ruled on AII ordinances have struck the housing provisions down on either federal or state preemption grounds.³⁸ The most significant opinion thus far has been *Hazleton*, in which the court struck down Hazleton's AII housing provisions on federal conflict preemption grounds.

Because federal law is largely silent on how immigration status affects housing, the *Hazleton* court first determined that statutory field preemption was not applicable to immigration-related housing restrictions.³⁹ The only provision of federal immigration law that even tangentially relates to housing is the "harboring" provision, which penalizes any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remained in the United States in violation of the law, conceals, harbors, or shields from detection . . . such alien in any place, including any building . . ." ⁴⁰ It is not at all clear that the term "harboring"—which implies both an intent to help a person hide from authorities and an intent to help a person remain in the United States—is meant to apply to landlords who simply rent out apartments.⁴¹ The courts have split on the issue of what

37. See, e.g., Hazleton Ordinance, *supra* note 10, § 10(b) (imposing a fine of \$1,000 for each occupant who lacks a permit, plus \$100 per day for each day that the landlord is out of compliance).

38. *Villas at Parkside Partners v. City of Farmers Branch*, Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 2008 WL 2201980, at *5–13 (N.D. Tex. May 28, 2008) (issuing permanent injunction against local ordinance on federal preemption grounds); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 530–33 (M.D. Pa. 2007) (enjoining local ordinance permanently as preempted by federal law); *Reynolds v. City of Valley Park*, No. 06-CC-3802, 2007 WL 857320 (Mo. Cir. Ct. St. Louis County Mar. 12, 2007) (enjoining ordinance because it conflicted with state landlord tenant law and because the penalties it imposed were greater than municipalities of its class could impose under state law).

39. *Hazleton*, 496 F. Supp. 2d at 521–25. Statutory field preemption exists when Congress has manifested the intent to clearly occupy the field through legislation, leaving no room for states to legislate, even when such state legislation would be harmonious with the federal statute. *De Canas v. Bica*, 424 U.S. 351, 356–58 (1976).

40. 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

41. Black's Law Dictionary defines "Harboring an Illegal Alien" as "the act of providing concealment from detection by law-enforcement authorities or shelter, employment, or transportation to help a noncitizen remain in the United States unlawfully, while knowing about or recklessly disregarding the noncitizen's illegal immigration status." BLACK'S LAW DICTIONARY 733 (8th ed. 2004) (emphasis added).

constitutes harboring,⁴² although as Huyen Pham points out, in every case where this question was presented, the defendant had more connection with the illegal immigrants than merely providing housing to them in a typical landlord-tenant relationship.⁴³ Although the federal courts have all interpreted the “harboring” provision in a manner that probably does not cover the landlord-tenant relationship, all of the AII ordinances incorporated the “harboring” language from the federal statute into their housing provisions, and each defined the term to include renting an apartment to an unauthorized person.⁴⁴ For example, Escondido’s ordinance defined “harboring” to include “to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.”⁴⁵

With field preemption unavailing, the *Hazleton* court next looked to conflict preemption, and it found that this doctrine is applicable to immigration-related housing restrictions.⁴⁶ It determined that Hazleton’s ordinance conflicted with federal immigration law in its assumption that all people who lack documentation of their legal status have no right or ability to remain in the United States (and by extension, in Hazleton). The reality, the court noted, is much more complicated. First, someone who clearly seems to be an “illegal alien”—a person who knowingly entered the country without legal permission or who remains in the country after legal permission expires—is only deportable if and when an immigration law judge issues a deportation order after a formal hearing.⁴⁷ There are also a

42. Compare *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (construing “harbor” to mean “afford shelter to”), and *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975) (broadly interpreting the term “harboring” to include “providing of shelter to”), with *Susjar v. United States*, 27 F.2d 223, 224 (6th Cir. 1928) (holding that the defendant must have acted with intent to shield the undocumented immigrant from detection).

43. Pham, *supra* note 3, at 792.

44. See, e.g., *Escondido Ordinance*, *supra* note 12, § 16E-1(a) (incorporating harboring language).

45. *Id.*; see also *Hazleton Ordinance*, *supra* note 10, § 2(E) (citing the federal harboring provision, stating that “the provision of housing to illegal aliens is a fundamental component of harboring”); *Valley Park Ordinance 1715*, *supra* note 12, § 2(E) (same); *Cherokee County Ordinance*, *supra* note 12, § 1, ¶ 8 (same); *Riverside Ordinance 2006-26*, *supra* note 12, § 166-2(F) (same).

46. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 525–29 (M.D. Pa. 2007). Conflict preemption occurs when subfederal governments are free to legislate because Congress has not preempted the field, but something about the legislation conflicts with federal law. See *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976) (explaining when conflicting law is preempted).

47. *Hazleton*, 496 F. Supp. 2d at 533. “[T]here is no assurance that a [person] subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular

number of circumstances under which persons can be technically out of status (i.e., without documents proving they have permission to be in the United States) but still be permitted to stay in the United States.⁴⁸ Finally, there are circumstances under which a judge may find that a person who is deportable may nonetheless remain in the United States.⁴⁹

Therefore, the court concluded that the ordinance, which required landlords and code enforcement offices to deny housing to anyone who could not produce documentary evidence of legal status, conflicted with federal law requiring immigration law judges or the Attorney General to make individualized status determinations.⁵⁰ Thus, the ordinance was conflict preempted and was struck down.⁵¹

The Northern District Court of Texas in *Villas at Parkside Partners v. City of Farmers Branch*,⁵² in contrast, did not reach the issue of field versus conflict preemption. Instead, it decided the case based on the odd drafting of the Farmers Branch AII ordinance.⁵³ The Farmers Branch ordinance incorporated the legal status restrictions used by the Department of Housing and Urban Development (“HUD”) to determine eligibility for federal housing assistance.⁵⁴ Essentially, Farmers Branch required landlords to deny housing to anyone who would not, for legal status purposes, be able to receive federal housing subsidies.⁵⁵ Because there are several categories of noncitizens who

undocumented [person] will in fact be deported until after deportation proceedings have been completed.” *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

48. For example: (1) aliens who have completed an application for asylum or withholding of removal; (2) aliens who have filed an application for adjustment of status to lawful permanent resident; (3) aliens who have filed an application for suspension of deportation; (4) aliens paroled into the United States temporarily for emergency reasons or reasons deemed strictly in the public interest; (5) aliens who are granted deferred action as “an act of administrative convenience to the government.” 8 C.F.R. § 274a.12(c) ¶¶ 8–11, 14 (2008).

49. For example, relief from removal may be obtained by spouses and other relatives of U.S. citizens, 8 U.S.C. §§ 1154, 1229b (2000), victims of domestic violence, *id.* § 1229b(b)(2), and those seeking protection from persecution or torture under the Convention Against Torture, *id.* § 1231(b)(3); 8 C.F.R. § 208.16–18. Additionally, the U.S. Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than 5 years; (2) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. 8 U.S.C. § 1229b.

50. *Hazleton*, 496 F. Supp. 2d at 525–29.

51. *Id.* The court also raised Due Process concerns because of the lack of a hearing or meaningful appeals procedure under the scheme set forth in the ordinance. *Id.* at 537–38.

52. Nos. 3:06-CV-2371-L, 3:07-CV-0061-L, 2008 WL 2201980, at *19 (N.D. Tex. May 28, 2008).

53. *Id.*

54. *Id.* at *9.

55. *Id.* at *7.

may be legally present in the United States yet ineligible for federal housing assistance (such as tourists, workers, students, and diplomats), the ordinance effectively substituted a different scheme for determining the “conditions under which a legal entrant may remain” in the United States by preventing such individuals from residing in Farmers Branch.⁵⁶ In addition, the court found that the ordinance placed responsibility for the determination of immigration status with landlords, who were likely to make ad hoc judgments, instead of with immigration authorities, who would conform to the federal immigration scheme.⁵⁷ Thus, the court determined that the Farmers Branch ordinance likely constituted an impermissible “regulation of immigration” in violation of the rule set forth by the Supreme Court in *De Canas v. Bica*⁵⁸ and permanently enjoined enforcement of the ordinance.⁵⁹

Although it is tempting for immigrant rights advocates to take solace in these two district court opinions and assume that preemption doctrine will thwart further municipal attempts at passing AII housing ordinances, preemption is a risky and unsatisfying approach for several reasons. First, there is no guarantee that future courts will find these ordinances preempted. The *Farmers Branch* ruling appears to be limited to its facts,⁶⁰ and it is entirely possible that future courts will break with *Hazleton* and find that local AII housing provisions are

56. *Id.* at *7–10.

57. *Id.* at *11–13.

58. 424 U.S. 351, 351 (1976). *De Canas* held that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *Id.* at 354. *De Canas* defined “regulation of immigration” as “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* at 355; *see also* *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”). Because the power to regulate immigration is plenary, any state statute deemed a regulation of immigration must be struck down without the need for the court to look to the doctrines of field and conflict preemption. *See De Canas*, 424 U.S. at 354 (explaining breadth of federal power).

59. *Farmers Branch*, 2008 WL 2201980, at *13. The court also found that the ordinance violated Due Process because it was impermissibly vague. Specifically, the ordinance failed to adequately inform the landlords who were subject to it about what acts were prohibited because of its confused descriptions of the meaning of “eligible immigration status” and lack of guidance with respect to documentation requirements. *Id.* at *16–17.

60. Indeed, Farmers Branch recently enacted a new version of its ordinance, Ordinance 2952, that fixes the drafting problems which led the court to determine that the ordinance impermissibly regulated immigration. Specifically, the new ordinance removes all references to the standards for eligibility for housing assistance set forth by HUD. Farmers Branch Ordinance 2952 (Jan. 22, 2008), available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf>.

not preempted at all.⁶¹ Express field preemption is clearly out of the question given the absence of federal law on immigration-related housing restrictions. Implied field preemption is also problematic because while the power to regulate immigration has historically been a federal prerogative, states and municipalities have long been recognized to possess the authority to regulate housing as part of their police power.⁶² This power, with some limits, enables municipalities to regulate the identities of who can reside in rental housing. For example, zoning laws that restrict occupancy of certain areas to “single families” have been consistently upheld, so long as “family” is not defined in an overly restrictive way.⁶³

61. Courts have recently broken with *Hazleton* in holding that the employment provisions of AII ordinances, which the *Hazleton* court found to be field preempted, are not preempted by federal law. See *Arizona Contractors Ass'n, Inc. v. Candelaria*, Nos. CV07-02496, CV07-02518, 2008 WL 343082, at *6–7 (D. Ariz. Feb. 7, 2008) (finding state statute not preempted); *Gray v. City of Valley Park*, No. 4:07CV00881, 2008 WL 294294, at *9–12 (E.D. Mo. Jan. 31, 2008) (“The statute at issue is such a licensing law, and therefore is not expressly preempted by the federal law.”). It should be noted that both of the laws at issue made suspension or revocation of business licenses the only sanction for offending employers, and that IRCA contains an express exception from preemption for “licensing and similar laws.” 8 U.S.C. § 1324a(h)(2) (2000).

62. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 145–46 (1963) (holding that partial congressional superintendence of a field does not foreclose ability of state to impose its own regulations, particularly when such regulation was part of the state’s police power). Longstanding doctrine holds that states and municipalities have the police power to regulate housing through land use and zoning. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–95 (1926). Currently, virtually every municipal and county government in the country exercises these powers, and the majority of all housing-related decisions are made by local governments. See Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 437 (2003) (“[L]ocal governments make most of the important housing decisions. They largely decide what housing will be developed, how much of it, what kind, and where.”).

63. *Village of Belle Terre v. Boraas* is perhaps the strongest endorsement of this municipal power. 416 U.S. 1, 1 (1974). The case involved a group of six unrelated college students who sought to live together in Belle Terre, N.Y. *Id.* They challenged a village zoning ordinance that limited the entire village to single-family occupancy. *Id.* The Court deferred to the Village’s authority to use its zoning power to address “family needs,” and guarantee families a safe, quiet “sanctuary” away from the noise, traffic, and filth that come with higher density population. *Id.* at 9 (concluding that it is a permissible goal “to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people”). This power will give way to constitutional concerns such as family privacy if it is exercised in such a way as to prevent people who are related from living with one another. See *Moore v. City of East Cleveland*, 431 U.S. 494, 512 (1977) (“[T]he municipality is constitutionally powerless to abridge . . . the freedom of personal choice of related members of a family to live together.”). This case is discussed *infra* at notes 187–88 and accompanying text. Other common examples of “human zoning” are the restrictions that some municipalities and states place on where sex offenders can live. Currently, some twenty states and over 400 local governments have zoning ordinances which limit where registered sex offenders can live. MARCUS NIETO & DAVID JUNG, CALIFORNIA RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 21 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>. These ordinances typically prevent a sex offender

In order for conflict preemption to be appropriate, there must be an “impossibility of dual compliance”⁶⁴ with both state and federal law. Impossibility of dual compliance may not be the case with AII housing provisions. For instance, a court may determine that AII ordinances do nothing more than place the burden on noncitizens to prove their legal status. Currently, any noncitizen who lacks documentation of her legal status is subject to arrest and detention by federal immigration authorities until her status can be determined. If she lacks status, her deportability is adjudicated. So, the argument might go, the AII ordinances merely target people who already have the burden of proving that they are legally present under the federal scheme. The AII ordinances do not grant noncitizens the ability to remain in the United States or require their deportation; they merely prevent such individuals from entering into a lease until their status is determined.⁶⁵

Moreover, whether because of political gridlock, the complexity of the issue, or the enormity of the problem, the federal government has not effectively prevented unauthorized people from entering the country or removed those who do. Meanwhile, local communities are faced with the practical task of absorbing influxes of immigrants, legal and otherwise.⁶⁶ The community’s housing stock, schools, workplaces, and hospitals are directly affected by such demographic changes. As a result, local governments will invariably continue to take action—in ways that may be either pro- or anti-immigrant. In light of this reality, it is unsatisfying to dismiss these attempts as being outside the constitutional scope of their powers.⁶⁷

from living within a certain distance from schools, day care centers, playgrounds, or parks. Such ordinances have routinely been upheld by courts.

64. *Florida Lime & Avocado Growers*, 373 U.S. at 143.

65. Courts have refused to find conflict preemption in cases where preemption seemed much more plausible than in the AII situation. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (holding that Federal Atomic Energy Act did not preempt state tort action against nuclear power company); *Florida Lime & Avocado Growers*, 373 U.S. at 142–43 (holding that a federal law prescribing standards for the maturity of Florida avocados did not preempt a California statute that required a stricter standard for avocados grown in California).

66. Cristina Rodríguez refers to this as the “de facto obsolescence of federal exclusivity.” Rodríguez, *supra* note 3, at 576.

67. A growing body of scholarship argues against a strict focus on preemption, either as a practical or as a constitutional matter. See Huntington, *supra* note 5, at 792 (arguing that the Constitution allows immigration authority to be shared among levels of government); Rodríguez, *supra* note 3, at 596 (“[C]ourt decisions that reject state and local efforts outright as ultra vires, instead of approaching potential preemption questions narrowly, thwart what should be an ongoing dialogue about these issues at the state and local levels.”); Schuck, *supra* note 5, at 64 (arguing against federal exclusivity as a functional matter); cf. Olivas, *supra* note 5, at 35 (having previously made the case against subfederal attempts to enforce immigration law,

Even if courts deem the area preempted on a state level, it is quite possible that there will be a move at the federal level to empower (or require) subnational governments or individual landlords to implement or enforce AII housing measures.⁶⁸ Peter Spiro argues that if state and local governments are prevented from dealing with immigration-related issues, they will turn to the federal government to effect change on the national stage.⁶⁹

There are several ways this could happen. Congress could pass legislation giving individual landlords a role to play, as it did with employers under the Immigration Reform and Control Act of 1986 (“IRCA”),⁷⁰ which provided for sanctions against employers who employ individuals who are not work authorized. Congress could also pass legislation giving states leeway to act within defined parameters, as it currently does with welfare benefits under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), which authorizes states to determine noncitizen eligibility for federal and state-funded benefit programs.⁷¹

Alternately, Congress may create cooperative agreements between federal authorities and local code enforcement officials. These agreements would be similar to the so-called “287(g) agreements” created by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).⁷² Under section 287(g), the Secretary of Homeland Security can enter into agreements with state and local law enforcement agencies to enforce federal immigration laws; federal officials train and supervise municipal employees, who are then authorized to investigate immigration cases and arrest and detain individuals for violations.⁷³

shifting his argument to say that such efforts are bad as a matter of public policy, and will lead to a degradation of enforcement efforts at all levels).

68. Peter Schuck refers to the general tendency of federal programs to rely on state and local involvement as the “federalist default arrangement,” Schuck, *supra* note 5, at 65, and notes that “the movement toward devolution is extremely powerful,” Peter Schuck, *Some Federal-State Developments in Immigration Law*, 58 N.Y.U. ANN. SURV. AM. L. 387, 387 (2002).

69. Spiro, *supra* note 3, at 1628–39. Spiro refers to this as the “steam-valve” theory of immigration federalism. He argues that in many cases immigrant-rights supporters might prefer to let individual states impose restrictions on immigrants rather than force a situation where frustrated citizens in one state press for tough nationwide measures.

70. 8 U.S.C. § 1324a(a)–(h) (2000).

71. *Id.* § 1612(b)(1).

72. *Id.* § 1357(g).

73. *Id.* There is a good deal of scholarship on whether such agreements are constitutionally permissible and/or sound public policy. Compare Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1409–12 (2006) (arguing such agreements should be subject to a balancing test between strict scrutiny and rational basis), Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why*

In light of these very real possibilities, scholars and advocates should move beyond a narrow focus on preemption as a way to defeat AII ordinances and instead analyze the substantive issues raised by these ordinances. This inquiry, as I approach it for the housing provisions, contains two components: First, if such ordinances are enforced, what are the likely results, and how might these results conflict with federal housing discrimination law? Second, regardless of whether specific federal law violations result, are AII housing measures sound as a matter of public policy?

II. PROBABLE RESULTS OF AII HOUSING ORDINANCES

A. Multiple Groups Likely to Be Affected

AII housing measures present a strong likelihood of discrimination against all national origin minorities, regardless of citizenship or legal status. This is due in part to the slippery nature of national origin as a legal concept and how it relates to perceptions of “foreignness.” National origin is a protected characteristic in most civil rights statutes and constitutes a suspect class worthy of strict scrutiny in Equal Protection jurisprudence.⁷⁴ The Supreme Court has defined national origin as “the country where a person was born, or, more broadly, the country from which his or her ancestors came.”⁷⁵ National origin, therefore, need not refer to the country from which the individual in question recently immigrated. It can also refer to ancestry, although it is not at all clear how far back this ancestry can or must be traced,⁷⁶ or what happens if a person’s ancestors have emigrated more than once.

Inviting Local Enforcement of Immigration Laws Violates the Constitution, 31 FLA. ST. U. L. REV. 965, 987–91 (2004) (arguing the immigration power is an exclusively federal power that must be exercised uniformly), and Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1095 (2003) (arguing that enforcement of federal immigration rules is “reserved for federal officials”), with Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199 (2005) (arguing such agreements are constitutional).

74. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (noting that governmental classifications based on race or national origin are given “the most exacting scrutiny”).

75. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

76. Technically, of course, all people living in the United States today, with the exception of “pure-blooded” Native Americans, can trace their ancestry back to another country. Juan Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 988 (1995) (“[T]he truth is that every American has an ancestry, traced far enough back in time, that began in another place or nation.”).

It seems clear that when most people speak of national origin, what they mean is ethnicity, which refers to physical and cultural characteristics that make a social group distinctive, either in group members' eyes or in the view of outsiders.⁷⁷ Without access to a person's birth certificate or family tree, it is impossible to know with certainty what country she or her ancestors come from. Instead we rely on ethnic markers such as language, accent, surname, cultural and religious practices, and race or "ethnic appearance" (itself a difficult to define term) to identify a person with a particular region of the world. Thus, national origin discrimination is less likely to consist of discrimination motivated by the fact that a person or her ancestors came from a particular country, and it is much more likely to consist of discrimination based on ethnic characteristics with regional associations.⁷⁸ Juan Perea uses a particularly apt term, "manifest ethnicity," to describe people whose appearance, accents, or other observable traits identify them with a particular country or region.⁷⁹ In this Article, I will use the terms "national origin minorities" and "ethnic minorities" to refer to individuals of manifest ethnicity.

National origin minorities, even those who are citizens and whose families have been living in the United States for generations,

77. See JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS 11–12 (3d ed. 1989) (discussing the meaning of "ethnic group"). There is a frequent overlap between national origin and race. For example, "Asian" is considered a racial category, but specific subgroups within this category, such as Korean or Vietnamese, are described in terms of national origin. Thus, discrimination against a Korean will frequently be classified as discrimination based on both race and national origin. The designation of Latino (or Hispanic), in contrast, refers only to a national origin group. Latinos can be of any race.

78. This has led some scholars to call for a re-imagining of national origin-based discrimination as discrimination based on ethnic traits. See, e.g., Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1164 (1985) (calling the current approach "virtually meaningless" and suggesting courts should "consider the heterogeneity that exists within a single national origin group"); Juan Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 809 (1994) ("The increasingly visible Latino, African-American, and Asian populations of this country invite reexamination of Title VII of the Civil Rights Act of 1964 and its adequacy as a legal tool for redressing the present and future forms of discrimination likely to be experienced in a more diverse workforce." (citation omitted)).

79. Perea, *supra* note 78, at 806. The more manifest these ethnic traits are, and the more they distinguish a person from "mainstream" America, the more likely they are to serve as a basis for discrimination. Neil Gotanda also uses an apt term, "racialized foreignness," which applies to particular groups who have had culturally embedded racial profiles constructed for them, implying foreignness and unassimilability. Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1698–1703 (2000). A rich literature exists on the racialization of ethnicity and national origin, which is outside the scope of this Article.

are still commonly perceived as foreigners.⁸⁰ Poll data show that people overestimate dramatically the likelihood that Latinos who live in the United States are here illegally.⁸¹ Anecdotal evidence demonstrates that even police officers and government officials may assume wrongly that Latinos are both foreign and undocumented.⁸²

This tendency to engage in stereotyping and make erroneous assumptions about ethnic minorities may in fact be hardwired into our cognitive processes. Social psychologists have long observed the human tendency to categorize other people into groups and to make assumptions about individuals based on their “group membership.”⁸³

80. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 10 LA RAZA L.J. 309, 311 (1998) (noting that some immigrants “remain perpetual foreigners” (citation omitted)); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258 (1993) (remarking that “many non-Asian Americans persist in thinking of Asian Americans as foreign”); Pat K. Chew, *Asian Americans: The Reticent Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 33–38 (1994) (noting how Asian Americans’ physical appearance and immigration history has affected how they are perceived as foreigners); Neil Gotanda, *Other Non-Whites in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (referring to the “persistence of the view that even American-born non-Whites were somehow ‘foreign’”); Kevin R. Johnson, *The New Nativism, in IMMIGRANTS OUT!* 165, 180 (Juan F. Perea ed., 1997) [hereinafter Johnson, *The New Nativism*] (noting that “[r]egardless of citizenship status, members of minority groups not infrequently are treated as foreign and un-American”); Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as “Foreigners,” and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 352–58 (1997) (discussing the treatment of Asian and Latino immigrants in the United States); Perea, *supra* note 76, at 988–98 (discussing the role the “national origin” concept plays in the identity of immigrants as outsiders).

Professor Chang describes an incident in which he tried to cross the border to the United States after a brief visit to Canada. Chang, *Toward an Asian American Legal Scholarship, supra*, at 18. Even though all that was required at that time for a U.S. citizen to re-enter was a valid driver’s license, the border guard insisted on seeing Chang’s passport. *Id.* The guard obviously imposed more stringent requirements upon Chang because he thought of Chang as foreign, while he allowed Caucasian drivers to cross the border with only a driver’s license. *Id.*

81. See WASH. POST/KAISER FAMILY FOUND./HARVARD UNIV. SURVEY PROJECT, NATIONAL SURVEY ON LATINOS IN AMERICA 98 (2000), <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13509> (finding fifty-seven percent of respondents believed that the majority of Latinos immigrating to the United States in the previous decade were illegal immigrants). The actual percentage of those illegally present was twenty-five percent. Michael A. Fletcher, *Poll Finds Latinos are Objects of Negative Perceptions*, NEWARK STAR-LEDGER, May 29, 2000, at A7. A 1993 survey revealed a similar disparity. See Joe R. Feagin, *Old Poison in New Bottles, in IMMIGRANTS OUT!*, *supra* note 80, at 13–43 (describing the 1993 survey in which two-thirds of respondents believed that most immigrants enter the United States illegally, while the actual percentage entering illegally is twenty-five percent).

82. See Ann M. Simmons, *Latinos in New Orleans Suburb Feel Slighted*, L.A. TIMES, Sept. 20, 2005, at A11 (describing FEMA’s failure to provide emergency housing to legal Latino residents of severely damaged housing complex after Hurricane Katrina, and quoting FEMA official as saying that “part of the problem with the Hispanic community is that if you are illegal, you cannot apply for housing”).

83. Linda Krieger provides a thorough analysis of this phenomenon and its significance for civil rights law in her influential article, *The Content of Our Categories: A Cognitive Bias*

These group-based stereotypes are absorbed typically during childhood and reinforced by social and cultural influences throughout a person's life.⁸⁴ Individuals tend to make stronger stereotyped assumptions about group outsiders, and people (predictably) tend to assess members of their own group more favorably.⁸⁵ People also tend to remember information that conforms to these stereotypes and to disregard information that does not.⁸⁶ Research demonstrates that people even "misremember" information that conflicts with stereotypes.⁸⁷ The bias, therefore, becomes self-reinforcing and stronger over time.

Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1186–1217 (1995). A number of studies in the social psychology literature have demonstrated the tendency of the human brain to categorize and stereotype. See, e.g., Richard D. Ashmore & Frances K. Del Boca, *Conceptual Approaches to Stereotypes and Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 1, 1–12 (David L. Hamilton ed., 1981) (discussing the history of stereotype research and theory); Henri Tajfel & A.L. Wilkes, *Classification and Quantitative Judgment*, 54 BRIT. J. PSYCHOL. 101, 104, 113 (1963) (describing experiment in which subjects exaggerated some differences across groups, but minimized differences within groups); W. Edgar Vinacke, *Stereotypes as Social Concepts*, 45 J. SOC. PSYCHOL. 229, 229 (1957) (recognizing the "considerable body of research" that had accumulated on the nature of stereotypes).

84. Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1044–45 (2004).

85. See Arnd Florack, Martin Scarabis & Herbert Bless, *When Do Associations Matter? The Use of Automatic Associations Toward Ethnic Groups in Person Judgments*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 518, 518 (2001) (noting that most studies of automatic associations toward ethnic groups revealed "a clear ethnic bias"); see also Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147–48 (2004) (discussing research on ingroup favoritism); Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23, 28 (1983) (reporting experiment in which Caucasian subjects were discovered to be more likely to ascribe positive characteristics to Caucasians than African-Americans). The tendency to make favorable assumptions about one's own group is present even when assignment to groups is arbitrary. See Marilyn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307, 308 (1979) (discussing study where subjects were randomly assigned to an "X-group" and "Y-group" and judged members of their own group more favorably).

86. Nancy Cantor & Walter Mischel, *Prototypicality and Personality: Effects on Free Recall and Personality Impressions*, 13 J. RES. PERSONALITY 187, 196–202 (1979) (describing the results of an experiment in which the subjects recalled more information about persons matching a personality type than those that did not). This phenomenon is typically referred to as "recall bias." Cf. Mark Snyder, *On the Self-Perpetuating Nature of Social Stereotypes*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR, *supra* note 83, at 190 ("Stereotypes influence and guide the remembering and interpretation of the past in ways that support and bolster current stereotyped interpretations of other people.").

87. See Nancy Cantor & Walter Mischel, *Traits as Prototypes: Effects on Recognition Memory*, 35 J. PERSONALITY & SOC. PSYCHOL. 38, 45 (1978) (describing experiment in which twenty-six students were placed in group sessions and were presented slides that described a fictional character and the students expressed "confidence that they had seen nonpresented but conceptually related material").

Because these processes occur at such a fundamental level of cognition, people are often quite unaware that stereotypes affect the way they perceive others.⁸⁸ In fact, such unconscious bias commonly affects the thought processes even of people who consciously reject stereotypes.⁸⁹ This bias can then translate into discriminatory treatment unchecked by social norms that mitigate against discriminatory behavior—because, of course, the actor does not recognize himself as biased.⁹⁰ Social science evidence also tells us that unintentional discrimination is particularly likely to occur in situations where discriminatory behavior can be rationalized easily,

88. See, e.g., Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 12 (1989) (reporting a study suggesting that when an individual's ability to consciously monitor stereotype activation is precluded, both those with high self-reported prejudice and those with low self-reported prejudice "produce stereotype-congruent or prejudice-like responses"); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 517–18 (1997) (reporting study in which "White participants responded faster to positive words following a White prime than following a Black prime and faster to negative words following a Black [prime] than following a White prime," despite the participants' self-reported level of racial bias); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, J. PERSONALITY & SOC. PSYCHOL. 509, 510–11 (1991) (reporting experiment in which subjects applied stereotypes in their descriptions of either a Caucasian or Asian female assistant when they were asked to describe the assistant while quickly completing another task); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 15–16 (1995) (discussing implicit race and gender stereotyping and defining "implicit stereotype" as "the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category").

89. See Devine, *supra* note 88, at 12 (reporting study in which subjects with low levels of self-reported bias displayed levels of bias similar to those with high levels of self-reported bias); Dovidio et al., *supra* note 88, at 518 (reporting experiment that "offers further evidence of implicit evaluation biases that may not be predicted from self-report measures of prejudice"); Gilbert & Hixon, *supra* note 88, at 515 (discussing experiment that suggests social interaction causes individuals "to become cognitively busy and thus reduces the likelihood that their stereotypes about each other will be activated"); Greenwald & Banaji, *supra* note 88, at 15 (discussing the results of a study on racial bias in which bias "occurred similarly for subjects who scored high and for ones who scored low on a direct (i.e., standard self-report) measure of race prejudice"). Unconscious bias is measured by using the Implicit Association Test, in which subjects are asked to make rapid determinations about whether particular concepts should be paired with particular attributes. Anthony G. Greenwald, Debbie E. McGhee & Jordan K.L. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1465–66 (1998). Longer response times for associating a racial or ethnic group with positive traits and/or short response times for making a negative association is considered indicative of bias. *Id.*; see also Bernd Wittenbrink, Charles M. Judd & Bernadette Park, *Evidence for Racial Prejudice at the Implicit Level and Its Relationship with Questionnaire Measures*, 72 J. PERSONALITY & SOC. PSYCHOL. 262, 264 (1997) (reporting experiment designed to examine the relationship between implicit and explicit associations of Caucasians toward African-Americans).

90. This phenomenon is referred to as "aversive racism." Sam L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, RACISM, AND DISCRIMINATION 61, 61–63 (John F. Dovidio & Sam L. Gaertner eds., 1986).

such as when the norms for what is appropriate (nonracist) behavior are unclear or when there are nonracial justifications for the discriminatory behavior.⁹¹

This creates a “perfect storm” of factors leading to discrimination in the AII housing context. Although most of the ordinances provide for the federal government to check the legal status of prospective tenants, for many practical reasons discussed in the next Section, individual landlords have the incentive to undertake their own evaluation of a prospective tenant’s status. These landlords will be immediately confronted with the difficulty inherent in determining a person’s legal status. It is impossible to discern legal status from looking at a person. Such a determination requires inspecting official immigration documents, which may be difficult for a variety of reasons. There are multiple types of legal status⁹² and dozens of documents that can demonstrate legal status.⁹³ A person’s status can change due to time or circumstances, and reliance on documents is further complicated by the proliferation of difficult-to-detect counterfeit documents.⁹⁴ Thus, the desire to comply with the

91. Devine, *supra* note 88, at 15–16; Gaertner & Dovidio, *supra* note 90, at 67–68.

92. There are two main categories of noncitizens who may be legally present in the United States. Non-immigrant visitors, who usually travel to the United States using visas, are permitted to reside in the United States for specific periods of time and for specific purposes, such as working for a particular employer or attending school. 8 U.S.C. § 1101(a)(15)(F), (H), (M) (2000). Immigrants, on the other hand, are people who desire to remain in the United States permanently. This group includes Permanent Resident Aliens (who are permitted to live and work in the United States indefinitely), Conditional Permanent Residents (who must petition to become Permanent Residents), and asylum-seekers and refugees (who enter the country without documents to establish legal status and must take steps to legalize their presence). *Id.* §§ 1101(a)(20), 1157–1158.

93. See, e.g., Pham, *supra* note 3, at 782 (noting that there is no “one definitive document that establishes legal presence”). A review of the U. S. Citizenship and Immigration Services website reveals that there are currently no less than seventy-five types of non-immigrant visas. U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis> (last visited Jan. 1, 2009). Some visitors may not possess visas because they come from countries that participate in the State Department’s Visa Waiver Program; currently, there are twenty-seven countries that participate in this program. Visa Waiver Program, U.S. Dep’t of State, Bureau of Consular Affairs, http://http://travel.state.gov/visa/temp/without/without_1990.html (last visited Jan. 1, 2009). In addition, certain immigrants may also be initially present under visas, such as family-based or employment-based visas. There are at least nine different visas for immigrants, as well as the Permanent Resident Card (also known as an Alien Registration Receipt Card, and commonly referred to as a “Green Card”), which is given to noncitizens who establish Permanent Resident Alien status, and the Conditional Permanent Resident Card, which is similar to a Permanent Resident Card but with a two-year expiration period. Immigration Classifications and Visa Categories: Immigrants, U.S. Citizenship and Immigration Services, <http://www.uscis.gov/portal/site/uscis> (last visited Jan. 1, 2009) (search “immigration classifications and visa categories”; access third result of search).

94. See U.S. GEN. ACCOUNTING OFFICE, REP. NO. GGD-99-33, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 10 (1999) [hereinafter 1999

ordinances supplies a nonracial justification for discriminatory behavior. Meanwhile, the confusion generated by the difficulty of compliance creates a situation with unclear norms for appropriate behavior. This is just the sort of ambiguous scenario in which unconscious bias will flourish.

All of these factors make it highly probable that people who attempt to comply with AII ordinances will “overcomply” and discriminate against national origin minorities who are citizens or otherwise legally present in the United States.⁹⁵

A similar pattern of discrimination occurred two decades ago after Congress enacted IRCA, which provided for sanctions against employers who employ individuals who are not work authorized.⁹⁶ From the start, concerns were raised that IRCA’s employer sanctions would encourage employers to discriminate against national origin minorities and any noncitizens who were work authorized.⁹⁷ In an attempt to address potential problems with discrimination, Congress included a provision making it illegal for an employer to discriminate based on national origin or citizenship status.⁹⁸ Nonetheless, the evidence demonstrated that the employer sanctions had exactly the

GAO REPORT], available at <http://www.gao.gov/archive/1999/gg99033.pdf> (noting that fraudulent employment eligibility documents are widely available due to large-scale counterfeiting); Thomas C. Green & Ileana M. Ciobanu, *Deputizing—and then Prosecuting—America’s Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203, 1206–07 (2006) (arguing that counterfeit documents are the main reason for IRCA’s failure to prevent the hiring of unauthorized workers).

95. See Campbell, *supra* note 6, at 1052–53 (discussing housing); Matthew Parlow, *A Localist’s Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1072 (2007) (recognizing that AII ordinances may violate the rights of U.S. citizens and legally admitted aliens); Pham, *supra* note 3, at 822–24 (noting that employers may discriminate because they do not understand the law); cf. Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Laws Affecting Immigrants*, 29 ST. MARY’S L.J. 105, 113 (1997) (noting that the majority of victims of the discriminatory backlash that followed the passage of California’s Proposition 187 were U.S. citizens or legal immigrants, not the illegal immigrants targeted by the initiative).

96. 8 U.S.C. § 1324(a) (2000).

97. See, e.g., S. REP. NO. 99-132, at 9, 104, 109 (1986) (Sens. Kennedy and Simon stating their concerns about increased levels of discrimination against “foreign looking or foreign sounding individuals”); H.R. REP. NO. 99-682(I), at 68 (1986), as reprinted in 1986 U.S.C.C.A.N. 5649, 5672 (reporting that witnesses at various congressional hearings expressed concerns that employer sanctions would “cause extensive employment discrimination against Hispanic-Americans and other minority group members”); Linda Sue Johnson, Comment, *The Anti-Discrimination Provision of the Immigration Reform and Control Act*, 62 TUL. L. REV. 1059, 1071 (1988) (“One of the most serious flaws of employer sanctions is that they will result in massive discrimination not only against documented aliens, but also against United States citizens of Hispanic origin and other minorities.” (citation omitted)).

98. As discussed later in this Section, while national origin is a protected characteristic under the Fair Housing Act, the statute contains no such protection against alienage discrimination.

discriminatory effect feared. A General Accounting Office (“GAO”) survey found that 10% of employers admitted to discriminating against people based on language, accent, or appearance because of fear of violating IRCA, and an additional 9% admitted to discriminating on the basis of citizenship status.⁹⁹ (The percentages were higher in areas with large Latino and Asian populations.) This amounted to approximately 891,000 employers who began discriminating based on either ethnic traits or citizenship as a direct result of the employer sanctions, leading the GAO to conclude that IRCA was responsible for “a widespread pattern of discrimination” against national origin minorities.¹⁰⁰ The U.S. Commission on Immigration reform also found a

[P]attern of subjecting foreign-appearing workers to different or additional requirements . . . : employers selectively verify employment authorization for some, but not other, employees, refusing to accept valid documents, requiring specific documents from certain workers (such as a green card from everyone they believe to be an immigrant), and accepting only a limited number of documents, such as a driver’s license and social security card.¹⁰¹

Unconscious bias, confusion about the law’s requirements, and fear of punishment will almost certainly cause what I call “discrimination slippage,” which is discrimination against large numbers of individuals who are not the targets of AII ordinances. The situation is complicated by the fact that AII ordinances, while ostensibly targeted at illegal immigrants, may well be motivated by hostility to immigrants generally or animus against a particular national origin group, regardless of legal status.¹⁰² Of course, some AII

99. U.S. GEN. ACCOUNTING OFFICE, REP. NO. GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 39 (1990) [hereinafter 1990 GAO REPORT].

