STANDING AND SPEAKING CONSTITUTIONAL TRUTH TO LOCAL POWER REGARDING UNDOCUMENTED IMMIGRANT RESIDENTS DWELLING WITH WE THE PEOPLE OF THE UNITED STATES

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INTRODUCTION

We the People of the United States, in order to establish a more perfect Union with justice and fairness for all persons, shall promote domestic tranquility by giving voice and constitutional protections to those undocumented immigrants dwelling with us.[1] This article will consider the logic of recent policies involving laws targeting undocumented immigrants and evaluate whether some communities are on a collision course with domestic tranquility because of immigrant hostility. While immigration is a long standing divisive topic,[2] today's headlines clearly demonstrate that the immigration debate is a hot subject. Many Americans believe that Congress has all but abandoned its responsibility to establish responsible, uniform, and pragmatic laws to address the status of the estimated twelve million undocumented immigrants living in the United States.[3] Because many scholars feel that the majority of undocumented immigrants come to the United States for economic opportunities,[4] scholars have an obligation to

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1. *Cf.* U.S. CONST. pmbl.
2. Clifton R. Gruhn, *Filling Gaps Left by Congress or Violating Federal Rights: An Analysis of Local Ordinances Restricting Undocumented Immigrants' Access To Housing*, 39 U. MIAMI INTER-AM. L. REV. 529, 530 (2008).
3. Rebecca van Uitert, *Undocumented Immigrants in the United States: A Discussion of Catholic Social Thought And "Mormon Social Thought" Principles*, 46 J. CATH. LEGAL STUD. 277, 280 (2007) (citing Jeffrey S. Passel, Pew Hispanic Ctr., The Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey i (2006), http:// www.pewhispanic.org/files/reports/61.pdf [hereinafter Passel, Estimates]).
4. *Id.* at 281 (citing Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 678 (1997) (arguing that most undocumented immigrants leave their countries of origin in order to obtain employment, better wages, and an improved standard of living).

critique court opinions construing local laws adopted by public officials targeting the conduct of undocumented immigrants, to see whether the judiciary has succumbed to popular misconceptions about the impact undocumented immigrants have on our national economy.

Many Americans feel that undocumented immigrants are taking advantage of the American economy.[5] The truth is that undocumented immigrants "contribute significantly to the [United States] economy" and in fact pay more to the public treasury in taxes than is expended on their behalf in social services.[6] We must stand and speak constitutional truth when addressing the rights of undocumented immigrants. America needs to acknowledge that its domestic tranquility is best preserved by paying all workers equitable wages whether they are called employees, undocumented immigrants or slaves.

Part I of this article contends that an undocumented individual, regardless of how he or she entered this country, is a person entitled to be treated fairly under the Due Process Clause of the Fourteenth Amendment. Part II considers the negative implications of both a local silence, resulting from fear and a federal ban prohibiting the hiring of undocumented immigrants on domestic tranquility. Part III presents constitutional implications for local laws regulating the rights of undocumented immigrant dwellers.

I. AN UNDOCUMENTED INDIVIDUAL, REGARDLESS OF HOW HE OR SHE ENTERED THIS COUNTRY, IS A PERSON ENTITLED TO BE TREATED FAIRLY UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Our Constitution provides "nor shall any State deprive any person of life, liberty, or property without due process of law."[7] The Due Process Clause of the Fourteenth Amendment protects persons located within the United States without regard to whether his or her presence is unlawful or temporary.[8] It has clearly been determined that "certain constitutional protections available to

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5. *Id.* at 283 (citing Julian L. Simon, Cato Inst. & Nat'l Immigration Forum Immigration: The Demographic & Economic Facts pt. 9 (1995), *available at* www.cato.org/pubs/policy_report/pr-immig.html; *see also* Cindy Chang, *Health Care for Undocumented Immigrant Children: Special Members of an Underclass*, 83 WASH. U. L.Q. 1271, 1271 (2005)); Richard Sybert, *Population, Immigration, and Growth in California*, 31 SAN DIEGO L. REV. 945, 995–1000 (1994).
6. van Uitert, *supra* note 3, at 283-84 (citing Nat'l Immigration Law Ctr., *Facts About Immigrants* (2004), *available at* www.nilc.org/immspbs/research/pbimmfacts_0704.pdf [hereinafter Nat'l Immigration Law Ctr., Facts] and Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219, 243 (1991).
7. U.S. CONST. amend. XIV.
8. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

persons inside the United States are unavailable to [immigrants] outside of our geographic borders."[9] It is a constitutional truth that after an immigrant has entered America, even illegally, he "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[10]

