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NOTE

THE CONSTRICTION OF RIGHTS: A PROPERTY LAW APPROACH TO CITY-BASED IMMIGRATION INITIATIVES THAT PLACE RENTAL BANS ON CITY BALLOTS

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I. Introduction

A landlord in Farmers Branch, Texas agrees to meet with prospective renters interested in leasing an apartment. After agreeing to show them the apartment, the landlord meets the prospective renters for the first time. The interested renters may be of Latin American descent, or, at least, this is what the landlord believes based upon their physical traits. Perhaps, the landlord believes this because of their skin color, hair color, or eye color. The hint of an accent gives the landlord some indication that the prospective renters are not native English speakers.

After being shown the apartment, the prospective renters express interest in renting it, and the landlord asks for documentation proving their immigration status as either citizens or lawful permanent residents. The landlord is specific in his request for "original documents of eligible citizenship or immigration status."[1] The landlord knows he should ask for documentation of immigration status from all interested parties looking to rent an apartment, but he does not always ask. He believes these renters, however, warrant special attention. After all, they do not seem to be Americans. Whether, in his history as lessor and apartment manager, the landlord would typically request such documentation is irrelevant. On this particular day and with these prospective renters, the landlord is merely doing what he is supposed to do—follow the law.

1. *See* Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007), *available at* http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf (requiring local landlords to rent only to tenants who can establish lawful immigration status).

This hypothetical scenario is not unimaginable and certainly not unique to Farmers Branch, Texas.[2] Cities across the country, including, but not limited to, Farmers Branch, Texas;[3] Hazleton, Pennsylvania;[4] Escondido, California;[5] Cherokee County, Georgia;[6] and Valley Park, Missouri,[7] as well as more than one hundred other communities, have passed ordinances that mandate that landlords and apartment managers verify the immigration status of all prospective renters.[8] The adoption and effective implementation of rental ordinances, otherwise known as rental bans, stem from cities' claims of authorized police power.[9] The alleged purpose behind rental bans is protection of communities, as certain cities maintain that rental bans are implemented to "promote the public health, safety, and general welfare of the public."[10] Cities that pass rental ban ordinances do not merely require landlords and apartment managers to enforce these bans out of courtesy and respect for the protection of residents, but rather landlords who violate ordinances are often subject to prosecution.[11]

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2. *See* Associated Press, *Texas City Faces Lawsuit over Rental Rules*, N.Y. TIMES, Sept. 16, 2008, at A18, *available at* 2008 WLNR 17574669 (describing MALDEF's and ACLU's joint lawsuit against Farmers Branch).

3. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006).

4. Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), *invalidated by* Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Pa. 2006), *enforced*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordiance.pdf.

5. Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), *invalidated by* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006), *available at* http://www.aclu.org/pdfs/immigrants/escondido-ordinance.pdf.

6. Cherokee County, Ga., Ordinance 2006-003 (Dec. 5, 2006), *available at* http://www.aclu.org/pdfs/immigrants/cherokeecounty_ordinance.pdf.

7. Valley Park, Mo., Ordinance 1715 (Sept. 26, 2006), *available at* http://www.aclu.org/pdfs/immigrants/valleypark_amendedordinance.pdf.

8. *See* Dianne Solís & Stephanie Sandoval, *Pennsylvania Ruling May Jeopardize FB Rental Ban*, DALLAS MORNING NEWS, July 27, 2007, at 1A, *available at* 2007 WLNR 14446376 (describing ordinances in Hazleton and Farmers Branch).

9. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 761 (N.D. Tex. 2007) (exploring the reasons for a city rental ban). The City of Farmers Branch argued that the federal requirement of proving U.S. citizenship or valid immigration status in order to rent would also benefit the city by safeguarding the public. *Id.* The court observed the city's frustration with the federal government for not regulating immigration for various reasons, such as lack of resources and manpower. *Id.* at 763. Furthermore, the court pointed out that, notwithstanding the will of the people to overwhelmingly support this ordinance, the ordinance cannot be enforced if it runs counter to the Constitution. *Id.*

10. *Id.*

11. *E.g.*, *id.* at 763 ("[A]ny person violating . . . the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction . . . shall be fined in a sum not to exceed [five hundred dollars] and a separate offense shall be deemed committed upon each day during or on which [a] violation occurs or continues.").

Recent lawsuits in Farmers Branch, Texas and Hazleton, Pennsylvania are, arguably, just the beginning of litigation on this issue.[12] Though courts have issued injunctions prohibiting enforcement of the Farmers Branch and Hazleton ordinances,[13] cities continue to perfect their appeals and crusade for the necessity of rental bans up to the highest courts. Cities will continue to draft rental bans and other similar laws because "the unhappiness of American citizens with their government's failure to enforce immigration laws, and the resulting pressure on their elected officials to do something, is not going away."[14] In spite of recent judicial decisions precluding some cities from continuing enforcement of rental ban ordinances, cities, municipalities, and states "will continue to exercise their authority to act in this field [of immigration reform], absent a sweeping enactment by Congress to preempt such state laws and erase existing federal statutes that invite states to act."[15] Recent litigation has primarily focused on the constitutional rights of individuals affected by the adoption and implementation of rental bans, as well as the importance of cities' blatant disregard of federal immigration laws.[16]

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12. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007) (holding that Hazleton's rental ban should be blocked); *Villas at Parkside Partners*, 496 F. Supp. 2d at 763 (invalidating the Farmers Branch rental ban).

13. *Lozano*, 496 F. Supp. 2d at 554; *Villas at Parkside Partners*, 496 F. Supp. 2d at 777.

14. Jan C. Ting, *The Case for Immigration Law Enforcement in the United States and in Hazleton, Pennsylvania*, 17 WIDENER L.J. 383, 390 (2008) (footnote omitted); *see also* Gaiutra Bahadur, *In Riverside, All Sides Are Now Taking Offense*, PHILADLPHIA INQUIRER, Aug. 6, 2006, at B1, *available at* 2006 WLNR 13566218 (stating that cities and municipalities maintain that "federal inaction on illegal immigration has forced them into the role of immigration enforcers as they confront quality-of-life issues that strain resources").

15. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 482–83 (2008); *see also* Matt Birkbeck, *The Fight's Not Over: Appeals Expected in Hazleton Case After Judge Strikes Down Law Regulating Illegal Immigrants*, MORNING CALL (Allentown, Pa.), July 27, 2007, at A1, *available at* 2007 WLNR 14455745 (claiming that in July 2007, supporters of the Hazleton rental ban maintained that appeals of the permanent injunction against its enforcement would follow). Hazleton's mayor, Lou Barletta, stated, "We are not going to stop fighting for the quality of life that we value here in Hazleton. I realize today that we're not only fighting for Hazleton any longer, we're fighting for cities all across the country." Matt Birkbeck, *The Fight's Not Over: Appeals Expected in Hazleton Case After Judge Strikes Down Law Regulating Illegal Immigrants*, MORNING CALL (Allentown, Pa.), July 27, 2007, at A1, *available at* 2007 WLNR 14455745.

16. *See* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1051 (2007) (discussing the typical anti-immigrant ordinance provisions, which include penalties for employers who knowingly hire undocumented immigrants, prohibit renting to undocumented immigrants, and forbid businesses or municipal entities from printing publications in a language other than English).

This Note describes the issue of rental ban ordinances from a different perspective, dealing principally with property rights. Although this Note will discuss the issue from a position of property law, there will be relevant discussion of constitutional rights, as constitutional rights are integral to the immigration issue and cannot be disregarded, even from a property-related approach. There will be ample discussion of the constitutional issues with respect to property rights of individuals affected by rental bans, and this Note will approach the issue from the perspectives of both prospective renters and landlords. Relevant sections of the Fair Housing Act[17] will be discussed in detail as it pertains to both landlords and renters. Although it is speculative at this stage of legal development to say whether appellate courts will ultimately rule against rental ban ordinances, an understanding of this issue, as well as the rights affecting property owners and renters is necessary given the complicated future of immigration ordinances. This Note seeks to illustrate how various areas of law, including property law, may provide the framework for impending litigation against cities that enact rental ban ordinances.

II. BACKGROUND

A. *Genesis and Evolution of Rental Ban Ordinances*

Cities that pass rental ban ordinances have adopted policies and customs that provide prospective plaintiffs with ample legal claims. Landlords, property owners, and apartment managers who adhere to the requirements of rental ban ordinances will undoubtedly find themselves in precarious circumstances and could conceivably incur liability for merely carrying out city-mandated laws.

Proponents of rental bans maintain that cities have the right to implement their own immigration measures.[18] One could argue that cities that place rental ban ordinances on the ballot are taking steps to reduce their communities' facilitation of illegal immigration.[19] But the regulation of

17. 42 U.S.C. §§ 3601–3619 (2006).

18. *See* Edward Sifuentes, *FAIR Could Join Escondido to Defend Rental Ban*, N. COUNTRY TIMES (San Diego, Cal.), Oct. 28, 2006, *available at* http://www.nctimes.com/articles/2006/10/29/news/top-stories/22_03_2810_28_06.txt (discussing the arguments made by defenders of rental bans). Further, early twentieth-century Supreme Court precedents support this argument. *See, e.g.*, New Orleans Pub. Serv., Inc. v. City of New Orleans, 281 U.S. 682, 686 (1930) (holding that a city is essentially an "arm of the state, [and] has . . . wide discretion in determining what precautions in the public interest are necessary or appropriate under the circumstances"); Terrace v. Thompson, 263 U.S. 197, 216–17 (1923) (echoing the idea that a state has broad discretion in determining public policy when concerning the health, safety, and welfare of the public).