100. *Id.* at 8. Of course, this figure does not account for those employers who may have been discriminating on the basis of ethnic trait or alienage all along, and thus the actual amount of discrimination on these bases was undoubtedly higher.

101. U.S. COMM’N ON IMMIGR. REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 80 (1994). This practice, known as “document abuse,” is specifically prohibited. 8 U.S.C. § 1324b(a)(6) (2000).

102. See, e.g., Parlow, *supra* note 95, at 1071 (recognizing that some of the motivating factors behind AII are “unsavory”); Kenneth Juan Figueroa, Note, *Immigrants and the Civil Rights Regime: Parens Patriae Standing, Foreign Governments and Protection from Private Discrimination*, 102 COLUM. L. REV. 408, 416 (2002) (arguing that immigrants of manifest ethnicity are likely to be targets of hostilities based on racial, ethnic, and cultural prejudice, as well as prejudice based on alienage); Alex Kotlowitz, *Our Town*, N.Y. TIMES, Aug. 5, 2007, § 6 (Magazine), at 33 (noting that in one jurisdiction contemplating an AII ordinance, the controversy “often seems less about illegal immigration than it does about whether new immigrants are assimilating quickly enough”); cf. Marlin W. Burke, *Reexamining Immigration: Is It a Local or National Issue?*, 84 DENV. U. L. REV. 1075, 1076–77 (arguing that much of the debate about illegal immigration is generally motivated by fear “that the racial, religious, and social make-up of our country is threatened” by immigration from Latin America).

ordinance supporters wish to promote respect for the rule of law and have genuine problems with the fact that unauthorized immigrants have broken the law. They may worry justifiably that the presence of unauthorized immigrants who lack automobile and health insurance will burden the community, and that immigrants willing to work for low wages will undercut the labor market for everyone else. They may fear that allowing unauthorized immigrants to settle in their community will only cause more to come. All of these concerns are legitimate aspects of the debate over illegal immigration. However, some of the sentiments expressed by supporters of AII measures are targeted less at legal status and more at the cultural differences between them and particular ethnic groups.¹⁰³

Put more bluntly, AII ordinances often seem motivated by the desire of white residents to “get the Mexicans out of town.” For example, the mayor of Valley Park made public statements indicating that the purpose of his city’s AII ordinance was to prevent Latinos from moving there: “You got one guy and his wife that settle down here, have a couple kids, and before long you have Cousin Puerto Rico and Taco Whoever moving in.”¹⁰⁴ A city councilman and supporter of the San Bernardino ordinance stated that he was motivated by hearing Spanish spoken in check-out lines and a Wal-Mart ad featuring a dark-haired family wearing Mexican soccer jerseys.¹⁰⁵ A Farmers Branch city councilman described his motives for introducing the AII ordinance: “I saw our property values declining . . . what I would call less desirable people move into our neighborhoods, people who don’t value education, people who don’t value taking care of their properties.”¹⁰⁶

There is also significant anecdotal evidence that members of the general public who favor AII ordinances are motivated by anti-immigrant or anti-Latino sentiment as much as they are by the desire to crack down on illegal immigration, or at the very least that they are

103. See Johnson, *The New Nativism*, *supra* note 80, at 179–80 (describing how support of early anti-illegal immigrant measures often masked nativist opposition to all foreigners, or people believed to be foreigners).

104. Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, RIVERFRONT TIMES (St. Louis), Feb. 28, 2007, at 1. In this article, the Mayor goes on to refer to Mexicans as “beaners” and “wetbacks,” and to describe how he first became a proponent of AII laws when a Mexican family—all of whom were legally present in the United States—moved in next door to his sister. *Id.*

105. See James Sterngold, *San Bernardino Seeking “Relief”*, S.F. CHRON., June 11, 2006, at A4 (“When,” the councilman is quoted as asking, “does it become my America?”).

106. Verified Complaint for Declaratory & Injunctive Relief at 8, *Vazquez v. City of Farmers Branch*, No. 3-06CV2376-R (N.D. Tex. filed Dec. 26, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-TX-0001-0001.pdf>.

confused about these distinctions.¹⁰⁷ For example, in Hazleton, a Latino reporter (and American citizen) who was covering a rally held in support of the ordinance was confronted by white protestors who shouted at him to “get out of the country.”¹⁰⁸ Other lawfully present Latinos report being told to get out of the United States by angry mobs.¹⁰⁹ Thus, members of the general public may contribute to the slippage by creating an atmosphere in which the terms “illegal immigrant,” “immigrant,” and “ethnic minority” are conflated.

This Article will therefore proceed under the assumption that AII housing provisions will have two effects. The first is the intended effect, which is to prevent undocumented people from entering into leases for, or residing within, rental housing. The second is the (possibly) unintended, but highly likely, effect of increased housing discrimination against all identifiable national origin minorities, regardless of their citizenship or legal status, and against legally present noncitizens.

B. Violations of the Fair Housing Act Likely

1. Background

The primary federal statute aimed at preventing housing discrimination is the Fair Housing Act (“FHA”).¹¹⁰ The FHA prohibits housing discrimination against individuals based on specific protected characteristics. The most significant substantive provision in the FHA

107. See, e.g., *id.* (quoting an AII ordinance proponent as saying, “There’s unemployment partly because of the Hispanics. The lady who took my job is Hispanic, and she’s bilingual,” and another as saying, “The education system is tanking, health care has gone through the roof, everybody is bilingual.”); Ellen Barry, *City Vents Anger at Illegal Immigrants*, L.A. TIMES, July 14, 2006, at A1 (quoting a Hazleton waitress who describes being reprimanded by customers who heard her speak Spanish and being told by a customer that he wanted Immigration to “take away the Mexicans”). In Hazleton, a Latino opponent of the AII ordinance received racist hate mail calling him “[s]ubhuman spic scum,” and stating “[i]f it is brown, flush it down.” Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 510 (M.D. Pa. 2007).

108. The reporter had to be escorted from the rally by police for his own protection. *Hazleton*, 496 F. Supp. 2d at 510.

109. See, e.g., Rosita Johnson, *Vigil, Lawsuits Challenge N.J. Town’s Anti-Immigrant Law*, PEOPLE’S WEEKLY WORLD, Aug. 22, 2006 (describing how a Latino prayer vigil opposing Riverside’s AII ordinance was met by counter-demonstrators who displayed a Confederate flag with the motto “The South Will Rise Again” and chanted “Go home!”), available at <http://www.pww.org/article/articleview/9722/>; Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3 (describing how whites who attended a Hazleton City Council meeting on the AII ordinance chanted “hit the road, Jack” at the Latinos present).

110. 42 U.S.C. §§ 3601–3619, 3631 (2000).

is § 3604, of which several subsections are relevant to the discussion here.

Section 3604(a) of the FHA makes it unlawful “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person” because of a protected characteristic.¹¹¹ This applies both to initial refusals to deal and to other actions—such as eviction—that deprive a person of housing once she has secured it.¹¹²

Section 3604(b) prohibits subjecting people who wish to obtain housing to different “terms, conditions, or privileges” because of a protected characteristic.¹¹³ It can apply in a variety of situations, such as where tenants are discriminatorily required to abide by different lease terms or rules, provided different levels of service and maintenance, subjected to harassment, or granted different privileges related to the dwelling.¹¹⁴

Section 3604(c) makes it unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination” based on a protected category, “or an intention to make any such preference, limitation, or discrimination.” This subsection applies to both oral and written statements.¹¹⁵

Section 3604(d) prohibits making false representations that a dwelling is not available for inspection or rental, where the false representation is made on a discriminatory basis.¹¹⁶ Because such an act will also make housing unavailable, violations of § 3604(d) will usually violate § 3604(a) as well. The subsection does have independent significance, however, because it gets around the requirement contained in § 3604(a) that a “bona fide offer” to buy or rent have been made. Section 3604(d) thus allows claims to be brought

111. *Id.* § 3604(a).

112. For a thorough discussion of this subsection and its application to different housing scenarios, see ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION LAW AND LITIGATION* §§ 13:1–13:16 (2007); Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 4–5 (2008).

113. 42 U.S.C. § 3604(b).

114. For a thorough discussion of this subsection and its application to different housing scenarios, see SCHWEMM, *supra* note 112, §§ 14:1–14:3; Oliveri, *supra* note 112, at 5–10.

115. For a thorough discussion of this subsection and its application to different housing scenarios, see SCHWEMM, *supra* note 112, §§ 15:1–15:13; Oliveri, *supra* note 112, at 10–11; Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 213–16 (2001).

116. 42 U.S.C. § 3604(d) (2000).

by housing “testers” who pose as real applicants in order to detect discriminatory practices.¹¹⁷

Finally, § 3617 prohibits intimidating or interfering with a person in the exercise or enjoyment of fair housing rights, or doing so because a person has aided or encouraged another person in the exercise or enjoyment of such rights.¹¹⁸ The “exercise or enjoy” language indicates three activities with which interference is forbidden.¹¹⁹ The first is the specific assertion of fair housing rights (for example, filing a discrimination complaint with a federal agency).¹²⁰ The second is the simple act of seeking, obtaining, or residing in housing on a nondiscriminatory basis.¹²¹ The third type of protected activity is assisting another person in exercising or enjoying fair housing rights.¹²² This is essentially a third party claim: the plaintiff is not the target of discrimination, but claims to have been retaliated against for assisting a person who is targeted.¹²³ Housing providers or their employees are often the plaintiffs who bring this third type of § 3617 claim.¹²⁴

National origin is a protected characteristic under the FHA.¹²⁵ However, neither alienage (whether or not a person is a U.S. citizen) nor legal status (whether or not a noncitizen is legally present in the United States, and, if so, under what type of status) are specified in the statute. As a result, both public and private actors are largely free to discriminate on these bases,¹²⁶ at least as far as the FHA is

117. For a thorough discussion of this subsection and its application to different housing scenarios, see SCHWEMM, *supra* note 112, §§ 16:1–16:2.

118. 42 U.S.C. § 3617 (2000).

119. See 24 C.F.R. § 100.400(c) (2008) (interpreting 42 U.S.C. § 3617).

120. 24 C.F.R. § 100.400(c)(5).

121. *Id.* § 100.400(c)(1)–(2).

122. *Id.* § 100.400(c)(3)–(4).

123. For a thorough discussion of this subsection and its application to different housing scenarios, see SCHWEMM, *supra* note 112, §§ 20:1–20:6; Oliveri, *supra* note 112, at 11–12.

124. See, e.g., *Gonzalez v. Lee County Hous. Auth.*, 161 F.3d 1290, 1298–1308 (11th Cir. 1998) (employee); *Sofarelli v. Pinellas County*, 931 F.2d 718, 721–23 (11th Cir. 1991) (house mover); *Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975) (employee); *People Helpers Found., Inc. v. City of Richmond*, 789 F. Supp. 725, 731–33 (E.D. Va. 1992) (nonprofit housing provider); *People Helpers Found., Inc. v. City of Richmond*, 781 F. Supp. 1132, 1133–36 (E.D. Va. 1992) (same).

125. 42 U.S.C. § 3604 (2000).

126. See, e.g., *Martinez v. Partch*, No. 07-cv-01237, 2008 WL 113907, at *2 (D. Colo. Jan. 9, 2008) (dismissing plaintiff's federal housing discrimination claims alleging her rental application was denied solely on the basis of her citizenship status); *Corwin v. B'Nai B'Rith Senior Citizen Hous., Inc.*, 489 F. Supp. 2d 405, 409 (D. Del. 2007) (“The prohibition of discrimination based on ‘national origin’ does not prohibit discrimination on the grounds of citizenship.”); *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 568 (E.D. Va. 1981) (interpreting 42 U.S.C. § 3604(a) to “prohibit[] discrimination on the basis of national origin, but not alienage

concerned.¹²⁷ Although both legal status and alienage may be loosely correlated with national origin,¹²⁸ for legal purposes, neither is considered congruent with national origin.

Thus, a landlord who wishes to discriminate against national origin minorities may adopt a "citizens only" policy. He would still

discrimination"). In fact, the Farmers Branch city ordinance specifically noted that the FHA does not contain any protection for alienage in its preamble. Farmers Branch Ordinance, *supra* note 12, pmbl. ("WHEREAS, the Fair Housing Act does not prohibit distinctions based solely on a person's citizenship status."). It should be made clear that everyone, regardless of alienage or legal status, is protected by the FHA's prohibition against national origin discrimination, and undocumented status does not deprive a person of the ability to vindicate her rights in a court of law. *Cf. Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (finding that unlawful immigrants are entitled to constitutional protection from deprivation of life, liberty, and property without due process of law, as afforded to them by the Fifth and Fourteenth Amendments); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 498-99 (M.D. Pa. 2007) (finding that unlawful immigrants still retain Due Process rights under the Fourteenth Amendment). Thus, an undocumented person has a cause of action under the FHA if she suffers housing discrimination on the basis of her Mexican national origin, but not if she is discriminated against because she is undocumented or because she is not a U.S. citizen.

127. A Reconstruction-era statute designed to protect the right to enter into contracts (including residential leases), 42 U.S.C. § 1981, offers some protection against alienage-based housing discrimination. However, this statute does not provide a complete solution. For one thing, muddled precedent and uncertain legislative history make it less than clear whether § 1981, which was originally intended to prohibit public acts of discrimination based on race, should be interpreted to prohibit private acts of alienage discrimination. *See* Aaron M. Danzig, Note, *The Scope of 42 U.S.C. § 1981: Protection Against Private Alienage Discrimination*, 11 GEO. IMMIGR. L.J. 527, 528-29 (1997) (noting circuit split on whether § 1981 prohibits private alienage discrimination); Angela M. Ford, Comment, *Private Alienage Discrimination and the Reconstruction Amendments: The Constitutionality of 42 U.S.C. § 1981*, 49 U. KAN. L. REV. 457, 459 (2001) (noting multiple disagreements among courts and unclear legislative history for both the original 1870 Act and the 1991 amendments). *Compare* *Murtaza v. N.Y. City Health & Hosps. Corp.*, No. 97-CV-4554, 1998 WL 229253, at *10 (E.D.N.Y. Mar. 31, 1998) (holding that § 1981 does not apply to alienage discrimination), *and* *Rios v. Marshall*, 530 F. Supp. 351, 360-61 (S.D.N.Y. 1981) (same), *with* *Nagy v. Balt. Life Ins. Co.*, No. 99-1859, 2000 WL 718391, at *5 (4th Cir., June 5, 2000) (holding that § 1981 applies to acts of alienage discrimination by private parties), *Anderson v. Conboy*, 156 F.3d 167, 169 (2d Cir. 1998) (same), *Duane v. Geico*, 37 F.3d 1036, 1042-43 (4th Cir. 1994) (same), *Martinez v. Partch*, No. 07-cv-01237, 2008 WL 113907, at *2 (D. Colo. Jan. 9, 2008) (same), *Chacko v. Tex. A&M Univ.*, 960 F. Supp. 1180, 1191 (S.D. Tex. 1997) (same), *Cheung v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 913 F. Supp. 248, 251 (S.D.N.Y. 1996) (same), *and* *Doe v. Edgar*, No. 88 C 579, 1989 WL 91805, at *6 (N.D. Ill. Aug. 4, 1989) (same). The weight of this authority points in favor of such coverage. Even if § 1981 is clearly held to prohibit private alienage discrimination, it is still an inferior tool to the FHA. The most significant weakness is that disparate impact theory is not available for cases brought under § 1981. *See* *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 386 (1982) (holding that § 1981 only applies to intentional discrimination and not to "practices that merely result in a disproportionate impact on a particular class"). As discussed in the following paragraphs, disparate impact theory is often the most viable theory for bringing a national origin case, because national origin discrimination frequently takes the form of discrimination based on non-protected but related characteristics such as legal status, language, or ethnic traits.

128. A person who emigrates from another country (as opposed to having ancestors who did so) is not a U.S. citizen unless she has been naturalized, and any noncitizen must have some type of legal status which permits her to be in the United States.

have to rent to ethnic minorities who are citizens but would be free to discriminate against those who are not, even if they are legally present in the United States. The noncitizens' only recourse under the FHA would be to proceed under a disparate impact theory of discrimination, alleging that the permissible ground for discrimination (alienage) in fact operates to perpetuate discrimination on an impermissible ground (national origin).¹²⁹ This would require the plaintiff to demonstrate that the alienage discrimination caused a significant disparate impact on a specific national origin minority group.¹³⁰ Even if such a showing were made, the defendant would then be permitted to argue that the discrimination has a legitimate business justification.¹³¹

Similarly, a landlord can institute a "legal residents only" policy, and discriminate on the basis of legal status. A landlord could also discriminate based on levels of legal status, for example, by renting to lawful permanent residents but not those in the United States on work visas. In addition, certain types of trait-based discrimination—for example, the refusal to rent an apartment to a Spanish speaker—may not be prohibited by the FHA, under the

129. *Espinoza*, 522 F. Supp. at 568 (allowing plaintiffs to proceed on the theory that alienage discrimination was a pretext for national origin discrimination and had a disparate impact on national origin minorities).

130. See SCHWEMM, *supra* note 112, §§ 10:4–10:6 (discussing disparate impact claims, and discriminatory effect claims generally, and their requirements when brought under the FHA).

Although the Supreme Court has never officially endorsed the use of the disparate impact theory in a fair housing case, there are several reasons to believe that the theory is a valid one in this context. First, the Supreme Court has endorsed disparate impact as a theory in Title VII cases, based on similar statutory language. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."). Second, many federal courts of appeal have endorsed the use of the theory in housing cases, and in two such cases, the Supreme Court denied certiorari. *Mountain Side Mobile Estates P'ship v. Sec'y of Urban Hous. & Dev.*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 270 n.20 (1st Cir. 1993); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036 (2d Cir. 1979); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146 (3d Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973). Third, this trend was well underway, with numerous high-profile cases such as those listed above endorsing disparate impact theory at the time Congress significantly amended the FHA in 1988. Presumably, if Congress had disagreed with this trend it would have clarified the statute to eliminate disparate impact.

131. See SCHWEMM, *supra* note 112, § 10:5, at 10–40 ("At this justification stage, the dispositive issue is whether the defendant's practice 'serves, in a significant way, the legitimate employment goals of the employer.'"). It is difficult to imagine what legitimate business reason a landlord would have for refusing to rent to, say, a lawful permanent resident simply because she was not a U.S. citizen, however it is possible that one could be articulated.

theory that traits are not necessarily congruent with national origin.¹³² In such cases, plaintiffs who believe they have really been discriminated against because of their national origin again must rely on disparate impact theory.¹³³

Thus, there is a gap in protection for national origin minorities, who cannot be discriminated against because of their national origin *per se*, but who can be discriminated against based on characteristics associated with national origin. To some extent, this gap can be attributed to the different goals of civil rights law and immigration law. Immigration law relies by its nature on status distinctions—citizen versus noncitizen, varying levels of legal status, legal versus unauthorized.¹³⁴ As a result, it can easily conflict with civil rights laws, which prohibit individuals and governments from making distinctions based on national origin, yet may permit them to make other types of distinctions (ethnic trait, alienage, and legal status) that are related to national origin.¹³⁵

132. See *Véles v. Lindow*, No. CV-96-20245, 2000 WL 1807851, at *1 (9th Cir. Nov. 1, 2000) (upholding summary judgment for defendant landlord who had an admitted policy of refusing to rent to non-English speakers).