Because the power to regulate immigration is a power expressly granted to Congress, the Due Process Clause of the Fourteenth Amendment should impose mutually substantive and procedural prohibitions on the power of state and local governments to unilaterally impose burdens on a person because of his or her immigration status.[11] Because a state does not have the constitutional authority to determine the terms and conditions under which a documented immigrant remains in this country, the state lacks the legal capacity to establish an immigrant's substantive rights, or to authorize a hearing or procedure to determine any person's immigration status.[12] Only Congress has the authority to establish uniform rules of naturalization for immigrants.[13]

II. A LOCAL SILENCE OF FEAR AND A FEDERAL BAN PROHIBITING THE HIRING OF UNDOCUMENTED IMMIGRANTS HAVE NEGATIVE IMPLICATIONS FOR THE DOMESTIC TRANQUILITY CONCEPT

The murder of an Ecuadorean immigrant, Marcelo Lucero, in Suffolk County, New York, shows the dangerous effects of silence based in fear and harsh immigration regulations.[14] Though Lucero was killed by a gang of boys, some blame Suffolk County executive Steve Levy because of his harsh approach to local immigration enforcement.[15] Mr. Levy points to friends and acquaintances of the gang of boys who remained silent while the gang systematically attacked Latinos.[16] Americans committed to justice and the rule of law simply should not remain silent as Latinos become victims of hate crimes and other hidden crimes.[17]

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9. *Id.*
10. Shaughnessy v. U.S. *ex rel*. Mezei, 345 U.S. 206, 212 (1953).
11. *See* U.S. CONST. amend. XIV, § 1 and U.S. CONST. art. I, § 8, cl. 4.
12. *See id.*
13. *See id.*
14. A *Catastrophic Silence*, N.Y. TIMES, Nov. 26, 2008, at A32, *available at* 2008 WLNR 22586131.
15. *Id.*
16. *Id.*
17. *Id.*

Jeffrey Sinensky, Director of the Domestic Policy Department for the American Jewish Committee, highlights the danger of remaining silent to the plight of undocumented immigrants.[18]

> While reasonable people may have different viewpoints about this difficult challenge, bigotry should never become acceptable in public debate . . . the American Jewish Committee is concerned with the racism, fear-mongering and scapegoating that increasingly are a regular part of the immigration debate. This rhetoric comes not only from extremist groups, but also from public officials, pundits on television and radio, and other influential Americans. Such language is antithetical to American values. There must be a return to reasoned discourse . . . . At stake are nothing less than individual lives, the unity of families, the state of our economy, and the very nature of our society.[19]

The police precinct commander in Suffolk was fired for failing to manage the attacks against Latino men, "an acknowledgment that in Suffolk, equal protection may not apply to everyone."[20] Nationwide, other communities have experienced similar circumstances.[21] In Postville, Iowa, it was reported that immigrant children were working long hours on a "slaughterhouse killing floor."[22] In New Bedford, Massachusetts, immigrant workers were "systematically cheated" out of wages.[23] On the Gulf Coast, "legal guest workers were held in modern-day indentured servitude."[24] The silence of undocumented immigrants is the "catastrophic silence of people trained by legislative harassment and relentless stereotyping to live mute and afraid."[25]

Regardless of their immigration status, setbacks in immigration reform affect all legal and illegal residents who "perceive an increase in discrimination against Hispanics" when immigration reform is defeated.[26] In Suffolk County, Levy contends that his local enforcement of federal immigration law should not be regarded as "negative" or "inflammatory."[27] However, critics of Levy's approach to undocumented immigrants offer