19. *See* Matt Birkbeck, *The Fight's Not Over: Appeals Expected in Hazleton Case After Judge Strikes Down Law Regulating Illegal Immigrants*, MORNING CALL (Allentown,

immigration is, by and large, a federal issue.[20] The Supreme Court decision in *DeCanas v. Bica* encapsulates the issue of immigration regulation as it pertains to state and federal power.[21] In *DeCanas*, the Court acknowledged the authority and power of states to act under the auspices of state police power.[22] Not giving complete deference to state power, the *DeCanas* Court sustained the idea that state power will not always take precedence when immigration issues are involved.[23]

B. *Conflict of Laws*

There are, however, many of the opinion that "[t]he text and structure of the Constitution do not require federal exclusivity and instead admit of a role for states and localities in enforcing immigration laws."[24] Despite the fact that state immigration reform is subordinate to federal regulation under the Supremacy Clause, cities that implement rental bans argue that "permitting states and localities to have a role in determining levels of immigration law enforcement would acknowledge the important economic and social stake that subnational governments have in immigration."[25] Supporters of rental ban ordinances and other anti-illegal immigration measures would posit that "[a] mere difference between

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Pa.), July 27, 2007, at A1, *available at* 2007 WLNR 14455745 (describing the city's attempts to fight illegal immigration in order to combat immigrant crime).

20. DeCanas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power." (citation omitted)).

21. *Id.*

22. *Id.* at 356.

23. *Id.* at 361.

> Under the Constitution the states . . . can neither add nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance of residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.

Id. at 358 n.6 (quoting Torao Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)).

24. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 824 (2008) ("This conclusion is supported by historical practice and is not foreclosed by Supreme Court precedent.").

25. *Id.* at 833; *see also* Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido's Un-Documented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 866–67 (2008) (discussing local self-help as an attempt to curb illegal immigration). Cities' dissatisfaction with federally controlled immigration measures is obvious, as evidenced by the fact that these measures are being adopted in cities across the country. *See* Dianne Solís & Stephanie Sandoval, *Pennsylvania Ruling May Jeopardize FB Rental Ban: Federal Judge Rejects Similar Ordinance, but Local Official Unbowed*, DALLAS MORNING NEWS, July 27, 2007, at 1A, *available at* 2007 WLNR 14446376 (noting the number of cities that have attempted to pass rental bans).

state and federal law is not conflict."[26] The placement of rental ban ordinances on city ballots reflects a belief that immigration is not exclusively a federal power.[27] Accordingly, many cities, even in the face of criticism and judicial scrutiny, continue to propose rental ban ordinances.[28]

C. *Rental Ban Layout*

1. Prohibitions and Requirements for Property Owners

In Farmers Branch, Texas, a rental ban was unanimously adopted and "overwhelmingly" approved by city council members and city voters.[29] Rental bans in different cities take varied forms, but their requirements, prohibitions, and penalties are aligned in terms of purpose. The Farmers Branch ordinance, for example, sets out the following: "The owner and/or property manager shall require as a prerequisite to entering into any lease or rental arrangement, including . . . renewals or extensions, the submission of evidence of citizenship, or eligible immigration status . . . ."[30] The ordinance further prohibits an owner or landlord from allowing individuals to occupy apartments or units without first tendering the required evidence of immigration status.[31]

Prior to the injunction issued against the City of Hazleton, Hazleton's ordinance provided for similar obligatory enforcement by landlords,

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26. Ariz. Contractors Ass'n v. Napolitano, No. CV07-1355-PHX-NVW, 2007 WL 4570303, at *25 (D. Ariz. Dec. 21, 2007) (citing Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963)).

27. Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido's Un-Documented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 866–67 (2008).

28. Natasha Altamirano, *Localities Unmoved by Alien Decision; Resolutions Deemed Lawful*, WASH. TIMES, July 31, 2007, at B01, *available at* 2007 WLNR 14676696 (identifying some cities that appear unaffected by the court's decision in Hazleton). Hazleton's rental ban was met not just by opposition, but found strong support in cities across the country. Matt Birkbeck, *The Fight's Not Over: Appeals Expected in Hazleton Case After Judge Strikes Down Law Regulating Illegal Immigrants*, MORNING CALL (Allentown, Pa.), July 27, 2007, at A1, *available at* 2007 WLNR 14455745. In Pennsylvania, more than thirty municipalities followed suit and sought the passage of illegal immigration measures. *Id.* (discussing the "ripple effect" across the country after the Hazleton decision).

29. Stephanie Sandoval, *Judge Halts Farmers Branch's Immigrant Rental Ban; Restraining Order Issued*, DALLAS MORNING NEWS, Sept. 13, 2008, *available at* 2008 WLNR 17391271 (reporting on the third injunction issued against Farmers Branch in the city's efforts to forbid property rentals for undocumented persons).

30. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007), *available at* http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf.

31. *Id.*

apartment managers, and property owners.[32] The Hazleton ordinance required all occupants of rental units to obtain an occupancy permit.[33] Obtaining a permit required applicants to show official documentation to prove legal citizenship or immigration status.[34]

2. Punitive Measures for Violators

Another component of rental ban ordinances is the provision for penalties for landlords, apartment managers, and property owners who ignore or violate the rental ban. The Farmers Branch ordinance, for example, provides that a violation of the rental ban ordinance makes the violator guilty of a misdemeanor,[35] and, upon conviction, violators shall be fined.[36] Landlords, property owners, and apartment managers are not necessarily to be fined for one isolated offense, but "a separate offense shall be deemed committed upon each day during or on which a violation occurs or continues."[37]

The City of Escondido, California took a much more punitive approach in the adoption of its rental ban ordinance.[38] On October 18, 2006, Escondido adopted an ordinance entitled "Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido."[39] Escondido's rental ban utilizes severe language for violators.[40] The ordinance provides penalties for "any person or business that owns a dwelling unit" and "harbor[s] an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered or remains in the United States in violation of law . . . ."[41] The ordinance's title, language, and penalties make clear that Escondido has little compassion for those undocumented immigrants who seek housing within the city, nor for individuals who "harbor" them through the rental of property.[42]

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32. Hazleton, Pa., Ordinance 2006-18 (Sept. 12, 2006), *invalidated by* Lozano v. City of Hazleton, 459 F. Supp. 2d 332 (M.D. Pa. 2006), *enforced*, 496 F. Supp. 2d 477 (M.D. Pa. 2007), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

33. *Id.*

34. *Id.*

35. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006).

36. *Id.* (imposing a fine not to exceed five hundred dollars for violations of the rental ban).

37. *Id.*

38. *See* Escondido, Cal., Ordinance 2006-38R (Oct. 18, 2006), *invalidated by* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006), *available at* http://www.aclu.org/pdfs/immigrants/escondido_ordinance.pdf.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* (articulating that an offense could potentially result in a "jail term of six months").

3. Harboring Leads to Prosecution

Federal courts have articulated the meaning of "harboring" within an immigration context and have set forth the elements necessary to clearly establish a cause of action for harboring an undocumented immigrant.[43] This standard requires a clear showing that:

> (1) [T]he alien entered or remained in the United States in violation of law, (2) the defendant concealed, harbored or sheltered the alien in the United States, (3) the defendant knew or recklessly disregarded that the alien entered or remained [and] (4) the defendant's conduct tended to substantially facilitate the alien remaining in the [country] illegally.[44]

In referring to harboring in the Immigration and Nationality Act (INA), "Congress intended to broadly proscribe any knowing or willful conduct . . . that tends to substantially facilitate an alien's remaining in the United States illegally . . . ."[45] With respect to the fourth prong for conviction of aiding and abetting the harboring of an undocumented immigrant, the trier of fact need only find that a defendant made it easier for an undocumented person to remain living in the United States.[46]

Plaintiffs in *Garrett v. City of Escondido* alleged that landlords and property owners would suffer irreparable harm if forced to comply with rental ban ordinances.[47] Landlords and property owners will "'face un-

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43. United States v. De Jesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005), *cert. denied*, 546 U.S. 1097 (2006).

44. *Id.*

45. United States v. Rubio-Gonzalez, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982) (citing the Immigration and Nationality Act of 1952 (INA) § 274A(a)(1)(A)(iii), 8 U.S.C. § 1524 (a)(1)(A)(iii) (2006)); *see also* 3A C.J.S. *Aliens* § 1580 (2008) ("'Haboring' encompasses any conduct tending substantially to facilitate an alien's remaining in the United States illegally." (footnote omitted)). Defining what constitutes "harboring" is a serious point of contention among courts. Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289, 295–300 (2008). The circuits are split as to the definition of "harboring," indicating that immigration reform is a serious point of contention within the judicial branch. *Id.*

46. *See* United States v. Shum, 496 F.3d 390, 392 (5th Cir. 2007) (defining "substantially facilitate[s]" as making it easier for undocumented individuals to remain in the United States); United States v. Kim, 193 F.3d 567, 574 (2d Cir. 1999) (extending liability for harboring to employers); United States v. Dixon, 132 F.3d 192, 200 (5th Cir. 1997) (defining facilitation as making it "easier or less difficult" for undocumented individuals), *cert. denied*, 523 U.S. 1096 (1998); *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 470–71 (2008) (discussing the troubles faced by immigration officials in stemming the flow of illegal immigration and declaring employment as the primary reason for illegal immigration).

47. Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1051 (S.D. Cal. 2006).

certainty' regarding which acts constitute the harboring of illegal aliens given the complexity of federal immigration laws and [must] choose between violation of the ordinance or breaching valid contracts" with renters.[48] Although different prongs must be satisfied to show that a defendant aided and abetted the violation of immigration law by harboring an undocumented individual,[49] and it is not guaranteed that a city will be able to consistently prosecute landlords and property owners under such stringent requirements, the language of rental ban ordinances serves to foster fear of prosecution. In this way, rental ban ordinances are successful in ensuring that landlords and property owners adhere to regulations.

Despite the fear factor of a conviction for harboring, the landlord's knowledge is a key component for meeting the harboring standard.[50] There is, however, little consistency among city ordinances with respect to how knowledgeable a property owner or landlord must be in order to be prosecuted for harboring. As an example,

> the harboring definition passed by Cherokee County, Georgia instructs owners that they may not "let, lease, or rent" or "suffer or permit occupancy" of a dwelling unit by any undocumented immigrant, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law." Other local laws require a higher mens rea of acting knowingly.[51]

The local standards are inconsistent, but this inconsistency does not necessarily negate the harboring charges that landlords and property owners may face if cities follow through with prosecuting violators of rental bans.