133. *Id.* (upholding summary judgment for defendant, where plaintiff failed to demonstrate that defendant's policy of not renting to non-English speakers had a disparate impact on Latinos, and where defendant offered legitimate reasons for instituting such a policy). It is easier for defendants to provide legitimate business reasons for legal status discrimination and certain types of trait-based discrimination. For example, a landlord could argue that his refusal to rent to non-immigrant visitors who are in the United States on visas is based upon the fact that such people are virtually guaranteed to return to their home countries after a relatively short period of time. Thus, he could claim, he has a reasonable fear that such people are more likely to leave owing rent or to leave the property in poor condition and then abscond beyond his ability to recoup what he is owed. Like the defendants in *Véles*, a landlord who refuses to rent to people who cannot speak English could argue that he must be able to communicate with his tenants in order to do business with them. *Id.*

134. See *Mathews v. Diaz*, 426 U.S. 67, 78–79 (1976) (finding that many “constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country”). The Court noted in *Mathews* that “[t]he whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens.” *Id.* at 79 n.12.

135. See Juliet Stumpf & Bruce Friedman, *Advancing Civil Rights Through Immigration Law: One Step Forward, Two Steps Back?*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 132 (2002) (noting the tension between immigration law and civil rights law, and arguing that the consequences of expanding immigration law enforcement into the private realm include an increased potential for discrimination based on protected characteristics).

2. Likely Fair Housing Act Violations

a. Private Landlords

In jurisdictions where the legal status of every prospective tenant must be pre-verified, the landlord may face long delays during the verification process (as well as any hearing that might be allowed or required), only to learn that he cannot rent to the person after all.¹³⁶ For the landlord who rents to a national origin minority, the complaint-driven enforcement procedure means that the landlord never knows when he will receive a complaint questioning the legal status of one of his tenants. The various ordinances give the landlord a relatively short time—anywhere between three and five days—to collect the requested information and submit it to the city for verification. If the verification comes back negative, the landlord has just a matter of days to cure the violation at his own expense. Failure to provide the information or commence eviction proceedings in the requisite number of days exposes the landlord to loss of profits, significant fines, and possibly jail time.

Faced with these bureaucratic obstacles¹³⁷ and punitive measures, a rational landlord may well refuse to deal with any person who looks, sounds, or seems foreign.¹³⁸ While the motivation for refusal would be a fear of punishment or a desire to avoid bureaucracy and delay, the decision itself would be based on the landlord's assessment of the prospective tenant's national origin or ethnicity. This would violate § 3604(a) of the Fair Housing Act, which prohibits refusing to rent to, or otherwise making housing unavailable to, a person based on national origin. The landlord (wisely) might not tell

136. As discussed in Section III.B.3 *infra*, there is currently no single federal database for municipalities to use in order to verify a person's legal status in order to determine their eligibility to rent an apartment. The experience of those using the federal databases in place to verify employment eligibility, however, indicates that in some circumstances, delays could take weeks. See *infra* notes 254–55.

137. In other contexts, the desire to avoid bureaucratic requirements can justify a landlord's withdrawal from or refusal to participate in federal housing subsidy programs, even where such withdrawal has a disparate impact on minorities. See, e.g., *Graoch Assocs. #33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n.*, 508 F.3d 366, 377–78 (6th Cir. 2007) (involving landlord's withdrawal from Section 8 voucher program of the federal Subsidized Housing Program); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 300–01 (2d Cir. 1998) (involving apartment manager's refusal to lease apartment to prospective, disabled residents because of their desire to utilize Section 8 subsidies).

138. Cf. *Johnson*, *supra* note 97, at 1072–73 (arguing that statutory penalties encourage employers to “play it safe” by refusing to hire people who look or sound like aliens); see also 1990 GAO REPORT, *supra* note 99, at 38 (describing discriminatory reactions by employers trying to avoid sanctions under IRCA).

the applicant that he refuses to deal with her because she appears to be Latina and he doesn't want to take a chance that she is undocumented. Instead, he might use the benign-sounding excuse that there are no units available. If untrue, this would violate § 3604(d), which prohibits making false statements about unavailability based on national origin.

A landlord who does not wish to turn away all apparent foreigners but who still fears the anti-immigrant ordinance may instead take advantage of the "safe harbor" provision by requesting prospective tenants' documentation. There are multiple problems with this scenario. First, in order to avoid impermissible discrimination, a landlord must request such documentation from *all* prospective tenants, not just those who seem foreign or who the landlord suspects are unlawfully present. One can imagine how tempting it would be for a landlord to request documents from a dark-skinned person named José Gonzales who speaks with a Mexican accent, but not to make a similar request from a blond-haired person named Bob Smith who speaks with a South Carolina drawl. Similarly, a landlord may feel compelled to request documentation from a Latino applicant with a Hispanic accent (under the assumption that such a person is probably not here legally), and not from a Caucasian applicant with a British accent (under the assumption that Britons are more likely to come here legally). To do either of these things, however, would violate § 3604(b) of the Fair Housing Act, which prohibits discrimination based on national origin in the terms and conditions of housing. Application requirements are considered a "term or condition of housing"; requiring some tenants and prospective tenants to undergo additional or more onerous application requirements than others based on a protected characteristic has been found to violate § 3604(b).¹³⁹

The landlord may also try to undertake his own evaluation of a prospective tenant's legal status. In addition to the problems described above, this scenario presents other dangers.¹⁴⁰ A landlord untrained in deciphering the intricacies of immigration documents is very likely to evaluate the documents incorrectly. A landlord who is presented with documents he does not recognize and who faces punishment for renting to an undocumented alien is likely to err on the side of caution

139. See, e.g., HUD v. Joseph, Fair Housing-Fair Lending Rep. (P-H) ¶ 25,072 (HUD A.L.J. 1994) (finding landlord violated § 3604(b) by requiring credit checks for black applicants but not for white applicants); HUD v. Jerrard, Fair Housing-Fair Lending Rep. (P-H) ¶ 25,005 (HUD A.L.J. 1990) (same).

140. Indeed, the Farmers Branch ordinance appears to require landlords to make this assessment. Farmers Branch Ordinance, *supra* note 12.

and refuse to rent to the person presenting the unfamiliar documentation. This outcome is even more likely if the landlord fears counterfeit documents and is unschooled in how to detect them.¹⁴¹

A landlord who does ultimately rent to a person who seems foreign may well feel the need to watch this tenant more carefully and scrutinize her guests to ensure that undocumented friends and relatives are not staying in the unit. In addition, because a person's legal status may change over time, the landlord may feel the need to make repeated requests for updated documentation from foreign-seeming tenants. Again, these scenarios would violate § 3604(b), which prohibits landlords from treating tenants differently based on national origin. For example, in *United States v. Sea Winds of Marco, Inc.*, the court found that plaintiffs stated a claim under § 3604(b) when they alleged that their condominium association required Latinos—and only Latinos—to wear wristbands identifying them as residents of the complex.¹⁴²

In all landlord-tenant interactions in which a landlord attempts to ascertain legal status, requests documents, or seeks identifying information, the landlord must be very careful. He is at great risk of running afoul of § 3604(c), which prohibits making statements that evince discrimination based on a protected characteristic. Because there is no requirement that an offending statement be made “because of” a protected characteristic, this part of the statute is often referred to as a strict liability provision;¹⁴³ it does not require that a defendant be motivated by any improper purpose or

141. Cf. 1999 GAO REPORT, *supra* note 94, at 6 (indicating that confusion about how to determine eligibility and the prevalence of counterfeit documents led to employment discrimination against national origin minorities); Johnson, *supra* note 97, at 1072 (noting that employers who have any doubt about the legitimacy of a person's documents are likely to refuse to hire the person). Recall that such situations—with uncertain norms and conflicting obligations—are precisely the sort of scenarios in which unconscious bias is likely to result in discriminatory behavior. See *supra* note 89 and accompanying text.

142. 893 F. Supp. 1051, 1055 (M.D. Fla. 1995). It should be noted that there is some disagreement over whether existing residents of housing can bring claims under § 3604(b) of the Fair Housing Act. While it had long been assumed that such claims were cognizable under that portion of the statute, a recent decision in the Seventh Circuit, *Halprin v. Prairie Single Family Homes*, held otherwise. 388 F.3d 327, 329 (7th Cir. 2004) (“The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but access to housing.”). The Fifth Circuit has followed suit. See *Cox v. City of Dallas*, 430 F.3d 734, 745 (5th Cir. 2005) (holding that, in a claim of discriminatory provision of services, § 3604(b) is inapplicable where the service was not connected to the sale or rental of a dwelling). For a discussion of this controversy and the *Halprin* and *Cox* decisions, see generally Oliveri, *supra* note 112; Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717 (2008); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

143. See Schwemm, *supra* note 115, at 215–16.

intend his remark to be discriminatory. Simply making a remark that indicates preference or discrimination is sufficient to violate the statute.

Under some circumstances, merely inquiring as to someone's place of birth, national origin, or citizenship may violate § 3604(c). For example, in *Housing Rights Center v. Donald Sterling Corp.*, the new management of an apartment complex required tenants to apply for parking spaces in the garage.¹⁴⁴ The application form required the tenants to state their country of birth, citizenship, and naturalization date. The court found that such questions, with no obvious connection to a person's ability to qualify for a parking space, indicated impermissible national origin bias and violated § 3604(c). Similarly, in *Jancik v. HUD*, a landlord's telephone query as to the race of a potential tenant was found to violate § 3604(c) because there was no legitimate reason for him to seek such information.¹⁴⁵

Of course, in the previous cases, the landlord's inquiries related directly to a protected characteristic and had no bearing on the tenant's qualifications to rent an apartment or obtain a parking space. Under the AII ordinances, the tenant's *national origin* is still technically irrelevant but her *legal status* is suddenly highly relevant. If landlords are careful and phrase their questions only in terms of legal status, they may not violate this portion of the law. However, laypersons without a lawyer's understanding of the distinctions between national origin, alienage, and legal status are likely to slip up.

Moreover, blatantly discriminatory or offensive terms or phrases are not required to violate § 3604(c)—the subsection can be violated by the use of any term or phrase that "indicates" discrimination. This means that landlords must steer clear of using "catch phrases" or "code words" that might suggest discrimination based on national origin, such as asking whether someone is "from around here" or where his or her accent is from.¹⁴⁶ A landlord who is

144. 274 F. Supp. 2d 1129, 1141-43 (C.D. Cal. 2003), *aff'd*, 84 F. App'x 801 (9th Cir. 2003).

145. 44 F.3d 553, 557 (7th Cir. 1995); *see also* Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992) (noting in dicta that "there is simply no legitimate reason for considering a[] [housing] applicant's race" (internal quotation marks omitted)).

146. In 1972 HUD adopted a set of "Advertising Guidelines for Fair Housing," in which it set forth phrases and terms that might constitute a § 3604(c) violation if used in a discriminatory context. These included terms such as "restrictive," "integrated," and "white home." These Guidelines were issued in the form of a Regulation in 1980, but removed by HUD from the Code of Federal Regulations in 1996 because HUD stated that it wished to provide such guidance in a different format. Thus far, HUD has failed to do so, and its original Guidelines remain a source of useful guidance in applying § 3604(c). For a thorough discussion of discriminatory indicators and the HUD Guidelines, see SCHWEMM, *supra* note 112, at §§ 15:3, 15:5.

trying to ascertain someone's legal status could easily slip up and use a term or phrase that is later found to be discriminatory.

The complaint-driven enforcement procedure also poses serious risks of channeling the discriminatory sentiments of some members of the general public. Complaints can be made by anybody and are far more likely to be made against identifiable national origin minorities who look or sound foreign.¹⁴⁷ Most *Hazleton*-style ordinances state that complaints that allege a violation based on race, national origin, or ethnicity are invalid.¹⁴⁸ Yet it is difficult to imagine what other information someone like a neighbor would have on which to base a complaint. Latinos are particularly likely to be targeted, both because of the anti-Latino animus that surrounds most AII ordinances and because people are more likely to believe mistakenly that Latinos are in the country illegally.¹⁴⁹ If a landlord repeatedly requests information and documents from national origin minorities in response to complaints, he may violate § 3617 of the FHA, which prohibits interfering with a person's right to enjoy housing free of discrimination.¹⁵⁰ If a landlord is repeatedly confronted with complaints about his tenants and hassled by members of the community, this may dissuade him from renting to national origin minorities.¹⁵¹ If the landlord persists in renting to national origin minorities and community members continue to complain, the complaining community members might be violating § 3617 with respect to the landlord, because they are interfering with his ability to assist others in enjoying housing free of discrimination.

147. See, e.g., Hinman, *supra* note 104, at 1:

The ink was hardly dry on the [Valley Park] ordinance when some residents . . . began making anonymous calls to the St. Louis County Police Department, asking them to investigate certain homes for illegals. Officers responded by knocking on a handful of doors—sometimes late at night—and asking Hispanics to furnish proof of legal residency in the United States.

148. See, e.g., Hazleton, Pa., Ordinance 2007-6, § 4(B)(2) (Mar. 21, 2007), available at <http://www.aclupa.org/downloads/hazletonord607.pdf>.

149. See WASH. POST/KAISER FAMILY FOUND./HARVARD UNIV. SURVEY PROJECT, *supra* note 81. For information on anti-Latino sentiment in areas with AII ordinances, see *supra* notes 102–09 and accompanying text. Of course, any national origin minority group that has recently arrived in large numbers, thus causing a backlash from the existing residents, may be targeted.

150. 42 U.S.C. § 3617 (2000). Similarly, the complainants may be liable for violating § 3617, particularly if they file multiple complaints. See, e.g., HUD v. Simpson, Fair Housing-Fair Lending Rep. (P-H) ¶ 25,082 (HUD A.L.J. 1994), 1994 WL 497538, at *4–6, 14 (Sept. 9, 1994) (finding a couple violated § 3617, in part, by repeatedly filing complaints against their Peruvian neighbor with the local code enforcement authorities).

151. See, e.g., Guadalupe T. Luna, *Immigrants, Cops and Slumlords in the Midwest*, 29 S. ILL. U. L.J. 61, 77 (2005) (discussing the burdens that some landlords face when they rent to Latinos, in the form of increased targeting by city officials for housing code violations).

The previous paragraphs describe how the threat of punishment and the hassle and delay of verifying a noncitizen's legal status can incentivize landlords to discriminate, even when they may harbor no discriminatory intent. For landlords who *want* to discriminate against national origin minorities, however, anti-immigrant ordinances provide great cover, especially given the prevalence of counterfeit documents. A landlord can easily make the pretextual claim that he refused to rent to a Latina apartment-seeker not because of her national origin, but because he thought she was here illegally, or because her documents looked funny.

In addition, some national origin minorities—and others—who *are* citizens may lack the necessary papers to document their citizenship, as well as the citizenship of everyone in their household. Approximately one in twelve low-income U.S.-born adults do not have a passport or birth certificate in their possession. More than one in ten such individuals do not have such documents for at least one of their children.¹⁵² This amounts to approximately 3.2 to 4.6 million citizens nationwide whose housing would be jeopardized if they were required to show documentary evidence of their legal status.¹⁵³

To summarize: AII ordinances require landlords to treat tenants and applicants for housing differently based on a factor—legal status—that is very difficult to discern with precision upon first encountering a person and may be difficult to establish even after reviewing that person's relevant documents (if such documents are available). In the face of bureaucratic hurdles and possible sanctions, many landlords subject to AII ordinances will likely resort to shortcuts. Such landlords may instead treat tenants and applicants differently based on ethnic markers. This results in two related harms: (1) increased housing discrimination against millions of national origin minorities who are either U.S. citizens or otherwise legally present noncitizens and (2) placing landlords at risk of violating the Fair Housing Act.

That there are two groups of people harmed by AII ordinances—those pressured to engage in illegal discrimination and those likely to be discriminated against—should not be overlooked. It

152. LEIGHTON KU, DONNA COHEN ROSS & MATT BROADDUS, CTR. ON BUDGET AND POLICY PRIORITIES, SURVEY INDICATES DEFICIT REDUCTION ACT JEOPARDIZES MEDICAID COVERAGE FOR 3 TO 5 MILLION U.S. CITIZENS 1 (2006), <http://www.cbpp.org/1-26-06health.pdf>.

153. *Id.*; see also William R. Tamayo, *When The "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 *ASIAN L.J.* 1, 19 n.126 (1995) (describing how, after the employer sanctions were created by the IRCA in 1986, it was noted that low-income African-Americans were negatively affected because they were less likely to have documents verifying their citizenship).

appears that landlords fear AII ordinances as much as national origin minorities and immigrants do because of the likelihood that attempting to comply will expose them to liability under the Fair Housing Act. In all lawsuits brought to challenge the AII ordinances, landlords have been named plaintiffs or participated as amici, underscoring the bind in which the AII ordinances place them. A group of apartment owners in Escondido, for example, argued that the AII ordinance would:

[I]mmediately and adversely impair their ability to conduct their business and professions by placing them in a prototypical “no-win situation.” They must either attempt to comply with the unlawful ordinance, thereby inviting an incalculable number of lawsuits brought on behalf of their current and prospective tenants for violations of federal and state housing, antidiscrimination, and privacy laws, or face the Ordinance’s draconian punishment provisions.¹⁵⁴

A number of landlords have made similar arguments in other cases challenging AII ordinances.¹⁵⁵

b. Municipalities

By passing and enforcing anti-immigrant ordinances, municipalities themselves may violate the Fair Housing Act under two different theories. The first is a direct theory. There is a good argument that under any scheme that requires a municipal employee to register or pre-authorize tenants, the municipality discriminates against national origin minorities. Just as individual landlords are unlikely to be skilled in interpreting immigration documents and are subject to bias, so are municipal code enforcement employees.

If municipal employees single out national origin minorities and either deliberately or mistakenly deny them the ability to qualify for rental housing, this constitutes a denial of housing in violation of § 3604(a). If they impose different requirements on such individuals—such as extra document checks or delays—this could violate § 3604(b), depending on whether the court considers these actions to be

154. Brief for San Diego Apartment Ass’n et al. as Amici Curiae Supporting Plaintiffs at 3, *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (No. 06-cv-2434-JAH-NLS), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-CA-0001-0005.pdf>.

155. See Complaint ¶ 52, *Stewart v. Cherokee County*, No. 1:07-cv-0015 (N.D. Ga. Jan. 4, 2007), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-GA-0001-0001.pdf>; Complaint ¶ 67, *Riverside Coal. of Bus. Persons & Landlords v. Township of Riverside*, No. 1:06-cv-05521-RMB-JS (N.J. Sup. Ct. Oct. 18, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-NJ-0001-0001.pdf>; Petition for Declaratory and Injunctive Relief ¶ 19(h), *Reynolds v. City of Valley Park*, No. 06-CC-03802 (Mo. Cir. Ct. St. Louis County Sept. 22, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-MO-0001-0003.pdf>.

connected to the rental of housing.¹⁵⁶ And if they make discriminatory national origin-based statements, they risk violating § 3604(c) if a court deems these statements to be connected to the rental of housing.¹⁵⁷

A municipality might also be liable to landlords under the provision of § 3617 that protects people from retaliation for aiding others in their ability to enjoy housing free of discrimination. If a municipality penalizes a landlord for failing or refusing to comply with an AII ordinance—for example, if the landlord refuses to request extra documentation from his Latino tenants after receiving a complaint—the landlord could have a cause of action against the municipality for retaliation.