D. *Parallel Ordinances and the Alleged Reasoning Behind Their Implementation*

1. Employment Verification

State-enacted immigration reform has taken effect through the implementation of a variety of ordinances. Employment, for example, is one area of pervasive regulation. In *Arizona Contractors Ass'n v. Napolitano*, plaintiffs filed for an injunction to prevent Arizona from implementing

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48. *Id.*

49. *See* United States v. De Jesus-Batres, 410 F.3d 154, 160 (5th Cir. 2005) (providing a test for the determination of harboring), *cert. denied*, 546 U.S. 1097 (2006).

50. Immigration and Nationality Act of 1952 (INA) § 274A(a)(1)(A)(iii) (requiring that a violation of the anti-harboring provision be knowing or willful).

51. Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 792 (2008) (footnote omitted) (explaining the definition of "harboring" as used by Cherokee County, Georgia).

legislation requiring immigration status verification for individuals seeking employment.[52] In a recent Ninth Circuit Court of Appeals decision, the Arizona law sanctioning employers for the employment of undocumented immigrants was found to be a valid exercise of state and local laws.[53] This case reinforces the idea that localities have some power with respect to immigration reform, as per the court's holding that employers have no due process right to employ undocumented aliens.[54] The arguments presented in favor of employment verification parallel the arguments for rental ban ordinances. Just as employment verification serves to retain jobs for legal citizens, proponents of rental bans would maintain that the bans serve to protect citizens in a similar manner.[55] Proponents also argue that rental bans protect individual citizens from being party to illegal immigration and insulate the housing and rental markets from the negative impact of illegal immigrants.[56]

There is merit to the argument that curbing illegal immigration will benefit states and localities. It is the means by which this is accomplished, however, that must be thoroughly examined before any implementation of a locality-based immigration plan.

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52. Ariz. Contractors Ass'n v. Napolitano, No. CV07-1355-PHX-NVW, 2007 WL 4570303, at *4 (D. Ariz. Dec. 21, 2007).

53. Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 979 (9th Cir. 2008), *amended and superseded on denial of reh'g by* 558 F.3d 856 (9th Cir. 2009); *see also* Beth Werlin et al., *Ninth Circuit Upholds Arizona Employer Sanctions Law*, 3 LITIG. CLEARINGHOUSE NEWSL. (AILF Legal Action Ctr., The Clearinghouse Project, Washington, D.C.), Oct. 23, 2008, at 1, *available at* http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_081023.pdf (noting the Ninth Circuit's holding that the Arizona act does not violate employers' rights or the rights of undocumented immigrants). Business and civil rights organizations maintained that the Legal Arizona Workers Act strips employers of their due process rights because it does not allow them an opportunity to challenge an employee's citizenship status before sanctions are imposed. Beth Werlin et al., *Ninth Circuit Upholds Arizona Employer Sanctions Law*, 3 LITIG. CLEARINGHOUSE NEWSL. (AILF Legal Action Ctr., The Clearinghouse Project, Washington, D.C.), Oct. 23, 2008, at 1, *available at* http://www.ailf.org/lac/litclearinghouse/litclr_newsletter_081023.pdf.

54. *Chicanos Por La Causa, Inc.*, 544 F.3d at 988.

55. *See* Lozano v. City of Hazleton, 459 F. Supp. 2d 332, 336 (M.D. Pa. 2006) (summarizing Hazleton's argument that the ordinance was "designed to prevent problems of social disorder and chaos that city leaders connect to the presence of illegal aliens in Hazleton"), *enforced*, 496 F. Supp. 2d 477 (M.D. Pa. 2007). Hazleton argued that the presence of illegal aliens leads to the diminishment of overall quality of life by leading to higher crime rates, subjecting hospitals to fiscal hardship, and diminishing the quality of care for legal residents. *Id.* The mayor of Hazleton stated that these ordinances were passed partly in response to the killing of a twenty-nine-year-old man by four illegal immigrants. *Id.*

56. *See id.* (detailing the city's arguments in favor of the rental ban).

People v. Crane discusses state power with respect to immigration.[57] In an opinion authored by Justice Cardozo, *Crane* dealt with the employment of "aliens."[58] Mention is made of Justice Cardozo's opinion because of the obvious parallels between employment and rental ban ordinances within the immigration context. Justice Cardozo observed:

> To disqualify aliens is discrimination indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.
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> . . .
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> The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens. Whatever is a privilege, rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.[59]

2. Curbing the Facilitation of Illegal Presence

Cities that implement rental ban ordinances maintain that locally initiated immigration measures are necessary to combat crime, curtail financial burdens, prevent the harboring of illegal immigrants, and curb the overall facilitation of illegal presence.[60] Though historical in context, Justice Cardozo's words provide support for advocates of rental bans, and cities may look to history for support, as contemporary immigration issues echo issues of the past.[61] But, in opposition to Justice Cardozo's observation, one could maintain that "concern for fiscal integrity" is not a

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57. 108 N.E. 427, 429 (N.Y. 1915) (detailing states' power to discriminate against aliens in the distribution of public resources), *aff'd*, 239 U.S. 195 (1915). "[T]he common property of the state belongs to the people of the state, and hence that, in any distribution of that property, the citizens may be preferred." *Id.*

58. *Id.* at 429–30.

59. *Id.* (elaborating on the states' prerogative to dispense public resources for the benefit of their citizens and to the exclusion of aliens); *see also* Graham v. Richardson, 403 U.S. 365, 373 (1971) (stating that the Court has used the same reasoning to uphold other state statutes that restrict the rights of aliens and noncitizens).

60. *E.g.*, Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1053 (S.D. Cal. 2006) (citing Escondido's argument that the city's rental ban curbs the "increasing trend of urban blight" caused by illegal renters' fear of reporting substandard maintenance conditions (citation omitted)); *Lozano*, 459 F. Supp. 2d at 335–36 (noting Hazleton's intent to prevent "[s]ocial disorder and chaos that city leaders connect to the presence of illegal aliens in Hazleton").

61. *See Crane*, 108 N.E. at 431 (affirming a conviction for unlawful hiring of aliens).

satisfactory justification for creating rental ban ordinances, as "an alien as well as a citizen is a 'person' for equal protection purposes."[62]

Adoption of ordinances is experimental in nature, in that the results will show either widespread success or complete failure.[63] "Such laws help to inform states and localities about more and less effective means of encouraging and discouraging migration."[64] What cities have not accounted for, however, is the interconnection between rental bans and property rights, as well as the potential for abuse of the ordinances.

Mandating that landlords verify immigration status and excluding undocumented immigrants from housing are not mutually exclusive. Arguably, the exclusion of undocumented immigrants is exactly what rental ban ordinances propose to accomplish. But the legal implications of rental ban ordinances are far-reaching and apply beyond the immigration context.

III. ANALYSIS

A. *The Scope of Property Ownership and the Agitation of Property Rights*

1. Theory of Property Ownership

The right to own property is widely regarded as a sacred right.[65] The theory of property as sacred is furthered by the fact that "a property interest consists not merely in its ownership and possession, but includes the unrestricted right of use, enjoyment, and disposal."[66] By extension, the right to rent one's property is an incident to title and possession.[67] An owner of property has a right to sell property, and others have a right

62. *See Graham*, 403 U.S. at 375 (discussing the rights of aliens for equal protection purposes).

63. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 847 (2008) ("The ordinances will help to inform other governments about the costs and benefits of these measures."). Such ordinances will also serve as indicators to non-citizens as to which localities are welcoming and which ones are not. *Id.*

64. *Id.*; *see also* L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 479 (2008) (arguing that locality-based immigration laws are hostile in nature).

65. *See* April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound, Inc., 153 S.W.3d 519, 525 (Tex. App.—Amarillo 2004, no pet.) (noting that the right to dominion over property is an accepted theory of law and addressing the extent of the term "property").

66. *Id.* at 524 (citation omitted).

67. Benson v. Greenville Nat'l Exch. Bank, 253 S.W.2d 918, 923 (Tex. Civ. App.—Texarkana 1952, writ ref'd n.r.e.) (explaining that restrictions upon the right to alienation of property are contrary to both settled law and public policy).

to purchase for sale or for rent.[68] Restraint on property is generally understood to be an invalid exercise of public policy.

A direct corollary of adopted rental bans is the restraint on property rights that invariably results. Exclusive dominion over private property provides an owner the right to rent freely and without restraint, provided that the rental of property does not "contravene law or public policy."[69] The crafting and subsequent adoption of rental ban ordinances unequivocally alters public policy and sets in place new laws that modify property rights. Property owners who rent their property for financial gain are undeniably subjected to reduced rights and must, as many ordinances stipulate, abide by city legislation or face stringent penalties.

Adopted rental ban ordinances may prevent property owners from disposing of their property through lease agreements as a result of increased burdens that they are obligated by ordinance to follow. "[O]wnership of land by legal title in fee carries with it the right to sell, mortgage, or otherwise alienate property at any time,"[70] and, arguably, this right is inclusive of rental agreements between a property owner or landlord and an interested tenant.

2. Constitutional Protections for Property Owners

A property owner may challenge a rental ban ordinance on due process grounds.[71] *Garrett v. City of Escondido* set the stage for questions relating to due process for landlords, as well as tenants, as a result of insufficient procedures "for administrative review before a landlord would be required to institute eviction proceedings" against a tenant.[72] A governmental entity can impose regulations, such as zoning or other land use regulations, but interference with land use must "bear a substantial rela-

68. 59 TEX. JUR. 3D *Property* § 13 (2008). *But see* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 887–88 (2007) (maintaining that, while the common law rule that restraints upon property are generally invalid, the Supreme Court has held both that the rule should not be dispositive and that other factors, such as duration, purpose, and method of determining price, should be taken into consideration before rendering a restraint upon alienation invalid); Urquhart v. Teller, 958 P.2d 714, 718 (Mont. 1998) (stating that a restraint on alienation is more likely to be deemed reasonable and valid if both parties mutually agree to the restraint or if the individual imposing the restraint has some interest in the property).

69. *April Sound Mgmt. Corp.*, 153 S.W.3d at 524 (citation omitted).

70. Trustees of the Casa View Assembly of God Church v. Williams, 414 S.W.2d 697, 702 (Tex. Civ. App.—Austin 1967, no writ).

71. *See, e.g.*, Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1058 (S.D. Cal. 2006) (finding that plaintiff landlords "have a legitimate property interest in collecting rent" that triggers the right to adequate notice and opportunity for hearing prior to deprivation of that interest).

72. *Id.* at 1059.

tion to the public health, safety, morals, or general welfare."[73] Although cities that impose rental bans maintain that one reason for their implementation is protection of the public,[74] property owners may find success if they can show that the deprivation of property rights that results from rental bans outweighs the alleged protection of the public.[75] Opponents of rental ban ordinances, however, are impeded by the fact that there is a presumption of validity for local ordinances.[76] Plaintiffs challenging local rental ban ordinances will need to overcome the presumption of validity by a clear showing of an ordinance's ambiguity, irrelevance, or unconstitutionality.[77]

It is universally recognized that "[a] property right is not bare title, but the right of exclusive use and enjoyment."[78] Courts have traditionally recognized and held that a deprivation of property is a substantive due process violation.[79] Since the right to own and dispose of property may be interpreted as a liberty interest protected by the Constitution,[80] property owners affected by rental bans may have a valid claim against cities. In proving a substantive due process violation, plaintiffs must show a con-

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73. Polenz v. Parrott, 883 F.2d 551, 556 (7th Cir. 1989) (quoting Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).

74. *E.g.*, Lozano v. City of Hazleton, 459 F. Supp. 2d 332, 335–36 (M.D. Pa. 2006) (citing "[s]ocial disorder and chaos" as evils the Hazleton rental ban sought to cure), *enforced*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

75. *See Polenz*, 883 F.2d at 558 (suggesting that upon a showing that an ordinance is arbitrary, unreasonable, or is not designed to promote the "public health, safety, or welfare," a plaintiff's claim based on a theory of substantive due process will prevail).

76. *See* City of Anchorage v. Richardson Vista Corp., 242 F.2d 276, 285 (9th Cir. 1957) (stressing that deference should be given to municipalities absent a showing of unreasonableness or unconstitutionality). Although this case does not render judgment on a rental ban ordinance, the court's opinion is analogous to the rental ban issue. *Id.* Thus, parallels can be drawn to rental ban litigation from this opinion, which provides:

> It must be kept in mind that the courts cannot set aside city ordinances unless they are unconstitutional or *ultra vires*, or in some special connection or effect, unreasonable. On the contrary, unless the ordinance is unnecessarily oppressive or unreasonable it is the duty of the court to uphold it. It is a well settled rule that where an ordinance is passed relating to a matter within the legislative power of the municipality all presumptions are in favor of its constitutionality, and reasonableness.

Id.

77. *See id.* at 286 ("If the municipality has power to enact an ordinance, it may not be set aside by the courts merely on the ground of hardship, harshness, injustice, unfairness or because of commercial advantage or disadvantages resulting from the enactment.").

78. *Polenz*, 883 F.2d at 557 (quoting Reed v. Village of Shorewood, 704 F.2d 943, 949 (7th Cir. 1983)).

79. *See, e.g.*, *id.* at 558 (recognizing certain rights of the ownership of property).

80. *Id.* (holding that liberty interests may be directly protected by the Fourteenth Amendment if plaintiffs can show a connection between deprivation of property and a constitutional right).

nection between the violation and the fact that the ordinance "bears no substantial relation to the public health, safety or morals," as well as show that the land-use ordinance at issue is "arbitrary and unreasonable."[81] In sum, the standard requires that the plaintiff prove that state law remedies will not suffice to remedy a clear violation of a constitutional right.[82]

It has been widely held, however, that where property interests are deprived or violated, a due process claim will often be recognized outright.[83] As the right to own property is, arguably, a due process right, property owners will likely have a cause of action against a city that imposes a rental ban and the subsequent restraint on their property.[84] Property owners could maintain a cause of action premised on the historical perspective that the right to possess and dispose of property is an inherent and essential right of United States citizenship.[85] This right to dispose of property carries with it certain entitlements and privileges that should not be subverted, as "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[86]

3. City Liability for Property Violations Against Owners of Real Property

In *Harlow v. Fitzgerald*, the Supreme Court held that government officials, no matter in what capacity they serve a city, municipality, or state, are insulated from civil liability, so long as their actions do not infringe upon statutorily protected rights "of which a reasonable person would have known."[87] This understanding of liability for public officials was refined in the *Anderson v. Creighton* decision, in which the Court held

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81. *Id.* (quoting Albery v. Reddig, 718 F.2d 245, 251 (7th Cir. 1983)).

82. *Id.* (proposing the standard that must be met by a plaintiff claiming an invalid land ordinance). The court imposes a heavy burden for the property owner that is justified because local zoning boards are presumed to have fairly imposed the restriction until the property owner proves a violation of substantive due process. *Id.*

83. *See* Harding v. County of Door, 870 F.2d 430, 431 (7th Cir. 1989) (holding that in a land use ordinance dealing specifically with zoning, only a clear showing of an irrational zoning decision will constitute a violation of due process), *cert. denied*, 493 U.S. 853 (1989); *Polenz*, 883 F.2d at 558 (stating that substantive violation of due process claims will sometimes be inferred in land-use ordinance conflicts); Burrell v. City of Kankakee, 815 F.2d 1127, 1129 (7th Cir. 1987) ("[I]n order to prevail on a substantive due process claim, plaintiffs must allege and prove that the denial of their proposal is arbitrary and unreasonable bearing no substantial relationship to public health, safety or welfare.").

84. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972) (discussing due process rights).

85. *See id.* (stating that citizenship includes the right of property ownership).

86. *Id.*

87. 457 U.S. 800, 818 (1982) (citations omitted) (establishing an objective reference for defining the limits of qualified immunity).

that the constitutionally protected right must be "clearly established,"[88] and was further expanded upon in *Wade v. Hegner*.[89] In *Wade*, the Court established a two-prong test for analyzing liability of government officials.[90] A court must inquire as to whether the alleged conduct of the official violates a constitutional right and whether the constitutional right was established at the time of the violation.[91] The *Harlow* Court recognized immunity issues that could arise as a result of officials' inability to know whether a right was clearly established as a constitutional right.[92] The Court understood that officials may not be apprised of or "reasonably be expected to anticipate" legal developments regarding certain rights.[93]

The issue of qualified immunity may become convoluted if cities maintain that the right to rent and dispose of property is not clearly protected; however, one could reasonably argue that an interpretation of substantive due process guarantees the right to own property, which carries with it the right to rent property without restraint. Thus, this right is clearly established and, therefore, clearly protected. Violations of this right by city officials through the continued implementation of rental bans illustrate ways in which cities and municipalities may be liable for implementing and adopting policies or customs that restrain property rights. Thus, the assertion of qualified immunity will not necessarily protect city officials from being haled into court.

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88. 483 U.S. 635, 640 (1987) (redefining the Supreme Court's earlier standard for analyzing qualified immunity of public officials when dealing with constitutional rights). The Court elaborated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in dire light of pre-existing law the unlawfulness must be apparent.

Id. (citations omitted).

89. 804 F.2d 67, 69–70 (7th Cir. 1986).

90. *Id.* at 70 (laying out the appropriate approach to dissecting the qualified immunity issue as it relates to civil liability).

91. *Id.*

92. *See Harlow*, 457 U.S. at 818–19 (requiring a clear showing of established law when deciding a qualified immunity issue).

93. *Id.* at 818 (implementing a standard under which a government representative or official is shielded from liability absent knowledge that a right is clearly established and protected); *see also Anderson*, 483 U.S. at 651 n.3 (discussing the evolution of the qualified immunity rule).

4. The Right to Use and Enjoyment of Property and the Restraint on Property Ownership

It is widely recognized that an owner of property may transfer rights to other parties to make use of the surface or subsurface of property.[94] By definition, this transfer of rights can encompass or be characterized as a rental of real property.[95] "'Property' is a word of comprehensive meaning and extends to every species of valuable right and interest in real . . . property."[96] Owners of property may rent their interest in that property within the bounds of applicable law.[97]

Rental ban ordinances do not categorically prevent owners of property from renting, but rather impose a burden on property owners wherein their right to rent property is controlled by a potentially discriminatory housing requirement.[98] Property owners are entitled to utilize their discretion as to whether they rent their property for profit.[99] As long as property owners do not violate public policy or established laws, they have a statutorily protected right to dispose of their property through rental agreements.[100] Rental bans, however, effectively force property owners and landlords to violate federal housing regulations by requiring them to uphold city regulations.[101] Violations of federal regulations are manifested through blatant violations of the Fair Housing Act.

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94. *See, e.g.*, Humphreys-Mexia Co. v. Gammon, 254 S.W. 296, 299 (Tex. 1923) ("It is elementary that the minerals in place may be severed from the remainder of the land by appropriate conveyances." (citation omitted)); Mobil Pipe Line Co. v. Smith, 860 S.W.2d 157, 159 (Tex. App.—El Paso 1993, writ dism'd w.o.j.) (providing that owners of land retain possession of title to the property and subsequently have the ability to extend rights to a third party for use and enjoyment).

95. *See Mobil Pipe Line Co.*, 860 S.W.2d at 159 (discussing the rental of property).

96. April Sound Mgmt. Corp. v. Concerned Prop. Owners for April Sound, Inc., 153 S.W.3d 519, 524 (Tex. App.—Amarillo 2004, no pet.). For example, property owners in a subdivision own significant rights and benefits to recreational opportunities. *Id.* at 525. These rights and benefits are owned commonly by all property owners in the subdivision. *Id.* Moreover, these common areas have "a significant impact on property values of lots in the subdivision." *Id.*

97. *Id.* at 525.