The second argument for municipal liability would proceed under a disparate impact theory. The reasoning is that a municipality violates §§ 3604(a) and (b) and § 3617 by adopting ordinances or by enforcing statutes in ways that will disproportionately harm national origin minorities by causing them to be denied housing, subjected to discriminatory terms and conditions, and harassed based on their national origin. Although others engage in the discrimination or harassment, the municipality is potentially liable for setting up the legal framework leading to these results.

There is a circuit split on the proper test for determining disparate impact for municipal actions. The more complicated test is set forth in *Metropolitan Housing Development Corp. v. Village of*

156. Section 3604(b) requires that the discriminatory terms and conditions occur “in connection with the sale or rental of housing.” 42 U.S.C. § 3604(b) (2000). As a result, courts and commentators (me included) have concluded that this subsection, as a general matter, can only be violated by someone who has some degree of control over another person’s housing situation. Most of the time, this person will necessarily be a homeseller, housing provider, or other housing professional (such as a real estate agent). See Oliveri, *supra* note 112, at 42 (observing that, barring unique circumstances, § 3604(b) will not apply to someone who is neither a housing provider nor professional, and citing cases in support). This situation presents an exception to the general rule, however, because the AII ordinances put municipal employees in control of the terms and conditions by which a person may obtain rental housing.

157. Section 3604(c) requires that the statement be made “in connection with the sale or rental of housing.” 42 U.S.C. § 3604(c). As with § 3604(b), discussed in the previous note, the argument could be made that only people who are themselves engaged in the sale or rental of housing are capable of making statements “in connection with the sale or rental of housing.” See Oliveri, *supra* note 112, at 44–45. Courts, however, have generally taken a broad view of this requirement. See, e.g., *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (refusing to limit § 3604(c) to property owners or their agents); *Mayers v. Ridley*, 465 F.2d 630, 649 (D.C. Cir. 1972) (applying § 3604(c) to the municipal Recorder of Deeds under the theory that he is engaged in the commercial real estate market). *But see* *Woodward v. Bowers*, 630 F. Supp. 1205, 1209 (M.D. Pa. 1986) (finding that Recorder is not engaged in the sale or rental of housing, and so is not covered by § 3604(c)). In this case, it is likely a court would find that the AII ordinances make the statements of municipal employees sufficiently connected to the rental of housing to fall under § 3604(c).

*Arlington Heights*¹⁵⁸ and is followed by the Fourth, Sixth, Seventh, and Ninth Circuits. The test requires balancing four factors: (1) whether there is a disparate impact on a protected group; (2) whether there is any evidence that the municipal action is, in fact, intentional, or motivated in any part by discriminatory animus;¹⁵⁹ (3) whether there is a legitimate economic or public safety rationale for the municipality's action; and (4) whether the plaintiff is requesting that the municipality provide her with housing, or whether she merely wishes for the municipality to stop interfering with her ability to obtain housing for herself.¹⁶⁰

Application of the *Arlington Heights* test reveals that in many cases, a municipal defendant could be liable for passing an AII housing ordinance. Whether the first factor, disparate impact, is satisfied will depend on the statistical evidence in a given case. If (as I assume) Latinos are shown to be significantly more likely to experience discrimination as a result of the ordinance, then this factor cuts in favor of liability.

As for the second factor, intentional discrimination, there may be evidence that AII ordinances are motivated both by animus against illegal immigrants and by animus against ethnic and national origin minorities. As discussed previously, while there are legitimate reasons for communities to be concerned about illegal immigration, there is evidence that some of the AII ordinances were passed in the wake of significant anti-Latino sentiment, as expressed by municipal leaders (recall the mayor of Valley Park's "Cousin Puerto Rico and Taco whoever" statements) and private citizens.¹⁶¹ This also weighs toward liability.

Whether the municipality can satisfy the third factor, a legitimate economic or public safety rationale, will depend on the quality of the municipality's justifications for the ordinance. The courts do not apply traditional Equal Protection scrutiny levels to

158. 558 F.2d 1283 (7th Cir. 1977).

159. The level of intentionality that suffices to satisfy this prong is much less than that required to prove a violation under 42 U.S.C. § 1983 or some other statute that requires intentional discrimination. This is because the whole theory of disparate impact is premised on the notion that the policy or practice at issue was *not* undertaken for discriminatory reasons. The *Arlington Heights* formulation merely uses incidental evidence of purposeful discrimination as one factor that indicates the disparate impact is impermissible. Similarly, the absence of evidence of intentional discrimination satisfies this prong, but is not in and of itself sufficient to vitiate the plaintiff's case. *Id.* at 1292.

160. *Id.* at 1290–93.

161. See *supra* notes 102–09 and accompanying text.

these justifications, and they appear to vary in how closely they will analyze the defendant's proffered explanation.¹⁶²

Many of the reasons cited for passage of AII ordinances are demonstrably false, have no supporting evidence, or cannot be traced to illegal immigrants. For example, Hazleton's ordinance stated that it was adopted because "[i]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services . . . and diminishes our overall quality of life."¹⁶³ The court, however, observed that (1) the city had provided no evidence that crime had increased; (2) crime had, in fact, *decreased* in Hazleton; and (3) even if crime had increased by 10%, as was asserted at oral argument, the city failed to produce any evidence that this increase was connected to illegal immigration.¹⁶⁴ The Farmers Branch ordinance offers an even more extreme example of the disconnect between justifications and reality. The sole justification cited for the city's AII housing restrictions was the terrorist attacks of September 11, 2001.¹⁶⁵ The assertion that AII housing measures fight terrorism is

162. Compare *Arlington Heights*, 558 F.2d at 1293:

[I]f the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate governmental action. On the other hand, if the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act.

(citation omitted), *with* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 939 (2d Cir. 1988) (stating that "a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available"), *aff'd per curiam*, 488 U.S. 15 (1988).

163. Hazleton, Pa., Ordinance 2006-18, § 2(C) (Sept. 12, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0010.pdf>. In addition, Hazleton's Mayor made a number of statements indicating that his primary motivation in supporting the ordinance was the increase in crime that illegal immigrants had caused in Hazleton. Barry, *supra* note 107.

164. *Lozano v. City of Hazleton*, 459 F. Supp. 2d 332, 336 (M.D. Pa. 2006). Similarly, Valley Park declared that it needed to pass its AII ordinance because "[i]llegal immigration leads to higher crime rates, subjects our hospitals to hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their costs and diminishing their availability to legal residents, and diminishes our overall quality [sic] of life and provides concerns to the security and safety of the homeland." Valley Park Ordinance 1715, *supra* note 12, § 2(C). However, prior to enacting the ordinance, the City Council conducted no research into the size of Valley Park's population of immigrants or illegal immigrants. At the same time, there was no evidence that crime had increased or that schools were overcrowded. Hinman, *supra* note 107, at 1.

165. See Farmers Branch Ordinance, *supra* note 12, pmb1. ("WHEREAS, in response to the widespread concern of future terrorist attacks following the events of September 11, 2001, landlords and property managers throughout the country have been developing new security procedures to protect their buildings and residents").

a stretch, to say the least, one that depends on the assumption that most potential terrorists (1) are present in the United States illegally and (2) will be deterred from their plans if they experience difficulty renting an apartment.¹⁶⁶

In terms of the third factor, enforcement of AII housing restrictions would frequently undermine the stated public health and economic goals behind the restrictions. As discussed in greater detail, *infra*, many of the ordinances state that immigration-related housing restrictions are necessary to eliminate overcrowding and to combat substandard housing conditions. However, ordinances that prevent people from obtaining quality housing are in fact likely to *cause* people to live in overcrowded or inadequate housing.¹⁶⁷ While all of the above belies the notion that AII ordinances have a legitimate purpose, whether this prong weighs in favor of liability will ultimately depend on how much deference is accorded to the municipality.

With respect to the fourth *Arlington Heights* prong, the plaintiffs challenging AII ordinances are not seeking to force the municipality to provide them with housing. Rather, they simply wish to prevent the municipality from impeding their ability to obtain housing for themselves, which clearly weighs in favor of liability.

A simpler test is set forth in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*¹⁶⁸ and followed by the Second, Third, Fifth, and Eighth Circuits. This test consists of factors (1) and (3) from the *Arlington Heights* test: Is there a disparate impact on a particular national origin minority? If so, is there a legitimate nondiscriminatory reason for engaging in the practice? The analysis under *Arlington Heights*, therefore, can translate to the *Huntington* test, and in most cases would lead to the same result.¹⁶⁹

166. For perspective, all nineteen of the terrorists who perpetrated the September 11 attacks entered the United States legally using various types of visas, and thus would not have been barred from renting an apartment by any of the AII ordinances. See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *Entry of the 9/11 Hijackers into the United States, Staff Statement No. 1*, available at http://www.9-11commission.gov/staff_statements/staff_statement_1.pdf.

167. See *infra* Section III.B.2.

168. 844 F.2d 926, 933–37 (2d Cir. 1988), *aff'd on other grounds per curiam*, 488 U.S. 15 (1988).

169. See SCHWEMM, *supra* note 112, § 10:7, at 10–57 (noting that it is unlikely that these two methods of analysis will produce substantially different results).

III. PUBLIC POLICY ARGUMENTS MILITATE AGAINST AII HOUSING MEASURES

The previous Section argued that AII housing ordinances are likely, in their application, to result in discrimination against national origin minorities and violations of the Fair Housing Act. Even ignoring the Fair Housing Act, there are several reasons why immigration-related housing restrictions are unwise. Housing, unlike other subjects that AII ordinances may target, implicates special matters of public policy. I separate these housing-related public policy matters into rights-based concerns and practical considerations.

A. Rights-Based Rationales

1. Collateral Damage

One important way in which housing differs from many of the other subjects targeted by AII ordinances is that when people are prevented from obtaining housing, the rights and interests of children, families, and communities also suffer.¹⁷⁰

a. Children and Families

Denying an individual access to housing also affects the people with whom she lives. A significant number of immigrants live in “mixed families,” in which some members are citizens or have legal status and some lack legal status.¹⁷¹ While ostensibly targeted only at unauthorized persons, AII housing provisions make it impossible for a mixed family to live together under one roof and thus penalize the entire family. Such a result unfairly harms the family members who are in the United States legally. This is especially so for the millions of families in which the adult household members are unauthorized but the minor children are citizens or legally present aliens because unemancipated minors may not legally reside anywhere without adult

170. It should be emphasized that, while housing is not a “right” in this country, *see infra* Section III.A.2, all residents of the United States do have the right not to be discriminated against because of protected characteristics when obtaining housing. Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619, 3631 (2000).

171. Using 2005 data, it has been estimated that there are approximately 3.1 million U.S.-born children in families headed by undocumented immigrants (referred to as “unauthorized families”). PASSEL, *supra* note 2, at 8. Mixed status families “represent about one-third of all unauthorized families and five out of six of unauthorized families with children.” *Id.*

guardianship.¹⁷² Early anecdotal evidence indicates that mixed families are hard hit by AII ordinances.¹⁷³

Even where all members of a family are unauthorized, punishing the entire family is unfair because it affects children who are clearly innocent victims.¹⁷⁴ Although often criticized, the Supreme Court's opinion in *Plyler v. Doe*¹⁷⁵ articulates powerfully the rights and interests implicated when undocumented children are punished for their parents' actions. *Plyler* involved a state law that would have denied funding to public schools that served children who lacked legal status.¹⁷⁶ The Court recognized that the law ultimately penalized children who were not responsible for their unlawful status.¹⁷⁷ Their parents chose to enter or remain in the country illegally, and the children were incapable of remedying the situation by independently moving back to their home countries:

The children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.¹⁷⁸

The *Plyler* Court concluded that it violates Equal Protection to deny public education to undocumented children¹⁷⁹ despite the fact that education, like housing, is not a fundamental right guaranteed by the Constitution.¹⁸⁰

172. *E.g.* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental aspects of self-determination—including even the right of liberty in its narrow sense . . .").

173. A real estate agent in a community that passed an AII ordinance observed a large number of Latino families moving out of the area and commented: "This is not something that only affects the undocumented, because in the same family, it's so common to have some people who are citizens, some people who are residents, and some who are undocumented. And those with papers are going to do whatever is necessary to protect those without." N.C. Aizenman, *New Fear Leads Both Legal, Illegal Latinos to Leave Pr. William*, WASH. POST, Oct. 22, 2007, at A1.

174. It is estimated that in 2005 there were about 1.8 million undocumented children under the age of eighteen living in the United States (approximately sixteen percent of the total undocumented population at that time). PASSEL, *supra* note 2, at 8.

175. 457 U.S. 202 (1982).

176. *See id.* at 205 (describing legal effect of Texas statute at issue).

177. *See id.* at 220 (finding the statute is "directed against children, and [that it] imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control.").

178. *Id.* at 220 (citation omitted).

179. *Id.* at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

180. *Id.* at 221 ("Public education is not a 'right' granted to individuals by the Constitution."). Even the dissenting Justices believed that the Texas law was unwise and unduly punitive. *Id.* at 242 (Burger, C.J., dissenting):

Plyler also contains the kernel of an argument supporting the right of undocumented children to housing. *Plyler* grants unauthorized immigrant families legitimately domiciled¹⁸¹ within a school district the right to send their children to public school in that district. The opinion specifically notes that “illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State.”¹⁸² Thus, a person’s ability to establish residence or domicile within a particular state—and the rights that flow from such residence—may be disaggregated from whether her presence in the country is legal or not.¹⁸³ The argument is a tricky one because the opinion does not endorse a “right of residence.”¹⁸⁴ At most, it appears to simply acknowledge the social fact that undocumented immigrants have taken up residence in many school districts, and that it is possible for rights to flow from this residency.¹⁸⁵

Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language.

181. See *id.* at 227 n.22 (“A State may not . . . accomplish what would otherwise be prohibited by the Equal Protection Clause, merely by defining a disfavored group as nonresident. . . . Appellants have not shown that the families of undocumented children do not comply with established standards by which the State historically tests residence.”); see also *id.* at 240 n.4 (Powell, J., concurring) (“Of course a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of *de facto* residency, uniformly applied, would not violate any principle of equal protection.”). One year after *Plyler*, the Supreme Court grappled with the issue of determining the legitimacy of domicile in *Martinez v. Bynum*, 461 U.S. 321 (1983). In *Martinez*, a boy who was a U.S. citizen sought to establish a domicile with his adult sister (also a U.S. citizen) in Texas so that he could attend public school there. *Id.* at 322–23. The boy’s parents were Mexican citizens who resided in Mexico. *Id.* The sister was not, and did not intend to become, her brother’s legal guardian. *Id.* As a result, the Court found that the boy was not legitimately domiciled in Texas and therefore not entitled to a tuition-free public education. *Id.* at 325.

182. *Plyler*, 457 U.S. at 227 n.22.

183. See *id.* at 227 (finding the asserted state prerogative of denying undocumented resident children free education services “solely on the basis of their undocumented status” insufficient to justify denying them the right to that education).

184. See *id.* at 226 (“To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation.”).

185. See *id.* at 215 (confirming that the Equal Protection Clause secures equally all rights and obligations imposed by a state on the basis of “presence” within that state). A more recent example of this is the phenomenon of states that grant in-state tuition to undocumented residents who attend their public universities. See Ragini Shah, *Sharing the American Dream: Towards Formalizing the Status of Long-Term Resident Undocumented Children in the United States*, 39 COLUM. HUM. RTS. L. REV. 637, 670–73 (2008) (noting that “ten states . . . currently allow undocumented students access to in-state tuition rates”).

In addition to implicating the rights of children, housing restrictions infringe on the ability of family members to live together as a unit. In a long line of cases, the Court has recognized a substantive due process right to family privacy.¹⁸⁶ It is well-established that the government cannot take actions that “slic[e] deeply into the family itself”¹⁸⁷ unless it can meet the requirements of strict scrutiny. For example, despite the traditional deference to municipalities in zoning matters, the Supreme Court held in *Moore v. City of East Cleveland* that municipal zoning restrictions that limit areas to single-family occupancy and define “family” in a way that prevents certain family members from living together are unconstitutional because they violate the right to privately order family as one chooses.¹⁸⁸ All provisions that prevent a family from residing together because one member of the family lacks legal status raise similar constitutional concerns.

Local governments may respond that All provisions meet strict scrutiny because the community’s need to rid itself of unauthorized persons is a compelling state interest.¹⁸⁹ A court may well find,

186. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (parallel citations omitted); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“The Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause”); *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972) (holding that the interest of parents in the religious upbringing of their children trumps state interest in requiring children to attend school); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that a state cannot presumptively presume unwed fathers to be unfit parents consistently with their interests under the Due Process Clause); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (holding the marital relationship to be within a “zone of privacy created by several constitutional guarantees”).

187. *Moore*, 431 U.S. at 498.

188. In *Moore*, a city’s single-family zoning ordinance defined family in such a way as to prevent a grandmother from living with her son and two grandsons, because the boys were cousins as opposed to brothers. *Id.* at 496–97. The Court (with Justice Powell writing for a plurality and Justice Stevens concurring) struck down the ordinance. *Id.* at 506. The plurality determined that because the ordinance intruded on the Fourteenth Amendment rights of privacy and familial association, strict scrutiny, rather than rational basis review, was appropriate. Specifically, the plurality reasoned:

When a city undertakes such intrusive regulation of the family, . . . the usual deference to the legislature is inappropriate. This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.

Id. at 499 (internal citations omitted). The city’s stated purposes for the ordinance—reducing traffic, parking congestion, and the burden on the schools—failed, in light of the fact that the ordinance as written was not narrowly-tailored to address these problems. *Id.* at 500 & n.7.

189. See *supra* Section II.A.

however, that the AII provisions fail the strict scrutiny test because they are not narrowly tailored; they are both overinclusive (by burdening innocent family members) and underinclusive (by restricting unauthorized people only from residing in rental units, but not from owning property or residing with others who do).¹⁹⁰

b. The Community

Housing practices that prevent a particular group from obtaining housing in a particular area also implicate the interests of the broader community.¹⁹¹ Widespread discriminatory practices skew the racial balance of the entire community and can lead to racial and ethnic segregation.¹⁹² Physical isolation breeds a lack of understanding at best and animosity, inequality, and violence at worst.¹⁹³ Segregation is reinforced by its negative consequences: a distorted residential real estate market, reduced property values, a diminished tax base, and segregated schools.¹⁹⁴ Ultimately, these harms are borne by the community as a whole, not simply the excluded groups.¹⁹⁵

190. *Id.*

191. The argument could be made, of course, that illegal immigrants are by definition legally prohibited from residing in the United States and therefore have no right to obtain housing in any particular area. *Id.* This is true; however, as discussed previously, illegal immigrants are not the only people affected by AII housing restrictions. *See supra* Section III.A.1.b.

192. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 110–11 (1979) (noting that discriminatory practices may alter the racial composition of neighborhood causing multiple “harms flowing from the realities of a racially segregated community”).