98. *E.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 771 (N.D. Tex. 2007) (concluding that the Farmers Branch rental ordinance imposes additional requirements upon landlords designed to drive undocumented immigrants from the city).

99. *April Sound Mgmt. Corp.*, 153 S.W.3d at 525.

100. *Id.*

101. *See* Fair Housing Act § 804, 42 U.S.C. § 3604(a) (2006) (prohibiting landlords from discriminating against potential tenants based on "race, color, religion, sex, familial status, or *national origin*" (emphasis added)).

B. *Potential Liability of Owners*

1. Violations of the Fair Housing Act

Not only are independent property owners restrained from freely renting property, but property owners, landlords, and apartment managers are, likewise, forced to comply with what can be interpreted as violations of federal law. Rental bans pursue a policy that may give rise to violations of the Fair Housing Act.[102]

The 1968 adoption of the Fair Housing Act (FHA) made discrimination-based claims legally viable for renters who encounter inequity in the housing market.[103] The FHA recognized the importance of protecting individuals who may suffer discrimination because of race, color, religion, sex, familial status, or national origin.[104] Property owners, landlords, and apartment managers may select tenants based on objective criteria, but the FHA does not allow for unlawful discrimination.[105] Federal law additionally requires that "[a]ll citizens of the United States shall have the same right, in every state and [t]erritory, as is enjoyed by [W]hite persons thereof to inherit, purchase, lease, sell, hold, and convey real and per-

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102. *See id.* (prohibiting discrimination in provision of housing).

103. *Id.*

104. *Id.* Those dwellings covered by the FHA include:

> dwellings owned or operated by the [f]ederal [g]overnment . . . dwellings provided in whole or in part with the aid of loans, advances, grants, or contributions made by the [f]ederal [g]overnment . . . dwellings provided in whole or in part by loans insured, guaranteed, or otherwise secured by the credit of the [f]ederal [g]overnment . . . dwellings provided by the development or the redevelopment of real property purchased, rented, or otherwise obtained from a [s]tate or local public agency receiving [f]ederal financial assistance for slum clearance or urban renewal.

Id. § 803(a)(1). The FHA does not apply to a "single-family house sold or rented by the owner" or to "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." *Id.* § 803(b).

105. *Id.* § 804 (stating that discriminatory acts shall be unlawful under the statute). Interestingly, section 807 of the Fair Housing Act provides exceptions for religious organizations and private clubs. *Id.* § 807. Under that section, any "religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society" may limit the sale or rental of dwellings that it owns or operates to people of the same religious faith. *Id.* § 807(a). In other words, section 807 does not prohibit religious organizations or private clubs from preferring their own members. *Id.*

sonal property."[106] Further, official, as well as private, discriminatory intrusion of property interests is unlawful.[107]

Rental bans do not explicitly state that a landlord, property owner, or apartment manager cannot rent to individuals not of the White race, nor do they contain any other specification as to race;[108] however, rental bans requiring the documentation of immigration status are the catalyst for discrimination based on race and national origin. It can be assumed that property owners, landlords, and apartment managers will be more likely to request documentation of status from individuals not of the White race, and "local ordinances prohibiting the rental of property to undocumented persons will lead to landlords turning away United States citizens and legal permanent residents whom they believe may be illegally present merely because of their race, color, or national origin . . . ."[109] In effect, requests for documentation will be racially motivated because landlords, property owners, and apartment managers are not qualified to assess or "determine the immigration status of potential tenants . . . [and] the inevitable result of such ordinances is that landlords will avoid renting to persons of certain ethnic backgrounds . . . ."[110]

The penalties levied on property owners will perpetuate racial and ethnic stereotypes, and the vague definitions of immigration status in the language of rental ban ordinances will "have the effect of encouraging racial and ethnic profiling of persons seeking to contract with landlords [and property owners]."[111] The language of rental bans does not require

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106. 42 U.S.C. § 1982 (2006) (emphasizing that all U.S. citizens have the same rights regarding personal property).

107. Shaare Tefila Congragation v. Cobb, 481 U.S. 615, 616 (1987) (citing Jones v. Alfred H. Mayer, Co., 392 U.S. 409, 413 (1968)) (holding that 42 U.S.C. § 1982 prohibits both public and private discrimination as a means of interference with property rights).

108. *E.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007), *available at* http://www.aclu.orgpdfs/immigrants/farmersbranch_ordinance.pdf.

109. Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1052 (2007) (discussing the illegal consequences of compliance with local ordinances).

110. *Id.*

111. *Id.* (addressing the inherent and illegal effects of the local regulations that target illegal immigration); *see also* Julia Preston, *City's Immigration Restrictions Go on Trial*, N.Y. TIMES, Mar. 13, 2007, at A13, *available at* 2007 WLNR 4697901 (discussing the Hazleton ordinance). Prior to the July 2007 decision in the Hazleton case, Hazleton's mayor, Louis J. Barletta, discussed the Hazleton ordinance as a ban against illegal immigrants, not individuals of certain races or ethnicities. Julia Preston, *City's Immigration Restrictions Go on Trial*, N.Y. TIMES, Mar. 13, 2007, at A13, *available at* 2007 WLNR 4697901. In response to many questions and objections, the Hazleton ordinance was revised several times before the Pennsylvania Supreme Court ordered a permanent injunction against its enforcement. *Id.* Even after the revisions, however, Mayor Barletta stated that the basic purpose behind

that landlords and property owners request documentation from members of particular races; rather, landlords and property owners are required to implement the ordinance to the extent that they request documentation from all prospective tenants.[112] But this requirement may lead to abuse of the ordinance.[113] Rental ban ordinances stipulate rules that would effectively force landlords to "evaluate a wide array of immigration documents to determine whether the person carrying them is legally in the country."[114] As a result, landlords and property owners are required to act as immigration officers, despite their lack of training and knowledge of immigration law.[115]

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the law remained the same—"to make Hazleton hostile territory for illegal immigrants." *Id.*

112. *E.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006) (requiring documentation from any and all prospective tenants). It is important not to overlook the fact that a noncitizen must first qualify for "eligible immigration status" before he can obtain the necessary documents. *Villas at Parkside Partners*, 496 F. Supp. 2d at 769. Since "HUD regulations do not include all noncitizens lawfully in the country under federal immigration standards," and the ordinance is based off of HUD's definitions concerning citizenship and legal immigration status, certain legal noncitizens, such as students who are in the country temporarily, will be denied renting an apartment in Farmers Branch. *Id.*

113. Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1052 (2007).

114. Anabelle Garay, *Texas Town Gets Tough on Illegal Immigration: Farmers Branch, Texas, Approved Anti-Immigration Measures Monday Night. One Makes English the Official Language*, INTELLIGENCER (Wheeling, W.Va.), Nov. 14, 2006, at A8, *available at* 2006 WLNR 20030654; *see also* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782–83 (2008) (defining the scope of private enforcement and arguing that individuals become private enforcers); Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido's Un-Documented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 884 (2008) (questioning the feasibility of enforcement of the Escondido ordinance). Consider the following:

> To begin with, it is unclear how "any official, business entity, or resident of [a] [c]ity" could be expected to enforce accurately [an] [o]rdinance without prior exposure to the "hundreds of pages of complicated regulations concerning different ways people can be lawfully present in the United States." The concerns voiced over "whether officials will have the proper training and expertise required to enforce immigration regulations" are amplified when considering private residents who have little to rely on beyond mere intuition.

Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido's Un-Documented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 884 (2008) (footnotes omitted).

115. Anabelle Garay, *Texas Town Gets Tough on Illegal Immigration: Farmers Branch, Texas, Approved Anti-Immigration Measures Monday Night. One Makes English the Official Language*, INTELLIGENCER (Wheeling, W.Va.), Nov. 14, 2006, at A8, *available at* 2006 WLNR 20030654. After voting, the city council of Farmers Branch, Texas also approved fines for landlords who choose to conduct business with illegal immigrants. *Id.* The city council additionally decided to allow local authorities to use screen devices on suspects in custody to determine whether they are illegally in the United States. *Id.* After

One can only assume the worst: that landlords will, on the whole, request documentation of immigration status from certain individuals who appear to be members of a certain race or ethnicity or who appear to be of a particular national origin. "Determining what race, [ethnicity, or national origin] a person belongs to is not necessarily an easy task,"[116] and landlords and property owners "do not possess the skills or the resources to determine the legal status of individuals they suspect as being an 'illegal alien' under the ordinances. Therefore, landlords are more likely to make judgments based on easily ascertainable indicators of nationality."[117] These "easily ascertainable indicators" will invariably be predicated upon race and ethnicity.[118] Consequently, some landlords and property owners may forgo requesting documentation from some individuals and deny them housing outright based upon the prospective renters' physical features that may give rise to presumptions about the renters' immigration status. Thus, citizens and lawful permanent residents may be denied housing based on physical traits; for example, citizens and lawful permanent residents of certain ethnicities will be lumped into a landlord's physical definition of what undocumented immigrants look like.[119]

2. Racial Steering

Discrimination takes varied forms. A prime example of discrimination in a property law context is discrimination through "racial steering." Racial steering occurs when an apartment manager or landlord "preserve[s]

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these laws were passed, Farmers Branch became the first Texas municipality to enact such stringent anti-immigration laws. *Id.*

116. Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American Public Law and Policy*, 7 NEV. L.J. 895, 912 (2007).

117. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 537 (2008) (suggesting that landlords are placed in a precarious position when forced to decide if a particular individual is an illegal immigrant).

118. *See id.* (indicating the broadness of the indicators that landlords rely upon to determine if a person qualifies to be a tenant). Because identification of race and national origin are among these indicators, rental ban ordinances make it known to Latin immigrants that their race and national origin will be scrutinized by landlords in rental decisions. *Id.* at 537–38. "The ordinances' vagueness in describing what constitutes an 'illegal alien' and their stated purposes bolster the threatening nature of the laws because they allow for almost unfettered discretion in their enforcement." *Id.* at 538–39 (footnotes omitted).

119. *See* Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289, 303 (2008) ("[C]oncerned landlords would probably evict many aliens present lawfully [in the United States] because they are unfamiliar with the range of valid documents.").

and encourage[s] patterns of racial segregation . . . by steering members of racial and ethnic groups to buildings occupied primarily by members of [the same] racial and ethnic groups . . . ."[120] Although rental ban ordinances were not crafted or intentionally calculated to promote racial steering, the adoption of rental bans may result in an alternative form of racial steering. This alternative form of racial steering is one of the pitfalls of these ordinances, as enforcement of rental bans may force individuals of certain races, national origins, and ethnic groups to relocate to areas where rental bans are not policy. Even legal citizens and lawful permanent residents of certain races and ethnicities (most likely Latinos) who face discrimination when seeking to rent an apartment may choose to relocate to an area that they perceive as less discriminatory.[121]

The holding in *Havens Realty Corp. v. Coleman* highlights the liability for racial steering that property owners and landlords could face in rental ban litigation.[122] The plaintiffs in *Havens Realty* alleged that owners of an apartment complex violated the Fair Housing Act in their practice of racial steering.[123] Plaintiffs asserted they "had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination."[124] Similarly, landlords' implementation of rental ban ordinances will begin a domino effect, whereby racial and ethnic segregation will proliferate. Although independent landlords and property owners may not intend for their actions to result in racial steering, compliance with rental ban ordinances will invariably culminate in racial and ethnic segregation.[125]

The effects of a rental ban ordinance in Riverside, New Jersey confirm how rental bans will engender a type of racial steering that results in indi-

120. Havens Realty Corp. v. Coleman, 455 U.S. 363, 367 n.1 (1982) (defining "racial steering" in the context of a violation of the FHA). Racial steering is defined not by the court, but rather by the complainants. *Id.*

121. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 534 (2008) (arguing that it is essentially unavoidable that lawful immigrants will be affected by locality-based ordinances).

122. *Havens Realty Corp.*, 455 U.S. at 382.

123. *Id.* at 367 n.1; *see also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 94 (1979) (addressing the topic of racial steering). In *Gladstone*, the Court defined racial steering as "directing prospective home buyers interested in equivalent properties to different areas according to their race." *Gladstone*, 441 U.S. at 94.

124. *Havens Realty Corp.*, 455 U.S. at 369.

125. *See* Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289, 303, 305 (2008) (stating that rental bans can cause landlords to discriminate against documented immigrants).

viduals leaving the city for more accepting areas.[126] A large population of documented and undocumented immigrants left Riverside before enforcement of the rental ban ordinance commenced, illustrating how a not–yet–enforced ordinance spawned a mass exodus and arguably fortified racial segregation.[127] Prospective renters who may appear to landlords to be of a particular national origin will certainly be discouraged from renting in cities that adopt rental bans.

3. Vicarious Liability

The FHA prohibits discrimination in the sale or rental of property and, specifically, provides for the protection of various classes of individuals.[128] *Meadowbriar Home for Children, Inc. v. Gunn* involved a complaint by a treatment center for emotionally disturbed women.[129] The center argued that city officials created obstacles that "resulted in the

126. *See* Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 554–55 (2008) (discussing the effects of a rental ban ordinance in Riverside, New Jersey). Within months of the passage of the ordinance prohibiting the renting to or employing of undocumented immigrants, hundreds, if not thousands, of recent immigrants from Brazil and other Latin American countries fled. Ken Belson & Jill P. Capuzzo, *Town Rethinks Law Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, at A1, *available at* 2007 WLNR 18841236. "As the local economy suffered and the town defended itself against two lawsuits, the ordinance was rescinded." *Id.*

127. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 554–55 (2008); Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1030 (2008) (articulating characteristics of "blight," a term that describes a neighborhood turning into a slum). The areas to which these individuals relocate might potentially become blighted because of resultant segregation. Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1030 (2008). Blight is often characterized by urban conditions that plague city neighborhoods. *Id.* One could argue that slum neighborhoods will, without question, emerge in the wake of an exodus of illegal immigrants. *Id.* The result of the establishment of more slum neighborhoods and "slumlords" would be the segregation of an entire illegal population. *Id.*; Mike King, *Lawmakers, Nail Slumlords*, ATLANTA J.-CONST., Mar. 1, 2007, at A19, *available at* 2007 WLNR 3904425 (proposing that segregation of neighborhoods fosters blight). Undocumented immigrants are less inclined to complain of or report violations in housing maintenance because of their illegal status. Mike King, *Lawmakers, Nail Slumlords*, ATLANTA J.-CONST., Mar. 1, 2007, at A19, *available at* 2007 WLNR 3904425. Consequently, slum neighborhoods will follow the expulsion of undocumented immigrants from certain cities that adhere to rental bans. *Id.*

128. Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2006).

129. Meadowbriar Home for Children, Inc. v. Gunn, 81 F.3d 521, 526 (5th Cir. 1996) (reviewing the action brought by a nonprofit corporation working to help emotionally disturbed women).

denial of dwellings for . . . handicapped" individuals.[130] The claims brought by plaintiffs in *Meadowbriar* are analogous to potential claims that may be brought by individuals claiming discrimination as a result of rental ban ordinances.[131] The handicapped are a protected class under the FHA, as are racial and ethnic minorities.[132] The *Meadowbriar* plaintiffs brought a claim under 42 U.S.C. § 1983, wherein officials may be liable for acting pursuant to a city's official custom or policy.[133]

Two of the defendants in *Meadowbriar*, an assistant city attorney and a senior fire inspector, were found to have qualified immunity because of their positions as public officials.[134] Although plaintiffs lost on their claim of conspiracy, this case provides the framework for establishing a legally viable conspiracy claim.[135] Conspiracy claims may be brought against cities and municipalities under § 1983.[136] Under § 1983, "[m]unicipalities and cities qualify as persons liable to suit."[137] For a claim to be successful under § 1983, the plaintiff must establish a city's or municipality's official adoption of a discriminatory policy.[138] The municipality must have itself caused the violation for the municipality to be liable,[139] or a plaintiff must show that "a person acting under color of state law" committed the alleged act of discrimination.[140] City officials and cities themselves are not immune from suit, provided that the plaintiff meets his or her burden of proof.[141]

To establish support for a claim falling under § 1983, the plaintiff must successfully show that: "1) a policy or custom existed; 2) the governmental [policy-makers] actually or constructively knew of its existence; 3) a

130. *Id.*

131. *See id.* (discussing the parties' claims).

132. Fair Housing Act § 804 (a)-(d), 42 U.S.C. § 3604(a)-(d) (2006).

133. *Meadowbriar Home for Children*, 81 F.3d at 532 (citing 42 U.S.C. § 1983 (2006)).

134. *Id.* at 529.

135. *See id.* at 532 (holding that defendants satisfied elements for qualified immunity and, therefore, plaintiffs' claims could not be sustained).

136. *Meadowbriar Home for Children*, 81 F.3d at 532–33 (indicating that cities and municipalities are not entirely immune from suit).

137. *Meadowbriar Home for Children*, 81 F.3d at 532 (citation omitted).

138. *Id.* at 532 (requiring a clear showing that the city implemented or executed a policy that violated constitutional rights).

139. *Id.*; *see also* City of Canton v. Harris, 489 U.S. 378, 385 (1989) (concluding that "a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue" (emphasis in original)).

140. West v. Atkins, 487 U.S. 42, 48 (1988).

141. *Id.*; *see also* Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 547 (2008) (maintaining that a plaintiff must meet two prerequisites to satisfy the burden of proof for a claim under § 1983 when directing claims against a municipality).

constitutional violation occurred; and 4) the custom or policy served as the moving force behind the violation."[142] Customs or policies that foster discrimination may also result in liability for public officials who implement them. The issues of municipality liability and liability of individuals acting under the "color of state law" coincide with matters of rental ban liability. An examination of party liability requires consideration of agent-principal liability as well.

An agent is under no obligation to adhere to and execute his principal's order that, if carried out, may result in an illegal act.[143] Although independent property owners are not agents working under a principal within the traditional definition of agency, one may draw comparisons between an agent's liability and a property owner's liability in carrying out an illegal act. Furthermore, property owners should be wary of adhering to rental ban ordinances, as they may incur vicarious liability for discriminatory actions in violation of the Fair Housing Act.[144] Although speculative and hypothetical, when the analogy is drawn between vicarious liability of an agent and the liability of property owners for blatant statutory violations, the property owner embodies the role of the agent, while the city acts as the principal. It follows that an agent "'is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal.'"[145] Although a plaintiff's argument will likely not mirror an agent-principal liability claim, one could conceivably draw parallels between the acts committed by an agent acting under a principal and a property owner acting under a city-mandated ordinance; in this way, the property owner "is himself liable as a joint tortfeasor."[146]

4. A Pattern of Discrimination

Arguably, plaintiffs bringing a cause of action against a city that adopts a rental ban ordinance can show that the ordinance targeted a specific

142. *Meadowbriar Home for Children*, 81 F.3d at 532–33 (citation omitted) (outlining the prerequisite elements that must be proven in order to win a claim based on an allegation of the existence of an official custom).

143. RESTATEMENT (SECOND) OF AGENCY § 411 (1958) ("In accordance with and subject to the conditions stated in the Restatement of Contracts, one who undertakes to perform service as the agent of another is not liable for failing to perform such service if, at the time of the undertaking or of performance, such service is illegal.").

144. *See* Fair Housing Act § 804, 42 U.S.C. § 3601 (2006) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.").

145. Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 562 (5th Cir. 1979) (quoting RESTATEMENT (SECOND) OF AGENCY § 343 (1958)) (stressing the fact that an agent is liable for an unlawful act, even if he is directed by the principal).