193. The President’s National Advisory Commission on Civil Disorders, commonly referred to as “the Kerner Commission,” was tasked to report on the conditions leading up to the mass riots in American cities in the summer of 1967. Exec. Order No. 11,365, 32 Fed. Reg. 11,111 (July 29, 1967). The Commission found that a major cause of the unrest was widespread racial segregation in housing. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1, 5, 118–20 (1968). This segregation, which amounted to a “system of apartheid,” was in large part the result of housing discrimination that kept blacks confined to urban centers while allowing whites to spread out into the suburbs. *Id.* at 118–20, 215–25. The Commission warned that America was rapidly becoming “two societies, one black, one white—separate and unequal,” and it concluded that this trend was the single biggest social challenge facing America in the modern era. *Id.* at 1; *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 8 (1993) (asserting that residential segregation “is the institutional apparatus that supports other racially discriminatory processes and binds them together into a coherent and uniquely effective system of racial subordination”).

194. *See, e.g., Gladstone*, 441 U.S. at 110–11 (finding that de facto segregation would likely create numerous collateral harms in the property market and that “school segregation is linked closely to housing segregation”).

195. *See id.* at 111–15 (holding the deprivation of the benefits of racially-integrated housing to be sufficient to constitute a “distinct and palpable injury” to parties suing on behalf of entire community to create standing to sue the parties allegedly responsible).

Segregationist practices are especially insidious and intractable when they are exclusionary. This is particularly true for such policies adopted into state or local policy. The reason is simple: people kept from living within a municipality or county will have a hard time playing a meaningful role in that locality's political process.¹⁹⁶ Residency within a geographic boundary has long been viewed as a key element of the franchise.¹⁹⁷ The requirement that one be an "insider" to have a say in local policy means that those who are forced or kept out will have a limited ability to change the status quo.¹⁹⁸ Meanwhile, those who are "in" will continue to shape the community in ways that suit their own preferences.¹⁹⁹ The segregation and exclusion thus becomes self-perpetuating and increasingly difficult to remedy.²⁰⁰ Currently, non-naturalized immigrants who are unable to vote (as they are in all but a few jurisdictions)²⁰¹ can still influence the polity through decisions about where to spend money, the types of businesses they operate, and which public services to use.²⁰² In addition, nonvoting residents can support particular

196. *But see* Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975) (arguing somewhat facetiously that if people are dissatisfied with exclusionary zoning laws they should not "overlook the availability of the normal democratic process").

197. *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1126, 1128 (1996) ("Local governments, in short, are place-based polities organized on the principle of residency. . . . Only rarely the subject of litigation, the connection between boundaries and the structure of local governments is virtually axiomatic: Boundaries typically determine such crucial issues as the electorate for local elections. . . ."); Richard Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1866–67 (1994) (noting that residency has long been a definitive element of local polities and that the Supreme Court has required the franchise to be extended to all "bona fide residents").

198. *See* Ford, *supra* note 197, at 1874 (noting that exclusionary policies, by definition, "exclude 'outsiders' from the political processes of the locality"). This results in what Ford refers to as the "tautology of community self-definition." *Id.* at 1861–64.

199. *See* Briffault, *supra* note 197, at 1142 (arguing that by drawing boundaries and limiting local government franchise to those within the boundaries, municipal governments are able to tailor policy more closely to the peculiar political desires of those insiders, and attract primarily potential settlers with similar desires, and further noting that one early reason for local government incorporation was racial exclusion).

200. Ford, *supra* note 197, at 1871 ("The 'democratic process' that produces and legitimates exclusionary zoning is thus very questionable: in many cases, the only significant vote that will be taken on the exclusionary ordinance is the first vote.").

201. *See* Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1526 (2002) ("[A] handful of school districts permit aliens whose children are in school to vote in community school board elections, and at least one locality permits aliens to vote in municipal elections. With these exceptions, however, resident aliens are unenfranchised, even at the state and local level." (citation omitted)).

202. *See, e.g.*, Randal C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength*, N.Y. TIMES, May, 2, 2006, at A1 (describing hundreds of thousands of immigrants in multiple cities participating in rallies as part of a national campaign during which non-naturalized immigrants would not participate in any economic activities).

institutions that have political power, such as churches, civic organizations, and advocacy groups.²⁰³

Standing doctrine under the Fair Housing Act has long recognized that housing discrimination and the resulting segregated living patterns affect the entire community.²⁰⁴ The FHA authorizes any person aggrieved by housing discrimination to file a complaint.²⁰⁵ It defines "aggrieved person" broadly as "anyone who claims to have been injured by a discriminatory housing practice" under the statute,²⁰⁶ which means that a person can raise an FHA claim even if he or she was not the target of discrimination.²⁰⁷ For example, in *Trafficante v. Metropolitan Life Insurance Co.*, a white resident of an apartment complex sued the complex because its racially discriminatory policies effectively ensured that virtually all residents of the complex were white.²⁰⁸ A unanimous Supreme Court held that the plaintiff's injury, which consisted of "the loss of important benefits from interracial associations,"²⁰⁹ was sufficient to grant standing under the FHA. The Court reasoned that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, . . . 'the whole community[.]'"²¹⁰ A number of other Supreme Court cases have endorsed this view of community harm and "community standing" under the FHA.²¹¹ This line of case law is

203. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1155–56 (noting the political power noncitizens can wield through various organizations).

204. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (finding standing under the Fair Housing Act because "the whole community" is a victim of discriminatory housing practices (quoting 114 CONG. REC. 2706 (1968) (statement of Sen. Javits))).

205. Fair Housing Act of 1968, 42 U.S.C. § 3601(a)(1)(A)(i) (2000).

206. *Id.* § 3602(i)(1).

207. Thus, the standing requirements under the FHA are merely those required by Article III of the Constitution—that the plaintiff has suffered "a minima of injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). The prudential limitations on standing—the prohibition on a plaintiff raising another person's legal rights, the rule barring adjudication of generalized grievances, and the requirement that the plaintiff's complaint fall within the zone of interests protected by the law involved—are not applicable in cases brought under the FHA. See *id.* ("[C]ourts . . . lack the authority to create prudential barriers to standing in suits brought under [the Fair Housing Act]."). These limitations, in addition to deficiencies in Article III standing, were found to prevent community members from challenging an exclusionary zoning ordinance in *Warth v. Seldin*, a case brought pursuant to the Fourteenth Amendment and Reconstruction-era civil rights statutes but would not have prevented claims under the FHA. 422 U.S. 490, 513–14 (1975).

208. 409 U.S. at 207–08.

209. *Id.* at 210–12.

210. *Id.* at 211 (quoting 114 CONG. REC. 2706 (1968) (statement of Sen. Javits)).

211. In *Gladstone, Realtors v. Village of Bellwood* the Court allowed a municipality and four of its residents to bring a FHA claim against a realty company, in which they alleged that the company's practice of steering whites and blacks into different neighborhoods was destroying the

growing dated, however, and has been undercut (although not overruled) by the Rehnquist Court's standing rulings in cases like *Lujan v. Defenders of Wildlife*.²¹² It is also quite likely that the current Supreme Court would look unfavorably on the FHA's liberal standing doctrine. I do not wish to weigh in on the continued soundness of the FHA's standing doctrine. Rather, I cite this line of cases merely to underscore that housing discrimination and segregationist practices cause harm to a broader swath of individuals beyond the immediate victims, and that such harm has been judicially recognized.

Early anecdotal evidence indicates that, in fact, significant numbers of Latino residents are leaving areas that have passed AII ordinances.²¹³ In some instances, this rapid loss of a significant part of the community has burdened the larger community with economic and social upheavals.²¹⁴ For example, the newly-revitalized business district in Riverside, New Jersey, became vacant again after the town's AII ordinance was enacted, and many initial supporters of the ordinance came to question whether it had actually benefitted the town.²¹⁵

2. The Significance of Housing

The point is simple but important: housing is central to basic human existence. The consequences of the other AII provisions—the inability to work, the inability to do business in one's native language,

racially integrated character of a twelve- by thirteen-block residential neighborhood. 441 U.S. 91, 93–95, 115 (1979). The plaintiffs' injuries consisted of "the loss of social and professional benefits" that accrue from living in an integrated community, as well as the economic injury caused by declining property values. *Id.* at 115. The Court rejected the defendant's argument that a residential neighborhood could not constitute the same type of "community" as the apartment complex at issue in *Trafficante*. *Id.* at 113–14; *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377–78 (1982) (recognizing the ability of community members to challenge housing discrimination under the FHA, but requiring the relevant "community" to be narrowly defined to include only those areas affected by the discriminatory conduct).

212. 504 U.S. 555, 560 & n.1 (1992) (requiring, as an "irreducible constitutional minimum of standing," a "particularized" and "actual or imminent" injury to a legally protected interest specifically occurring to the plaintiff "in a personal or individual way").

213. *See, e.g.*, Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1 (reporting that, within months following a New Jersey township's passage of AII ordinances, "hundreds, if not thousands, of immigrants from Brazil and Latin American countries had fled").

214. *See, e.g., id.* (describing the significant negative social, economic, and legal impacts on communities following the passage of AII ordinances).

215. *Id.*

or the deprivation of public services—are serious, but losing stable housing is potentially devastating to all other aspects of life.²¹⁶

One commentator observes:

Of all the elements that comprise cities, suburbs, and towns, housing is perhaps the most complex. In addition to providing shelter, housing is also the driver of transportation patterns, a consumption good, a prominent feature of the built environment, an investment for building wealth, a determinant of social interaction and achievement, and a symbol of familial connections and personal history.²¹⁷

Another illustrates “the centrality of housing” by pointing out that housing “functions as the focal point where [multiple] critical economic and social forces and practices intersect.”²¹⁸ A third argues:

Housing is never merely shelter. However inadequate and temporary, one’s shelter becomes the ground floor for meeting basic needs, a foundation for job search and education, and a piece of one’s identity – a “home” of sorts. For those who have always been adequately housed and take it for granted, a full appreciation for the importance of adequate, decent[,] and affordable housing can probably only be gained by experiencing its loss.²¹⁹

Residence also has important ramifications for self-definition. Richard Briffault argues that “[l]ocalities are valued not as temporary nodes in a continual migratory process, but as ‘life spaces,’ rich with personal and cultural meaning. . . . Local citizenship can be seen, not simply as a matter of residence, but as ‘primarily a relation of membership’ in an on-going entity.”²²⁰ For all of these reasons, the concept of the home has long occupied an important position in the American consciousness and legal system.²²¹

216. See Iglesias, *supra* note 62, at 442 (describing the significant ramifications of being deprived of adequate housing in myriad areas).

217. *Id.* at 440.

218. Justin D. Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. 339, 342–51 (1996) (noting that housing is closely linked to employment and educational opportunities, access to health care and financial capital, and access to mentoring and information networks).

219. Iglesias, *supra* note 62, at 442; see also Manuel Mariano Lopez, *Su Casa No Es Mi Casa: Hispanic Housing Conditions in Contemporary America, 1949-1980*, in RACE, ETHNICITY, AND MINORITY HOUSING IN THE UNITED STATES 127, 127 (Jamshid A. Momeni ed., 1986) (arguing that “housing provides a setting for one’s entire social existence,” and that being “ill-housed” can cause deprivations in health, safety, and transportation, which can then lead to disadvantages in employment, education opportunities and economic stability).

220. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1127–28 (1996).

221. A long line of cases recognizes the significance of the home in American law and society. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (finding the protection of residential privacy to be a significant government interest); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (noting that “[t]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society,” and “[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value”); *Gregory v. Chicago*, 394 U.S. 111, 125 (1969)

But the concept of the home as a legal entity has its limits. Although human rights paradigms recognize the importance of housing, and some human rights treaties and other resolutions treat housing as a basic right,²²² these agreements are either nonbinding or the United States has refused to sign them. Social justice activists in the 1970s also failed to establish a positive right to housing in the federal Constitution,²²³ and American courts have consistently refused to recognize a positive right to shelter.²²⁴

Nevertheless, American policy still recognizes the value of shelter even if there is no positive right to a home. The Housing Act of 1949 established as a national “goal” that every American family have “a decent home and a suitable living environment.”²²⁵ Thus, federal, state, and local governments may attempt to supply housing to those

(Black, J., concurring) (describing the unique nature of the home as “the last citadel of the tired, the weary, and the sick”). There are also a number of cases in Fourth Amendment jurisprudence that emphasize the importance of the home, far too many to be cited to here. *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 586 (1980) (noting that under Fourth Amendment law, searches and seizures inside a home with no warrant are presumptively unreasonable).

222. *See* Universal Declaration of Human Rights art. 25 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”); International Covenant on Economic, Social and Cultural Rights art. 11 (containing similar language).

223. Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886–87 (1989) (describing failed litigation efforts at the national level). Commentators continue to advance arguments for making housing a positive right, often by looking either to state constitutions or to international human rights norms. *See generally, e.g.*, Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 317 (1990–91) (suggesting a coalition between the government and the private sector to create a national entitlement to housing); Robert Doughten, *Filling Everyone’s Bowl: A Call To Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 423 (2003–04) (contending that such rights should be found by looking to international human rights norms); Florence Wagman Roisman, *Establishing a Right to Housing: A General Guide*, 25 CLEARINGHOUSE REV. 203, 203–04 (1991) (discussing programs in several states aimed at providing homes to the homeless); Rob Rosenthal & Maria Foscarinis, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 316, 317–19 (Rachel G. Bratt et al. eds., 2006) (discussing local efforts to address the problem); Bradley R. Haywood, Note, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 157 (2002) (arguing that a right to shelter can be found in New York’s State Constitution). Of course, the notion of a positive right to shelter has critics as well. *See, e.g.*, Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 24–25 (1992) (arguing that housing conditions in countries that recognize a right to shelter are poor, and that the guarantee of such a right will undermine the incentives of the poor to work).

224. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (although recognizing “the importance of decent, safe, and sanitary housing,” holding that the Constitution does not guarantee access to any particular type of housing); *Williams v. Barry*, 708 F.2d 789, 793 (D.C. Cir. 1983) (Bork, J., concurring) (“No one has plausibly maintained that there is a constitutional . . . right to city-provided shelter.”).

225. 42 U.S.C. § 1441 (2000).

in need as a policy matter but at the same time refuse to recognize any legal right to housing.

However, the individuals directly or collaterally deprived of housing by AII ordinances—legal immigrants, unauthorized immigrants, and U.S. citizens of manifest ethnicity regardless of immigration status—are not asking any unit of government to provide them with housing. Nor are they asking private individuals to supply them with housing free of charge.²²⁶ They are simply attempting to procure housing for themselves, at their own expense, on the private market. An analogy between food and housing, both basic necessities, might be instructive here: Even though many people in America may believe that unauthorized immigrants should not be eligible for food stamps, how many would argue that they should be prohibited from buying food? There is something particularly inhumane about a legal regime that prevents people from obtaining shelter, even those who are illegally present in the country.

3. Harassment and Hostility

Increased hostility against, and harassment of, national origin minority group members will likely result from AII ordinances generally and AII housing measures in particular.

AII ordinances generally create deep and ugly rifts in the communities that debate enacting them. City council meetings turn violent, groups on each side of the issue hold massive demonstrations, and threats are made against city officials and activists.²²⁷ Moreover,

226. This was essentially the situation in *Lindsey*, 405 U.S. 56, in which the plaintiffs were tenants who sought to challenge Oregon's landlord-tenant law, which prevented them from withholding rent in response to the landlord's failure to provide basic maintenance. Addressing the plaintiffs' argument that this statute deprived them of their fundamental right to decent shelter, the Court specifically held that the Constitution does not recognize "the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement." *Id.* at 74. To find otherwise, the Court reasoned, would likely violate the Takings Clause of the Fifth Amendment. *Id.* Thus, the Supreme Court's main judicial pronouncement foreclosing any Constitutional right to housing is itself limited to the proposition that there is no such right to *free* housing.

227. In San Bernardino competing groups faced off in an angry confrontation at the courthouse while a judge heard the issue of whether to allow the AII measure to be placed on the ballot. Kelly Rayburn, "*Illegal Immigration Relief Act*" Not Likely to Appear on Ballot, INLAND VALLEY DAILY BULL. (Ontario, Cal.), Jun. 27, 2006, available at http://www.dailybulletin.com/news/ci_3983764. After the initiative's chief proponent told one Latino activist "Your mother can go [bleep] herself," the activist slapped him in the face and was arrested for battery. *Id.*; see also *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 508–10 (M.D. Pa. 2007) (describing atmosphere of fear and hostility that surrounded Hazleton's AII ordinance, including threatening letters sent to one ordinance opponent); Barry, *supra* note 107 (describing how police were required to keep groups of white and Latino demonstrators apart as the

in the areas where AII ordinances have passed, Latinos report being constantly and indiscriminately harassed.²²⁸ It is impossible to determine how much of this harassment is traceable to any particular AII provision or how much stems from the acrimony of the public discourse and the inflammatory rhetoric of those who support these measures. However, if we could draw such distinctions, it seems likely that a good deal of the harassment would stem from the housing provisions. This is because the goal of AII housing measures is not to prevent people from engaging in a particular activity (such as working, conducting business in Spanish, or congregating in a particular place), but to remove a specific group of people from the community. When this is combined with the difficulty of determining immigration status; the public's confusion over legal status, alienage, and national origin; and the perception that people of manifest ethnicity are "aliens"—not to mention the irresponsible statements of political leaders²²⁹—the result is a cloud of suspicion over all national origin minorities. Thus, jurisdictions with AII housing measures tend to be centers of mass community sentiment against the very *presence* of Latinos and other groups, regardless of their actual legal status. In short, they are harassed simply for being within the city limits and looking like they are not from the United States.

Hazleton City Council voted on its AII ordinance, and noting that Hazleton Mayor Lou Barletta wore a bullet-proof vest to the vote); Toni Callas, *Riverside Council Approves Anti-Illegal Immigration Crack-Down*, PHILA. INQUIRER, July 27, 2006, at B1 (describing Riverside City Council meeting where AII ordinance was approved, which was marked by "jeers, screams, and shouting matches" and from which police escorted several people); Dianne Solís, *Moving on in Farmers Branch*, DALLAS MORNING NEWS, May, 14, 2007, at 1A (describing how the Mayor of Farmers Branch had his home vandalized after coming out against the AII ordinance, and how the Department of Justice had to send election monitors when the ballot initiative was voted on).

One could argue that such feelings were preexisting and would only be exacerbated by a regime that divests all decisions from the locality. See Rodríguez, *supra* note 3, at 639 ("[P]reempting local laws that aim to exclude immigrants will not make for a better integration environment, because the sentiments behind the preempted ordinances are likely to remain and fester."). Nevertheless, in many of the cases to receive press coverage, the introduction of the ordinance seems to be the catalyst for the rancor. See, e.g., *Hazleton*, 496 F. Supp. 2d at 510 n.31 (M.D. Pa. 2007) (noting that the AII ordinance "apparently had the effect of increasing racial tension in the City"); Kotlowitz, *supra* note 102 (noting that the AII ordinance in one jurisdiction "has turned neighbor against neighbor").

228. See, e.g., Campbell, *supra* note 6, at 1044 ("The targeting of 'illegal aliens' that brought suspicion on anyone who might be suspected of not being lawfully present because of their skin color made non-white residents of Hazleton—citizen and noncitizen alike—fearful of being subject to harassment and singled out as a nuisance, a public burden, or worse—a criminal."). According to one Latino business owner in Riverside, N.J., "The ordinance almost authorizes a vigilante-type attitude. Everyone lives in fear." Press Release, ACLU, *Businesses Sue Riverside Over Vague, Discriminatory Anti-Immigrant Ordinance* (Oct. 18, 2006), available at <http://www.aclu.org/immigrants/discrim/27107prs20061018.html>.

229. See *supra* notes 104–106.

The experience of California in the wake of Proposition 187,²³⁰ a 1994 state ballot initiative that barred undocumented immigrants from receiving most public benefits and public education, is instructive. Commentators noted that numerous acts of harassment and discrimination followed after the ballot initiative passed and that the majority of victims were U.S. citizens or legal immigrants, not the undocumented individuals who were the initiative's targets.²³¹ Researchers observed a 23.5% increase in hate crimes against Latinos in Los Angeles that year, and advocates described thousands of calls to a hotline for reporting complaints about ethnic-based harassment and discrimination.²³²

B. Practical Considerations

In addition to the rights-based arguments against AII housing measures, there are a number of practical reasons why AII housing provisions should not be pursued as a matter of public policy. These considerations include the nature of housing and the landlord-tenant relationship, the lack of connection between housing and illegal immigration, the manner in which most AII ordinances would have to be enforced, and the contrary goals and consequences of such enforcement.

1. Nature of Rental Housing and the Rental Transaction

Several characteristics of private rental housing and the rental transaction demonstrate the perversity of attempting to introduce immigration restrictions into the equation. First, renting an apartment is an arm's length consumer transaction. It takes place on the private market, with little oversight from state or federal authorities.²³³ The typical apartment rental involves some initial contact between the landlord and the tenant as the parties arrange for the rental, but little direct interaction after that. No agency relationship is formed, as with an employer-employee relationship.²³⁴

230. See *supra* note 7.

231. Barth, *supra* note 95, at 113–14.

232. Nancy Cervantes, Sasha Khokha & Bobbie Murray, *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 8–9 (Fall 1995).

233. It is true that every state has a landlord-tenant law that governs many of the rights and obligations of the parties to a lease, and state and federal civil rights laws apply to prevent discrimination. Nevertheless, these are complaint-driven legal mechanisms—they will not be triggered unless and until someone invokes them.

234. At most, renting an apartment creates an ongoing relationship based on the different interests the landlord and the tenant have in the same piece of property.

The landlord and the tenant are simply two private individuals who have entered into a contract the performance of which usually involves little more than sending a monthly rent payment. Bringing immigration law enforcement into this transaction makes little intuitive sense, and the slippery slope argument is strong: If we allow immigration restrictions for rental housing, what comes next? Requiring people to show their birth certificates or immigration papers before they buy a car? A pair of shoes? A gallon of milk?

Moreover, private rental housing has no logical intersection with other government programs in which verification of immigration status is justified. In employment, for example, requiring employers to check the immigration status of their employees makes sense because employers must report salary payments and withholdings to the Internal Revenue Service, state taxation authorities, and the Social Security Administration. Immigration status is relevant to how people are taxed and whether they are able to participate in the social security system. Put another way, by working and paying taxes, a person becomes connected into various state and federal bureaucracies in ways that implicate immigration status. The same does not hold true for renting an apartment.

2. Relationship Between Housing and the Stated Goals of AII Ordinances

One of the chief goals of AII provisions generally is the preservation of scarce resources for American citizens and those legally present in the United States. Jobs are one such resource. The belief that unauthorized immigrants are “taking” jobs from American citizens is one of the most powerful forces driving the anti-illegal immigrant movement. Hence, Congress passed IRCA, which singled out employment as an area of particular concern.²³⁵ Virtually every state and local AII ordinance features employment restrictions as its centerpiece. Public benefits are another scarce resource; thus, virtually all federal benefits are limited to American citizens and legal immigrants. By contrast, in the vast majority of markets nationwide, private rental housing is not a scarce commodity.²³⁶ There is no serious argument that undocumented people are depriving others of apartments. Similarly, an argument against the employment of unauthorized immigrants is that it skews the labor market by driving

235. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2000).

236. In this regard, market-rate private rental housing can be contrasted with subsidized or affordable housing, which is extremely scarce in most places and which is not the focus of this Article.

wages down. No argument can plausibly be made, however, that the presence of unauthorized immigrants skews the market for housing by driving the cost of housing up.

A related goal of AII legislation is to eliminate “pull factors” that draw unauthorized immigrants into this country and to particular areas. Employment is the single most powerful pull factor for illegal immigration to this country.²³⁷ Similarly, public benefits such as health care, education, and welfare, are regarded as pull factors (although whether these benefits actually “pull” has never been demonstrated).²³⁸ Housing, in contrast, is simply not a pull factor that brings unauthorized people to the United States.²³⁹ No one has argued that the housing provisions of AII ordinances are necessary to stop people from coming to the United States in search of private rental units.

While housing does not draw unauthorized people to any particular area, it is true that the ability to obtain some type of housing is usually a necessary condition for them to *remain* there for any length of time. Rental restrictions therefore do serve another—usually unstated—goal of AII measures, which is to make life so unpleasant for unauthorized people that they will leave voluntarily.²⁴⁰ This goal contains some inherent problems.

First, if the AII housing provisions fail to drive unauthorized people out of town and instead drive them further underground, the results will run directly counter to the stated reasons for the housing provisions: the elimination of overcrowding and poor housing conditions. Virtually every ordinance that contains housing-specific

237. *Plyler v. Doe*, 457 U.S. 202, 228 (1982) (“The dominant incentive for illegal entry into the State of Texas is the availability of employment”); Pham, *supra* note 3, at 810 (“Experts agree that employment is the most important factor drawing undocumented immigrants to the United States”).

238. See *Plyler*, 457 U.S. at 228 (“[F]ew if any illegal immigrants come to this country . . . in order to avail themselves of a free education.”); Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1465 (1995) (finding “no empirical evidence that significant numbers of people immigrate to the United States for public education or for welfare, although admittedly it does not follow that the sudden termination of either health services or public education would not spur some immigrants to leave or discourage others from coming”). Indeed, the fact that unauthorized people are prevented from receiving most welfare and health care benefits belies the contention that these are pull factors.

239. Pham, *supra* note 3, at 791 (“No one argues that the availability of housing is a pull factor, drawing undocumented immigrants to the United States.”).

240. Hazleton Mayor Louis Barletta made clear that the purpose of that city’s ordinance was to “get rid of the illegal people,” emphasizing, “It’s this simple: *They must leave.*” Michael Powell & Michele Garcia, *Pa. City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A03 (emphasis in original).

justifications points to these goals. The ordinance of Cherokee County, Georgia, contains representative language:

4. Because [unauthorized immigrants] are not in this country lawfully, there is an increased chance that they will reside in dwelling units without typical leasing, payment and other tenancy arrangements that enable the civil and regulatory processes of the County to be effective. The regulations of the County regarding housing and property maintenance often depend upon reporting by residents and neighbors as a means of bringing unlawful conditions, and notify authorities [sic], or to participate in subsequent proceedings to remedy such conditions. This creates an increased likelihood that housing and property maintenance violations will remain unreported and because such conditions are unreported, an increased chance that such conditions will multiply in the future.

5. Because of the lack of tenancy arrangements that are subject to normal civil and regulatory processes . . . there is a greater chance that such individuals will occupy residential units in excessively large numbers, or under living conditions, that do not meet applicable building and health and safety codes. This creates unanticipated burdens on the unit and the public infrastructure supporting such dwellings.²⁴¹

All rental restrictions, however, will likely *lead* to overcrowding, because people who cannot rent housing on their own will “double-” or “triple-up” with families who own their homes or who live in rental housing with lax landlord oversight. Unauthorized immigrants may be forced into substandard living conditions, as unscrupulous landlords who are willing to violate the law take advantage of them and charge high rents for poor-quality housing. It is hard to imagine a plan more likely to increase these ills than one that prevents people from freely renting decent housing of their own.

A second problem with using rental restrictions as a mechanism for driving unauthorized immigrants out of town is that these restrictions are both under- and over-inclusive. They are under-inclusive because they do not reach all unauthorized immigrants, just those residing in or seeking to reside in rental housing. Unauthorized people, so long as they reside in the United States, are still able to legally *purchase* homes in virtually every jurisdiction.²⁴² They may

241. Cherokee County, Ga., Ordinance 2006-03 § 1, ¶¶ 4–5 (2006); *see also* Escondido, Cal., Ordinance 2006-38 § 1, ¶ 3 (2006) (containing identical language); Riverside, N.J., Ordinance 2006-16 § 166-2(I)-(J) (2006) (amended by Ordinances 2006-19, 2006-26) (describing how unscrupulous landlords who rent to unauthorized people typically charge them excessive rent, which leads to overcrowding conditions, which then cause fire, health, and public safety hazards).

242. Nothing in federal law prevents unauthorized immigrants from owning homes. Unauthorized immigrants are often able to apply for credit and open bank accounts using the Individual Taxpayer Identification Number (“ITIN”) issued by the IRS, which allows undocumented people to pay taxes in lieu of a Social Security Number. It is not uncommon for banks (including large lenders such as Citibank and Bank of America) to use ITINs in making mortgage loans to undocumented people. *See* Kenneth R. Harney, *Should Taxpayer ID Be Enough for a Loan?*, SAN JOSE MERCURY-NEWS, Feb. 24, 2007, at RE8 (discussing a proposed bill

also reside with friends or relatives who own their homes, or they may become homeless but still remain in the area to work. AII rental restrictions are over-inclusive because, as discussed *supra*, they may force out U.S. citizens and legal residents who reside in mixed families.²⁴³

3. Regulatory and Bureaucratic Mechanisms

The regulatory and bureaucratic mechanisms required to implement any AII housing ordinance would be onerous, intrusive, and prohibitively expensive. Regardless of who enforces AII housing measures—federal officials, local officials, or private landlords—the ability to do so depends on the existence of a quick, cheap, and reliable means to verify the legal status of every tenant and applicant for housing. Indeed, virtually all of the Hazleton-style ordinances require verification with the “federal government” as a central feature of their enforcement and/or registration schemes. Such a requirement would require a comprehensive database containing accurate and up-to-date

that would prohibit home loans to anyone without a social security number); Miriam Jordan, *Loans to Illegals Seen as Sturdy*, CHI. SUN-TIMES, Oct. 14, 2007, at S8 (noting that, even with the credit crunch, this type of loan is still made frequently and has a lower default rate than other types of loans); Juan Antonio Lizama, *Documents Can Help Illegal Immigrants Get Accounts*, RICHMOND TIMES-DISPATCH, Sept. 16, 2007, at A14 (noting that some banks will give loans without verifying an immigrant’s status, so long as he has a reliable source of identification); Rick Rothacker, *Mortgages for Illegal Immigrants: Goal of Attracting Hispanic Market Also Creates Window for Segment*, CHARLOTTE OBSERVER, July 29, 2007, at 1D (arguing that banks are making this type of loan in an effort to attract the Hispanic market); see also Calvin Bellamy, *Serving the Under-Served: Banking for Undocumented Immigrants*, AM. IMMIGR. LAW FOUND., Mar. 30, 2007, available at <http://www.immigrationpolicy.org/index.php?content=P20070416> (discussing the potential benefits of this type of loan to an under-served group).

A number of states have so-called “alien land laws,” which restrict noncitizens from owning property in a variety of ways. Early versions of these laws focused in a direct and discriminatory way on race and national origin. For example, California passed a law that essentially prohibited only noncitizens of Japanese origin from owning property. Such obviously discriminatory laws have since been repealed. Today, the vast majority of such laws are not targeted at aliens per se, but at *non-resident* aliens and/or corporations, or at alien ownership of resources such as agricultural fields or industrial sites. For a discussion of alien land laws, their history, and their current iterations, see generally Ronald L. Bell & Jonathan D. Savage, Note, *Our Land is Your Land: Ineffective State Restriction of Alien Land Ownership*, 13 J. MARSHALL L. REV. 679 (1980); William B. Fisch, *State Regulation of Alien Land Ownership*, 43 MO. L. REV. 407 (1978); James A. Fretcher, Note, *Alien Landownership in the United States: A Matter of State Control*, 14 BROOK. J. INT’L L. 147 (1988); James R. Mason, Jr., Note, *“Pssst, Hey Buddy, Wanna Buy a Country?” An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VAND. J. TRANSNAT’L L. 453 (1994); Fred L. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621 (1976).

243. See *supra* Section III.A.1.a.

information about every lawful immigrant and non-immigrant visitor to the United States at a given time.²⁴⁴ No such database exists.²⁴⁵

The federal government maintains a variety of immigration-related databases for specific purposes. For example, the U.S. Customs and Immigration Service (“USCIS”) operates a database to check immigration status for work authorization called E-Verify (formerly known as Basic Pilot).²⁴⁶ E-Verify compares a job applicant’s name, date of birth, and social security number against centralized databases run by the Social Security Administration and USCIS to verify identity and citizenship status.²⁴⁷ The information is then run through a database operated by the Department of Homeland Security to determine employment eligibility.²⁴⁸ E-Verify is part of a larger program used to check immigration status for receipt of welfare benefits called Systematic Alien Verification for Entitlements (“SAVE”).²⁴⁹ There are a variety of reasons why these systems should not be used to verify legal status for prospective tenants.

244. This is in contrast with employment and receipt of public benefits, for which only limited categories of lawful immigrants and non-immigrant visitors are eligible. As discussed below, there are specialized databases for making such eligibility determinations, although these have serious flaws. See *infra* notes 245–52.

245. After Farmers Branch approved the latest version of its AII ordinance, a spokesperson for the U.S. Citizenship and Immigration Services was quoted as saying: “There is no database where the city or anyone can pick up the phone and give alienage, like yes this person is legal or no that person isn’t legal; there is no such database.” Annabelle Garay, *Suburb Passes New Anti-Immigrant Rule*, USA TODAY, Jan. 22, 2008 (quoting Maria Elena Garcia-Upson), available at http://www.usatoday.com/news/nation/2008-01-22-1094435090_x.htm. It was for this reason that Escondido, California stipulated to a permanent injunction of its AII housing provision. See Statement Regarding City of Escondido Actions Approving Stipulation for Final Judgment and Permanent Injunction 1 (Dec. 13, 2006) (noting that “the lack of an assured federal database to determine the status of individuals for housing purposes” was a “serious problem”), available at <http://www.ci.escondido.ca.us/immigration/Statement.pdf>.

246. Congress authorized the development of the Basic Pilot program in 1996, through the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), §§ 401–405, Pub. L. 104-208, codified as a note to 8 U.S.C. § 1324a (2000). Currently, participation in the Basic Pilot/E-Verify system is voluntary, and only a fraction of employers do so. See NAT’L IMMIGR. LAW CTR., BASIC PILOT/E-VERIFY NOT A MAGIC BULLET 1 (2008), http://www.nilc.org/immsemplymnt/ircaempverif/e-verify_nomagicbullet_2008-01-04.pdf [hereinafter NOT A MAGIC BULLET] (noting that fewer than one percent of U.S. employers take part in the voluntary system).

247. NOT A MAGIC BULLET, *supra* note 246, at 1.

248. *Id.*

249. Information about SAVE and E-Verify is available at the U.S. Customs and Immigration Service’s website, www.uscis.gov. The National Crime Information Center also maintains an “Immigration Violators File,” which is the primary nationwide law enforcement database queried regularly by local law enforcement officials. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 325 (2005). However, this database is limited to people who have received final orders of deportation and have absconded, which is only a small fraction of the total illegal immigrant population, *id.* at 325 n.4 (noting that of the roughly 10 million illegal

First, these databases are filled with inaccuracies, and these inaccuracies disproportionately work to the detriment of noncitizens and naturalized citizens. Audits of the E-Verify program have found that foreign-born people who are work authorized are thirty times more likely to receive a tentative nonconfirmation from the database.²⁵⁰ Almost 10% of foreign-born individuals who are U.S. citizens receive erroneous tentative nonconfirmations.²⁵¹ Because of data entry errors, lack of updated information, and inconsistent recordkeeping systems across databases, an estimated 20% of all initial program entries result in false negatives.²⁵² The Social Security Administration's database is riddled with errors, which are caused by data-entry mistakes, inconsistent transliteration of foreign names, applicants who use a less "foreign" sounding first name for work purposes, and different naming conventions that are common in many parts of the world (such as multiple surnames, or the inversion of family name and given name).²⁵³ The problems with these databases led Illinois to pass a law prohibiting employers from making use of the

immigrants in the United States in 2004, there were approximately 400,000 absconders), and even this database is incomplete, *id.* at 325 n.5 (noting that of the 400,000 absconders believed to be in the United States as of 2004, only 38,587 had been entered into the IVF database).

250. WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION (2007) [hereinafter 2007 Audit], available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>; U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-05-813, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS (2005) [hereinafter 2005 GAO REPORT], available at <http://www.gao.gov/new.items/d05813.pdf>.

251. 2007 Audit, *supra* note 250, at 97.

252. *Problems in Current Employment Verification and Worksite Enforcement System: Hearings Before the Subcomm. on Immigration, Citizenship, Refugee, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Stephen Yale-Loehr) [hereinafter Yale-Loehr Testimony], available at <http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf>.

253. Complaint ¶ 25, *Am. Fed'n of Labor v. Chertoff*, No. C 07-04472 CRB, 2007 WL 2972952 (N.D. Cal. 2007) (filed Aug. 28, 2007). It is estimated that the SSA database contains more than 17 million discrepancies. SOCIAL SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., CONGRESSIONAL RESPONSE REP. NO. A-08-06-26100, ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE 5 (2006), available at <http://www.ssa.gov/oig/ADOBEPDF/A-08-06-26100.pdf>. An estimated 4.8 million records for noncitizens who are work authorized, and 248,560 for naturalized U.S. citizens contain discrepancies that may result in inaccurate employment eligibility results when the database is queried. *Id.* at 9, 11.

When an employer's records do not match the SSA's records, the SSA sends the employer a "no-match" letter notifying them of the discrepancy. 20 C.F.R. § 422.120(a) (2008). In 2007, the DHS passed a rule that would require employers receiving such letters to take immediate action against the referenced employees. See *Am. Fed'n of Labor v. Chertoff*, 552 F. Supp. 2d 999, 1003-04 (N.D. Cal. 2007) (explaining that employers may not simply disregard these notices). In October of 2007 a federal district court judge enjoined enforcement of the rule because of concerns over the accuracy of the database. *Id.* at 1015.

E-Verify system.²⁵⁴ As a result of these flaws, noncitizens and naturalized citizens suffer expense and delays in obtaining employment. If the false negative cannot be reconciled, the records must be verified by hand, which can take two weeks or longer.²⁵⁵ This causes problems for employees who wish to begin work. For a family waiting to move into an apartment, such a delay may cause a serious hardship.

Second, studies have also shown that employers consistently use the E-Verify system improperly, in ways that harm noncitizens and national origin minorities. A Memorandum of Understanding that all users must sign requires that E-Verify only be used to verify the status of individuals who have received offers of employment—that is, it should not be used to screen job applicants or to eliminate existing employees hired before E-Verify’s creation.²⁵⁶ In addition, employers are prohibited from penalizing employees who receive a tentative nonconfirmation. Audits of the program, however, have discovered that employers are likely to use E-Verify to do all the above: screen out applicants, weed out existing employees, and penalize employees whose status cannot be immediately confirmed.²⁵⁷ These actions are disproportionately taken against Asian and Latino workers.