146. *See id.* (citing RESTATEMENT (SECOND) OF AGENCY § 343 cmt. d (1958)) (discussing the potential liability of agents acting under or at the command of a principal).

group. Despite the fact that rental ban ordinances do not explicitly target any one race, ethnicity, or national origin, the aggregate effect of discrimination on one specific group could evidence the group's compensable injury. "While a discriminatory purpose is most often evidenced by legislative intent, it may also be shown by 'a clear pattern, unexplainable on grounds other than race . . . even when the governing legislation appears neutral on its face.'"[147]

Merely couching rental ban ordinances in seemingly harmless language will not necessarily secure cities against liability. Although proponents of rental ban ordinances maintain that the implementation of ordinances effectively reduces illegal immigration, it is not guaranteed that legal citizens and lawful permanent residents of a particular race, ethnicity, or national origin will not feel the discriminatory effects of a city's adopted policy.[148] The possibility that landlords and property owners will be unable to avoid discriminating against prospective renters because of the intricacies of rental bans and their ignorance of immigration regulations will lead to violations of the FHA.[149]

C. *Recourse for Prospective Renters*

1. Protection Afforded by the FHA

Violations of the FHA and rental ban ordinances requiring prospective tenants to tender proof of immigration status are both aspects of the immigration issue. There is no explicit prohibition against states enacting regulations that touch and concern immigration.[150] According to the Fifth Circuit:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute of judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.[151]

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147. Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1038 (2008) (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)).

148. Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289, 304–05 (2008).

149. *See id.* at 305 ("If the landlord denies a lawfully present applicant and the applicant suspects that the decision was based on alienage or national origin discrimination, the applicant can sue the landlord under the [FHA]." (footnote omitted)).

150. DeCanas v. Bica, 424 U.S. 351, 357 (1976) (concluding that, by enacting the INA, Congress did not intend to completely restrict state power to regulate issues within state power to regulate, even if state regulation of those issues impacts immigration policy).

151. Lee v. S. Home Sites Corp., 444 F.2d 143, 143 (5th Cir. 1971).

It follows that "even state regulation designed to protect vital state interests must give way to paramount federal legislation."[152]

Prospective renters could assert causes of action against cities that impose rental ban ordinances because rental ban ordinances will result in blatant violations of the FHA and, consequently, city-adopted regulations cannot be viewed as federally sanctioned.[153] Findings of violations can hinge on judicial determinations that minorities were disproportionately affected by a racially motivated housing practice or policy.[154]

2. Theories of Disparate Treatment or Disparate Impact

Plaintiffs affected by discriminatory rental bans may find relief in one of two ways: (1) plaintiffs can assert that a rental ban ordinance is intentionally discriminatory; or (2) plaintiffs can allege that facially neutral legislation gives rise to a disparate impact.[155]

In order to establish a violation of the FHA, a plaintiff must demonstrate either disparate treatment or disparate impact.[156] A disparate impact claim requires proof that the discriminatory impact resulted from facially neutral legislation.[157] This is likely to be the better claim for plaintiffs affected by rental ban ordinances, as rental bans are not facially discriminatory; rather, rental ban ordinances appear facially neutral.[158] It may be inferred that "the ordinances will almost certainly have a dispa-

152. *DeCanas*, 424 U.S. at 357; *cf.* Alyssa Garcia Perez, *Texas Rangers Resurrected: Immigration Proposals After September 11th*, 8 SCHOLAR 277, 290–91 (2006) (discussing the factors that determine whether state regulatory laws preempt federal law).

153. *See* Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 539 (2008) ("Any law that would require or permit discriminatory housing practices is invalid under the [FHA]." (footnote omitted)).

154. *See* Orange Lake Assocs. v. Kirkpatrick, 21 F.3d 1214, 1227–28 (2d Cir. 1994) (providing that housing practices are discriminatory under the FHA if minorities are affected in greater numbers than White renters).

155. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants Access to Housing*, 39 U. MIAMI INTER. AM-L. REV. 529, 540 (2008).

156. *See* Barkley v. Olympia Mortgage Co., No. 04-CV-875, 2007 WL 2437810, at *13 (E.D.N.Y. Aug. 22, 2007) (providing an alternative theory on which plaintiffs can successfully bring claims under the FHA).

157. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants Access to Housing*, 39 U. MIAMI INTER. AM-L. REV. 529, 540 (2008).

158. *E.g.*, Farmers Branch, Tex., Ordinances 2892 (Nov. 13, 2006), *invalidated by* Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757 (N.D. Tex. 2007), *available at* http://www.aclu.org/pdfs/immigrants/farmersbranch_ordinance.pdf.

rate impact on both undocumented and documented immigrants in their respective localities."[159]

Conversely, however, a claim of outright or intentional discrimination may be too high a burden of proof.[160] The language of rental ban ordinances, no matter where they are enacted, does not explicitly state that property owners and landlords are to discriminate against, for example, Latin Americans, Asians, African-Americans, or another particular racial group.[161] Proponents of rental bans claim that the ordinances do not seek to discriminate against one particular race or national origin, but rather seek only to prevent undocumented immigrants from infiltrating the housing market.[162] Arguably, it would be too difficult to prove blanket discrimination from a reading of any given rental ban ordinance. However, "if aggrieved plaintiffs can show that the ordinances permit such discriminatory housing practices[,] they could attack them on such grounds."[163] But a fair reading of different cities' ordinances will show a meritorious claim for discrimination that proceeds from a facially neutral law,[164] and plaintiffs, therefore, should substantiate discrimination-based claims on a theory of disparate impact.

Additionally, individuals facing discrimination when seeking to rent property in cities with adopted rental bans will have an action in tort.[165]

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159. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants Access to Housing*, 39 U. MIAMI INTER-AM L. REV. 529, 540 (2008) (footnote omitted).

160. *See id.* at 539 ("[J]ust because the ordinances seem to provide a vehicle with which landlords might act discriminately toward prospective tenants based on race and/or national origin, does not mean that the localities intended such a consequence.").

161. *E.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006) (containing no facially discriminatory language).

162. *E.g.*, Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1047–48 (S.D. Cal. 2006) (designating "illegal aliens" as the only group targeted by the rental ban ordinance). The City of Escondido argues that the purpose of the ordinance is to alleviate the blight in the city's housing market. *Id.* at 1052–53. The plaintiffs, however, contend that "the study used by [d]efendant to justify the [o]rdinance did not cite illegal immigrants as the source of housing problems, but that the blight conditions in the [Escondido] area were due to the high costs of housing and the unavailability of affordable subsidized housing in Escondido." *Id.* at 1053.

163. Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 539 (2008).

164. *E.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006).

165. *See* Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 562 (5th Cir. 1979) ("An action based upon the federal antidiscrimination statutes is essentially an action in tort."). The Supreme Court has upheld tort claims stemming from violations of the FHA; in fact, the Court has analogized discrimination suits with actions for the intentional infliction of mental anguish and defamation. *Id.* (citing Curtis v. Loether, 415 U.S. 189, 195 (1974)). Further, "the statutory ban on racial discrimination in housing 'could be viewed as an ex-

Not only will property owners and landlords potentially face criminal prosecution or financial sanctions by cities if they violate rental ban requirements,[166] but they will be civilly liable for upholding the bans as well.[167] Property owners and landlords, therefore, will find themselves in a state of legal limbo, uncertain of how to proceed.[168]

IV. CONCLUSION

It cannot be denied that judicial scrutiny will affect future implementation of rental bans. The preservation and survival of rental bans will depend entirely on how courts treat the hundreds of challenges to rental ban ordinances that are being litigated throughout the country.[169] Cities that pass rental ban ordinances have recently found themselves in unsettled territory, as litigation on the issue of rental bans has become pervasive. State-enacted immigration reform is manifested by the adoption of many different anti-immigration measures.[170] As different cities in different states enact their own policies to reduce the facilitation of illegal im-

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tension of the common-law duty of innkeepers not to refuse temporary lodging to a traveler without justification.'" *Id.* (quoting *Curtis*, 415 U.S. at 195); *see also* Patterson v. Am. Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976) (analogizing the scheme of compensation for redress of racial employment discrimination to the scheme of compensation under tort law), *cert. denied*, 429 U.S. 920 (1976). "The analogy is apt because a statutory action attacking racial discrimination is fundamental for the redress of a tort." *Patterson*, 535 F.2d at 269 n.10 (citing *Curtis*, 415 U.S. at 195).

166. *See, e.g.*, *Villas at Parkside Partners*, 496 F. Supp. 2d at 763 (stating that the Farmers Branch ordinance imposes fines and possible jail time for property owners who fail to comply with the adopted rental ban).

167. *See* Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 539 (2008) (claiming that these landlords may be liable for discriminatory conduct under the FHA).

168. *See* Sophie Marie Alcorn, Note, *Landlords Beware, You May Be Renting Your Own Room . . . in Jail: Landlords Should Not Be Prosecuted for Harboring Aliens*, 7 WASH. U. GLOBAL STUD. L. REV. 289, 293, 304–05 (2008) (contrasting penalties for failing to comply with rental bans with penalties for discriminating in violation of the FHA).

169. *See* Clifton R. Gruhn, Comment, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access to Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 556–57 (2008) (stating that "the issues presented by [rental bans and similar state anti-immigration laws] are far from settled"); *see also* Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22, *available at* 2008 WLNR 2574286 (discussing how the varied decisions around the country on this issue have created a conflict of laws between the states).

170. *E.g.*, Nchimunya D. Ndulo, Note, *State Employer Sanctions Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 CORNELL J.L. & PUB. POL'Y 849, 852 (2009) (analyzing the Legal Arizona Workers Act, which bans Arizona employers from hiring undocumented immigrants).

migration, there is still no clear legal guidance for enforcement.[171] One could argue that some deference should be given to city and state ordinances because of the existing relationship between national security and illegal immigration.[172] It has been argued that the mere fact that local enactments concern illegal immigration does not signify a local attempt to regulate immigration, as local enactments and policies do not set parameters for which immigrants may remain in the United States.[173]

This Note highlights the fact that cities that pass rental ban ordinances are not immune from suits based on viable constitutional claims. A city's or municipality's claim of sovereignty is rendered obsolete if the city or "municipality *itself* causes the constitutional violation at issue."[174] Arguably, plaintiffs can successfully abrogate sovereignty claims, as well as municipalities' qualified immunity claims, by showing that a rental ban ordinance is discriminatory on its face or is affirmatively linked to a disparate impact.[175]

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171. Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 790–91 (2008) (stating that courts are not reaching consistent conclusions on local immigration enactments).