The lack of a centralized system makes any system requiring “dial-in” or web-based verification infeasible. Simply maintaining an easily accessible, constantly changing database with information about every single legally present noncitizen—a larger group than those people who are work authorized—would be a costly and daunting administrative task. Even with such a system, verification of all prospective tenants of rental housing would be impractical and extremely expensive given the numbers involved. Rental housing makes up a significant amount of the private housing market. In 2000,

254. Illinois Act, Pub. L. No. 095-0138 § 12(a) (amending the Illinois Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. 55/1, *et seq.*). The federal government challenged the law. Complaint, United States v. Illinois (C.D. Ill. filed Sept. 24, 2007), *available at* http://www.dhs.gov/xlibrary/assets/US_v_Illinois_Complaint_092407_to_File.pdf. In response, Illinois agreed to halt the enforcement of the law, and both parties requested that the lawsuit be stayed in order to give the Illinois General Assembly the chance to override the law. See Stephen Franklin, *Deal On Verifying Workers Reached: Illinois Won't Block Checks of Legal Status*, CHI. TRIB., Dec. 18, 2007, at A3.

255. Yale-Loehr Testimony, *supra* note 252, at 6 (noting that the verification process can take two weeks or longer for noncitizens); 2005 GAO REPORT, *supra* note 250, at 23–24 (noting that fifteen percent of queries required manual verification, and that of these, some took as long as two weeks to resolve).

256. Basic Employment Verification Pilot Memorandum of Understanding art. II, § C, ¶ 8 (2006), *available at* <http://www.uscis.gov/files/article/MOU.pdf>.

257. 2007 Audit, *supra* note 250, at 100–01.

there were more than 35.6 million units of rental housing in the United States, which accounted for 33.8% of all housing.²⁵⁸ The average rental unit contained 2.4 people.²⁵⁹ Recall from the earlier discussion of the Fair Housing Act that, to comply with the law, AII provisions must apply to *all* prospective tenants, not simply those who “seem foreign.”²⁶⁰ Thus, every single renter or prospective renter would have to prove his or her legal status prior to signing a lease. If AII housing restrictions became national policy, this would come out to well over 85 million people whose status would have to be verified.²⁶¹ Creating and operating a program of this magnitude would be both costly and a bureaucratic nightmare.²⁶²

The U.S. immigration system is extremely complex. It already requires an enormous bureaucracy to administer and enforce. It necessitates unwieldy databases and multiple processes just to verify whether a person is work eligible. If landlords and local officials were required to determine whether every tenant is “lease eligible,” the bureaucratic obstacles and costs would be prohibitive. It is unlikely that the nation’s landlords—and tenants—would be willing to accept this extra layer of regulation and bureaucracy. The collateral consequence of such a regime would likely be that many small landlords would choose to leave the rental business entirely, rather than assume the costs and legal risks of attempting to comply.

258. U.S. CENSUS BUREAU, GENERAL HOUSING CHARACTERISTICS (2000), available at http://factfinder.census.gov/servlet/QTSubjectShowTablesServlet?_lang=en&_ts=249054700826 (select “QT-H1. General Housing Characteristics”).

259. U.S. CENSUS BUREAU, HOUSEHOLD POPULATION AND HOUSEHOLD TYPE BY TENURE (2000), available at http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_QTH3&-ds_name=DEC_2000_SF1_U.

260. See *supra* Section II.B.2.a.

261. This figure represents a snap shot of the rental population at any given time, and cannot be used to make an estimate of the number of verifications that would be required annually. Obviously, some people remain in rental housing for more than one year, in which case their status presumably would not have to be re-verified. However, others may enter into short-term leases and may move during the year, in which case their status would have to be verified more than once in a single year. This also does not take into consideration the verifications that would need to occur in response to complaints, if such a mechanism were contained in a federal policy.

262. By way of comparison, it is estimated that making a dial-in version of the Basic Pilot system mandatory for all 8.4 million employers in the United States would cost the federal government, employers, and employees about \$11.7 billion total per year, with employers bearing most of the costs. 2005 GAO REPORT, *supra* note 250, at 29. An expert who testified about the ramifications of making the E-Verify Program mandatory for all employers, stated that “expanding Basic Pilot in its current state and requiring participation by all 8.4 million employers would be a bureaucratic nightmare.” Yale-Loehr Testimony, *supra* note 252, at 6.

IV. THE NEED TO PROTECT HOUSING ACCESS FOR LEGALLY PRESENT NONCITIZENS, LEGAL IMMIGRANTS, AND NATIONAL ORIGIN MINORITIES GENERALLY

The analysis in Section II concluded that AII housing ordinances are likely to cause landlords to violate the Fair Housing Act and lead to increased housing discrimination against national origin minorities. Even though AII ordinances do not facially conflict with the FHA (they do not, after all, instruct landlords to discriminate on the basis of national origin), they will almost inevitably violate it in their application. A regime in which both coexist, therefore, is untenable. As a result, Congress has two choices: it must either remove the prohibition against national origin discrimination from the FHA, or it must prevent municipalities from enacting AII housing provisions.

If Congress removes national origin as a protected characteristic from the FHA, the result will be disastrous for national origin minorities. National origin was listed as a protected characteristic in the original version of the FHA precisely because Congress recognized that, like race, it is highly likely to be the object of invidious discrimination.²⁶³ Private discrimination based on national origin has been commonplace in American history.²⁶⁴ Local governments have used their zoning and regulatory power to target national origin minorities since at least the mid-1800s.²⁶⁵ Racially

263. National origin, race, and religion have long been the characteristics most clearly protected by modern civil rights laws. TRACEY MCCARTNEY & SARA PRATT, *THE FAIR HOUSING ACT: 35 YEARS OF EVOLUTION* 1 (2008), <http://www.fairhousing.com/include/media/pdf/35years.pdf>. They were the original protected characteristics in Title VII and in the FHA (which was modeled to some degree on Title VII). *Id.* There was little separate discussion of national origin in the legislative history of either statute, most likely because race and national origin were seen as having significant overlap. Raechel L. Adams, Comment, *English-Only in the Workplace: A New Judicial Lens Will Provide More Comprehensive Title VII Protection*, 47 CATH. U. L. REV. 1327, 1330–32 (1998). Sex was not added to the FHA until 1972, and disability and familial status were not added until 1988. MCCARTNEY & PRATT, *supra*, at 3–4.

264. Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the “Black-White Paradigm,”* 54 RUTGERS L. REV. 959, 975–76 (2002); Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1322–23 (1997).

265. In response to an influx of Chinese immigrants during the mid-part of the 1800s, municipalities in California enacted zoning laws that directly discriminated against them. Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 63 (1993). When these laws were struck down, the municipalities passed facially-neutral ordinances that were nevertheless targeted at the Chinese, and which were struck down by the Supreme Court. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (describing San Francisco ordinance regulating laundries that was applied only to Chinese immigrants). Nonetheless, municipalities continued to pass “Chinese laundry” ordinances into the 1930s. David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211, 230 (1999).

restrictive zoning was common in the beginning of the twentieth century.²⁶⁶ One of the fears of early opponents of modern zoning was that municipalities would use zoning ordinances “for the purpose of segregating in like manner various groups of newly arrived immigrants.”²⁶⁷

Even with national origin as a protected characteristic, all of the available data indicate that national origin minorities—particularly Latinos—continue to face tremendous levels of discrimination in the private rental market. The most comprehensive national testing project done to date found that there is a 25.7% likelihood that a Latino will be discriminated against when seeking rental housing.²⁶⁸ Based on these findings, it is estimated that a total of 1,178,315 instances of discrimination against Latinos occur annually in the private rental market.²⁶⁹ Testing for “accent discrimination” reveals that Latinos with a discernable accent may be discriminated against as much as two-thirds of the time they attempt to obtain rental housing.²⁷⁰ Latinos currently experience high levels of residential segregation from non-Latino whites.²⁷¹ And even though overt national origin discrimination in zoning is prohibited, municipalities have found more indirect ways in recent years to target Latinos for discrimination.²⁷²

266. For a discussion of racially-restrictive zoning ordinances, see Oliveri, *supra* note 112, at 59–62. The Supreme Court struck down racially-restrictive zoning laws in 1917. *Buchanan v. Warley*, 245 U.S. 60 (1917). Despite this, municipalities continued to pass such laws, which continued to be struck down, for another thirteen years. See *City of Richmond v. Deans*, 281 U.S. 704, 704 (1930) (affirming the Fourth Circuit’s holding that struck down a racially-restrictive zoning ordinance in Virginia); *Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (reversing the Louisiana Supreme Court’s ruling in favor of a zoning ordinance that racially discriminated against African-Americans).

267. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 313 (N.D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926).

268. U.S. DEPT. OF HOUSING & URBAN DEV., HOUSING DISCRIMINATION SURVEY FINAL REPORT 3–5 (2002). This was the researchers’ best estimate. *Id.* Their upper-bound estimate was that Latinos would be discriminated against 52.7% of the time. *Id.*

269. NAT’L FAIR HOUSING ALLIANCE, 2004 FAIR HOUSING TRENDS REPORT 3 (2004).

270. Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 477 n.119 (2007) (describing testing in various cities that showed rates of discrimination at 66%, 65%, and 52%).

271. Researchers use an Index of Dissimilarity (“ID”) to compute how segregated a particular racial or ethnic group is from other groups. LEWIS MUMFORD CTR., ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND (2001), available at <http://mumford.albany.edu/census/WholePop/WPreport/page1.html>. Values of forty to fifty are considered moderate. *Id.* In 2000, Latinos had an ID value of 51.5 from non-Latino whites. *Id.* Troublingly, while the ID value for African-Americans and whites has been steadily declining in the last twenty years, the ID values for Latinos have remained essentially unchanged. *Id.*

272. See, e.g., Feagin, *supra* note 264, at 979–80 (describing how, in cities from New York to California, discriminatory building code enforcement has been used to target Latinos); Yale

National origin minorities, particularly recent immigrants, share characteristics that make them more vulnerable to housing discrimination and poor treatment by unscrupulous landlords. For example, landlords may take advantage of their tenants' lack of legal status, knowing that they will not complain.²⁷³ Even immigrants who are legally present may be reluctant to initiate complaints because they are not citizens.²⁷⁴ They may also be unaware that they possess legal rights not to be discriminated against in housing and lack knowledge of where to go for help.²⁷⁵ Language differences may also act as an impediment.²⁷⁶ In addition to outright national origin discrimination, the financial circumstances and family characteristics (such as larger and extended families) of recent immigrants make it difficult for them to find housing and easier for landlords to discriminate against them.²⁷⁷

National origin is thus an extremely important protected characteristic in the housing context, and eliminating it would threaten access to housing for millions of national origin minorities. The AII housing ordinances, therefore, must go. The United States needs a strong national policy against AII housing restrictions; thus, Congress should enact legislation explicitly preempting states and localities from enacting such restrictions.²⁷⁸

Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 101-20 (Charles M. Haar & Jerold S. Kayden eds., 1989) (documenting cases in which cities displaced thousands of black and Latino residents using "urban renewal" after the minority neighborhoods had been deliberately blighted through overzoning and lack of municipal services); Carla Dorsey, Note, *It Takes a Village: Why Community Organizing is More Effective than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. ON POVERTY L. & POL'Y 437, 441-58 (2005) (describing attempts by several cities to condemn, destroy, and redevelop predominantly Latino areas); Luna, *supra* note 151, at 72-77 (describing pattern of Midwestern municipalities enacting restrictive occupancy codes in order to keep out Latinos and enforcing housing codes against Latinos in a discriminatory and abusive manner); Feagin, *supra* note 264, at 979-80 (describing how, in cities from New York to California, discriminatory building code enforcement has been used to target Latinos); Paul F. Cuadros, *Suburban Housing Inspectors Crack Down on Latinos*, CHI. REP. (Sept. 1995), available at <http://www.chicagoreporter.com/issue/index.php?issueId=289> (describing how communities in the Chicago suburbs used occupancy restrictions and housing codes to target Latino immigrants).

273. Luna, *supra* note 151, at 67-68.

274. Herminia L. Cubillos, *Fair Housing and Latinos*, 2 LA RAZA L.J. 49, 59 (1988).

275. *Id.*

276. *Id.*

277. *Id.* at 50-51.

278. In an ideal world, Congress would still remain sensitive to the reality that local governments do the lion's share of the work of accommodating and assimilating immigrant populations. Congress could perhaps make funding available to such communities so that they can undertake housing rehabilitation programs, comprehensive planning, and other measures designed to successfully absorb a population of newcomers. The City of Santa Ana, California

The time may well come, however, when Congress is asked to consider what actions it can take to restrict housing for unauthorized immigrants. It may wish to devolve authority to the states to act or enter into cooperative agreements with localities or require individual landlords to screen for legal status. For the reasons discussed in Section III, however, none of these options is advisable. Congress must not only prevent states and municipalities from legislating in this area; it must also decline to take any action itself in support of AII measures.

This, however, will still not go far enough to protect national origin minorities and legally present noncitizens from housing discrimination because housing discrimination based on legal status and alienage remains permissible under the Fair Housing Act.²⁷⁹ Landlords may attempt on their own initiative to screen tenants for legal status or alienage, or landlords may feel pressure to do so from municipal authorities or community members. There are two problems with this. First, these attempts will only lead to discrimination slippage and result in discrimination based on national origin. Second, even in the absence of discrimination slippage, housing discrimination against noncitizens who are legally present in the United States is problematic. It is illogical and bizarre that our national immigration law permits legally present noncitizens to reside here, and yet our housing rights law allows private individuals to deny them housing because of their legal status.

In addition to preempting subfederal governments from passing AII housing ordinances, Congress should make alienage a protected characteristic in the Fair Housing Act, clearly according legally present noncitizens the same level of protection in the housing market that they receive in the employment market.²⁸⁰ The FHA's omission of alienage invites discrimination and has empowered the municipalities that passed AII housing ordinances.²⁸¹ There is no good

provides an exemplary case study of how municipalities can use their land-use and redevelopment powers to respond to influxes of immigrant groups without discriminating against or marginalizing them. See, e.g., Stacy Harwood & Dowell Myers, *The Dynamic of Immigration and Local Governance in Santa Ana: Neighborhood Activism, Overcrowding, and Land-Use Policy*, 30 POLY STUDIES J. 70, 70-91 (2002) (analyzing the City of Santa Ana's use of land-use policy to promote urban revitalization and bring substandard housing up to code).

279. As discussed *supra*, note 127, 42 U.S.C. § 1981 provides some protection against alienage discrimination, but is an imperfect remedy.

280. In the absence of clear guidance from the Supreme Court, Congress should also specify that private acts of housing discrimination based on alienage are prohibited by § 1981.

281. At least one municipality to pass a housing AII ordinance, Farmers Branch, specifically noted the fact that the FHA has no protection for alienage in the preamble to its ordinance. See Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), available at <http://www.aclu.org/>

reason to permit a landlord to discriminate on this basis, particularly with respect to permanent residents who have indicated an intention to reside in this country indefinitely.²⁸² At the same time, there is a strong likelihood that such discrimination is based on animus toward noncitizens, national origin minorities, or both. At least one major city, New York City, has recognized this, and has a longstanding ordinance prohibiting landlords from inquiring about or discriminating on the basis of the alienage or citizenship status of prospective or existing tenants.²⁸³

But adding alienage as a protected status still may not go far enough. In the absence of a prohibition against legal status discrimination, landlords are free to discriminate against groups of people who are legally entitled to be in the United States. For example, a landlord can decide to rent to people with a particular legal status, such as lawful permanent residents, but not to others, such as individuals on work or student visas. Moreover, discrimination slippage suggests that a prohibition against alienage-based discrimination would be meaningless without protection based on legal status. It would be far too easy for a landlord attempting to discriminate only on the basis of legal status to discriminate based on citizenship or national origin. Therefore, Congress should also consider making legal status a protected category in the Fair Housing Act. This would prohibit housing providers from inquiring about or discriminating based on a person's immigration status. This would also interpose another barrier to local and state governments trying to pass AII housing ordinances.

Recently, California adopted a first-of-its-kind law that does exactly this. The law prohibits landlords from asking tenants or prospective tenants for proof of legal status²⁸⁴ and prohibits California municipalities from passing legislation to compel landlords to make such inquiries.²⁸⁵ Not surprisingly, the law passed with the support of

pdfs/immigrants/farmersbranch_ordinance.pdf ("WHEREAS, the Fair Housing Act does not prohibit distinctions based solely on a person's citizenship status . . .").

282. For temporary (non-immigrant) visitors who are present on student or work visas, an argument could be made that landlords should be able to limit lease terms to the length of time that a tenant is legally permitted to remain in the country, because temporary visitors are subject to deportation after their time expires. However, visas may be extended or new visas may be issued, and until these things happen there is no way to determine how long a visa holder will be permitted to remain in the United States.

283. N.Y. CITY ADMIN. CODE § 8-107(5).

284. CAL. CIV. CODE § 1940.3(b) (West 2007).

285. *Id.* § 1940.3(a).

both immigrant rights groups and apartment owners.²⁸⁶ At the time of this writing, the law had only recently gone into effect, so its long-term effects are difficult to gauge.²⁸⁷ From the perspective of safeguarding housing for national origin minorities and legally present noncitizens, however, it is clearly a step in the right direction.

CONCLUSION

The combination of AII ordinances, discrimination slippage, congressional inaction on comprehensive immigration reform, and the gaps in fair housing laws has left us in an unstable position with respect to housing our nation's immigrants and national origin minorities. Something has to give. Unfortunately, the *Hazleton* opinion merely defers the reckoning to another time or another authority.

In order to protect national origin minorities who are citizens and legally present noncitizens from discrimination, it is not enough for the federal government to bar localities from passing AII housing ordinances and to refuse to act itself. Such discrimination already occurs to a significant degree, and it is only encouraged by the contentious nature of the immigration debate. Discrimination slippage, and the fact that both alienage and legal status discrimination are permissible under the Fair Housing Act, already create conditions in which people who have every right to be in this country are likely to be discriminated against in housing.

As a result, Congress must create affirmative protections in the Fair Housing Act for both alienage and legal status. However, the experience of California notwithstanding, a blanket prohibition against taking legal status into consideration in housing would be a hard sell as a matter of federal law. Even the most pro-immigrant politicians tend to draw the line at illegal immigrants, and there would be enormous political backlash among some constituencies if such a law did pass. Given the intense emotions surrounding the issue of illegal immigration, it is difficult to imagine the general population accepting the concept of illegal immigrants being given any type of

286. See Frank D. Russo, *California Becomes First State to Prohibit Landlords From Asking About Tenants' Immigration Status*, CAL. PROGRESS REP., Oct. 12, 2007, available at http://www.californiaprogressreport.com/2007/10/california_beco.html (discussing the passage of California's law and its widespread support).

287. Future scholarship should examine whether the new law has an effect on the overall level of housing discrimination against Latinos and other national origin minorities in California, and whether it appreciably affects housing quality and overcrowding.

“special protection” in the law, particularly if this law is imposed from Washington.²⁸⁸

It is important, however, to underscore that these (somewhat radical) reforms I propose are necessary to combat discrimination against American citizens who are national origin minorities and legally present noncitizens—groups of people whom our laws recognize as having every right to be here. That my proposals will also have the effect of making life slightly easier for undocumented immigrants is a collateral consequence that, I submit, is worth accepting when it comes to an area as fundamental as access to housing.

288. Admittedly, Peter Spiro’s “steam valve” theory of immigration federalism cautions against such top-down measures. Peter J. Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627, 1628–39 (1997).