172. *See id.* at 806 ("Since the attacks of September 11, 2001, the federal government has actively sought the law enforcement assistance of states and localities." (footnote omitted)); *c.f.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947) (noting that the immigration issue is characterized by a perpetual tug-of-war between state and federal powers). "It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the [s]tates undisturbed except as the state and federal regulations collide." *Rice*, 331 U.S. at 230–31 (citation omitted); Townsend v. Yeomans, 301 U.S. 441, 455 (1937) (asserting that where there is a conflict between state and federal power, the conflict may be resolved based on a standard of uniformity and consistency between the state and federal statutes); Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 399–400 (1913) (maintaining that when Congress acts, its laws override those of the individual states).

> [The] reservation to the states manifestly is only of that authority which is consistent with, and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of [f]ederal power. The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations.

Simpson, 230 U.S. at 399.

173. *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) (defining "regulation of immigration" as setting conditions for immigrants to remain in the country).

174. Burnett v. Sharma, 511 F. Supp. 2d 136, 141 (D.C. Cir. 2007) (emphasis in original) (citing City of Canton v. Harris, 489 U.S. 378, 385 (1989)).

175. *See* Barkley v. Olympia Mortgage Co., No. 04-CV-875, 2007 WL 2437810, at *13 (E.D.N.Y. Aug. 22, 2007) (stating that disparate impact is legitimate grounds for suit under the FHA).

Individuals negatively affected by rental ban ordinances undoubtedly have legitimate constitutional claims.[176] This issue is in the early stages of resolution and is evolving within a legal context. Plaintiffs seeking to quash local rental bans have been preliminarily successful in obtaining injunctions and temporary or permanent restraining orders against enforcement.[177] But despite this precursory success, this issue will continue to inspire controversy, as it is an issue that affects many individuals, including both citizens of the United States and undocumented immigrants.

As an example of this preliminary success, the court in *Villas at Parkside Partners v. City of Farmers Branch* found the Farmers Branch ordinance preempted because it constituted a "regulation of immigration."[178] The absolute designation of the ordinance as a regulation of immigration serves as a strong foundation for decisions in future lawsuits. Arguably, however, the future remains unclear, as other courts may hold that immigration ordinances do not attempt to regulate immigration. As a result, the *Villas at Parkside Partners* decision can in no way be interpreted as judicial precedent.

This Note does not seek to predict a legal outcome for rental ban ordinances, but rather attempts to bring to light potential claims that may develop or evolve from rental ban adoption. The establishment and actualization of rental ban ordinances invites litigation in many different areas of law; clearly, litigation is not limited to the issue of discrimination based on constitutionally protected traits. When brought to fruition, legal claims could conceivably encompass causes of action stemming from property-related interests, such as an ordinance's resultant restraint on alienation of property. Plaintiffs seeking to challenge rental bans in their cities should not stop with asserting only constitutional claims of discrimination, but should pursue the issue from a property approach as well. Adjudication on the merits could potentially result in a finding that property owners have been prevented from the effective use, enjoyment, and disposal of their property. Thus, cities cannot effectively defend their rental bans without incurring some liability. Plaintiffs should espouse their rights as property owners and seek adjudication on the merits of this issue. Other plaintiffs, such as prospective tenants, could prevail on

176. *See, e.g.*, Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 776 (N.D. Tex. 2007) (authorizing the granting of an injunction against enforcement of the Farmers Branch rental ban).

177. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 542, 545–46 (M.D. Pa. 2007); *Villas at Parkside Partners*, 496 F. Supp. 2d at 777; Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1060 (S.D. Cal. 2006).

178. *Villas at Parkside Partners*, 496 F. Supp. 2d at 774.

claims under the FHA with allegations of systematic discrimination based on race, ethnicity, or national origin.[179]

Only time will tell whether rental ban ordinances will survive judicial scrutiny; however, one can infer that judicial inquiry will be intense and lengthy, as this issue will assume national proportions due to the widely held belief that cities and states must continue to enact legislation to curb illegal immigration.[180] Local immigration measures calculated to curb illegal immigration are sure to continue.[181] It is likely that cities will revamp rental ban ordinances absent federal reform. Federal legislation has never specifically undertaken reform on certain local immigration ordinances, such as rental bans, and it is unlikely that this issue will be mitigated or resolved merely by temporary injunctions or restraining orders; however, "a temporary restraining order, though not ultimately determinative on the merits, is an important step."[182] Mere censure of city rental ban ordinances is not an adequate remedy for the larger issue.

Carefully drafted legislation is necessary to curtail the conflict plaguing America's cities. If municipalities are to continue to act as extensions of state power, states must diligently draft future statutes to be as comparable to federal law as possible; to do otherwise will undoubtedly result in claims of federal preemption.[183] Conceivably, there will be division and conflict as to what amounts to proper immigration reform in the immediate future. Immigration issues run so deep that anti-immigrant ordinances will likely remain a serious point of contention absent

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179. *See* Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2006).

180. *See* Gretel C. Kovach, *Voters in Dallas Suburb Back Limit on Renting to Illegal Immigrants*, N.Y. TIMES, May 13, 2007, at 120, *available at* 2007 WLNR 9058926 (echoing the notion that litigation will be lengthy). Supporters of rental bans in Farmers Branch, for example, are not opposed to litigating the issue up to the Supreme Court. *Id.* Their party-opposition, however, maintains the same stance. *Id.*

181. *See* Stephanie Sandoval, *New Mayor Says Top Priority Is Ridding Carrollton of Illegal Immigrants*, DALLAS MORNING NEWS, May 12, 2008, *available at* 2008 WLNR 8902450 (suggesting that the adoption of rental bans will continue absent unequivocal judicial decisions).

182. L. Darnell Weeden, *Local Laws Restricting the Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 497 (2008) (footnote omitted).

183. *See* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 464 (2008) ("[T]here is wide latitude for states and municipalities to act without being preempted, provided the statutes are drafted correctly."). Three significant restrictions must be taken into account with state statutes and city ordinances to avoid preemption. *Id.* at 465. The statute or ordinance must not create a category of aliens that is not currently recognized by federal law, use language and terminology that is inconsistent with federal law, or contain any attempt to allow non-federal authorities to determine, independently and without authorization by the federal government, the immigration status of an individual. *Id.*

unambiguous and clear-cut federal reform. Without such reform, there remains the possibility of the evolution of a "patchwork of divergent laws."[184] At the same time, however, in accordance with federal preemption standards, states will be acting in harmony with federal laws, so long as there remains no uniform law as to locality-based immigration rental ordinances.[185] But with respect to federal anti-discrimination laws, such as the FHA, municipalities and property owners remain amenable to suit.[186]

Cities across the country are taking divergent approaches to the issue of immigration reform. Some cities, such as those that adopt rental ban ordinances, take a punitive approach to illegal presence. The establishment of rental bans in cities across the country is an attempt to curb illegal immigration within city borders. Other cities, however, seek immigration reform through a more accepting and liberalized approach. This liberal approach is exemplified by the creation of "sanctuary cities."[187] No matter which approach a city adopts, both are attempts at immigration reform. These divergent legislative strategies highlight the polarization of the immigration debate that is being waged in cities across the United States. One perspective is often interpreted as openly hostile and punitive, the other as liberal and undermining the historically proper channels for immigration to the United States.[188] Although this Note fo-

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184. *Id.* at 483.

185. *Id.* at 469 (contending that there is no real divergence between federal and state laws when state legislatures enact immigration legislation).

186. *See* Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2006) (articulating grounds of discrimination).

187. *See* Michael Luo, *A Closer Look at the 'Sanctuary City' Argument*, N.Y. TIMES, Nov. 29, 2007, at A26, *available at* 2007 WLNR 23527581 (analyzing the establishment of sanctuary cities for undocumented immigrants across the United States); Michele Wucker, *A Safe Haven in New Haven*, N.Y. TIMES, Apr. 15, 2007, at 15, *available at* 2007 WLNR 7152133 (noting that some cities across the country have welcomed and embraced undocumented workers). "Sanctuary cities" are described by opponents as "cities that turn a blind eye to federal immigration law." Michael Luo, *A Closer Look at the 'Sanctuary City' Argument*, N.Y. TIMES, Nov. 29, 2007, at A26, *available at* 2007 WLNR 23527581. Cities that adopt these "don't ask, don't tell" policies, like New Haven, Connecticut, argue that "bringing undocumented residents out of the shadows benefits everyone." Michele Wucker, *A Safe Haven in New Haven*, N.Y. TIMES, Apr. 15, 2007, at 15, *available at* 2007 WLNR 7152133.

188. Michael Luo, *Walking a Tightrope on Immigration*, N.Y. TIMES, Nov. 29, 2007, at 41, *available at* 2007 WLNR 22824057. Cities that promote themselves as sanctuary cities are often designated as more liberal because they undertake the immigration issue from an accommodation approach, as opposed to a hostile and punitive approach to illegal immigration. *Id.* During the Republican primaries in 2007 and 2008, most of the candidates spoke out against sanctuary cities and amnesty as part of their platforms on illegal immigration. *Id.* But the rising number of Hispanic voters forced candidates to tone down their anti-immigrant rhetoric. *Id.*

cuses on rental ban ordinances, the contrast between cities that impose strict immigration ordinances and cities that abstain from imposing any sort of legislation (sanctuary cities) highlights the point that the immigration issue is not easily resolved. Until there is a uniform system of immigration reform, or some consistency between federal and state immigration laws that will prevent cities from adopting their own measures, rental ban ordinances will continue to be placed on city ballots.

For this reason, individuals affected by rental ban ordinances, both property owners and prospective tenants alike, should be aware of the potential for lawsuits. Absent judicial resolution or federal reform, rights will be suspended in the alleged interest of local police power.