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18. *No More Fear-Mongering*, N.Y. TIMES, Dec. 7, 2008, *available at* 2008 WLNR 23504013.
19. *Id.*
20. *See A Catastrophic Silence*, *supra* note 14.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *See id.*
26. Leticia M. Saucedo, *A New "U": Organizing Victims And Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 899 (2008) (citing Pew Hispanic Center, 2006 National Survey of Latinos: The Immigration Debate, 13, *available at* http://pewhispanic.org/files/reports/68.pdf.)
27. *A Catastrophic Silence*, *supra* note 14.

several reasons for rejecting his local regulation of immigration policy.[28] First, critics assert that his "fixation on uprooting and expelling immigrants" simply does not work, and his inflammatory zeal "tears communities and families apart."[29] Second, Levy uses local police in a manner that causes immigrants to become "the mute prey of criminals."[30] Third, Levy believes "illegal" status is unforgiveable and that undocumented immigrants are a "permanent class of presumed criminals who have no rights."[31] Finally, Levy should "give the jobs of deportation and border control back to the federal government and concentrate on making things safer and lawful in his local community."[32]

According to commentators, many undocumented immigrants claim that employment is the most important reason for coming to the United States, although employing an undocumented immigrant in the United States is unlawful.[33] An undocumented immigrant accepting "unauthorized employment" may be deported and/or become ineligible to gain "permanent residence."[34]

Michael J. Wishnie, Clinical Professor of Law at Yale Law School, believes that federal penalties for employers who hire undocumented immigrants have failed to discourage illegal immigration or positively affect U.S. labor markets.[35] Professor Wishnie makes a strong argument that the federal ban on employment of undocumented immigrants should be abolished because those restrictions have "led to increased workplace exploitation of undocumented immigrants," and have simultaneously "encouraged illegal immigration and eroded wages and working conditions for U.S. workers."[36] Furthermore, federal sanctions have "undermined public safety and homeland security by driving millions of undocumented immigrants and their families into the shadows of civic life," unwilling to cooperate with "ordinary law enforcement, public health, and other social programs" for fear of deportation.[37]

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. D. Aaron Lacy, *The Aftermath Of Katrina: Race, Undocumented Workers, And The Color Of Money*, 13 TEX. WESLEYAN L. REV. 497, 502 (2007) (citing ROBERT C. DIVINE & R. BLAKE CHISAM, IMMIGRATION PRACTICE, § 19–2 (2006) and 8 U.S.C. § 1101 (1994)).
33. *Id.*
34. *Id.* (quoting ROBERT C. DIVINE & R. BLAKE CHISAM, IMMIGRATION PRACTICE, § 19–2 (2006)).
35. Michael J. Wishnie, *Prohibiting The Employment Of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (2007).
36. *Id.*
37. *Id.*

Meanwhile, prohibiting the employment of undocumented immigrants has unfairly advantaged businesses who are willing to break the law because enforcement is left to the employer.[38] By entrusting immigration enforcement control to private employers, restrictions have created "inherently exploitative circumstances in the workplace."[39] Therefore, as Professor Wishnie argues, "[e]mployer sanctions have failed and should be abandoned."[40]

III. CONSTITUTIONAL IMPLICATIONS FOR LOCAL LAWS REGULATING THE RIGHTS OF UNDOCUMENTED IMMIGRANT RESIDENTS

In *Lozano v. City of Hazleton*, legal and unauthorized immigrants, as well as Latino associations, sued in federal district court to challenge the constitutionality of laws controlling the rental of housing, and the employment, of undocumented residents.[41] In deciding six distinct issues, the federal district court in *Lozano* first granted standing to landlord plaintiffs who, because of the tenant registration and employment provisions under the Hazleton law, experienced renting difficulties but were still in business.[42] Second, immigrants with an undecided immigration status could take part in the suit as anonymous plaintiffs in order to protect "their basic rights to shelter, education, and a livelihood."[43] Third, the federal Immigration and Reform Control Act preempted Hazleton from penalizing businesses who hired undocumented immigrants.[44] Fourth, the due process rights of landlords and tenants in Hazleton were violated by landlord/tenant regulations that demanded proof of officially authorized citizenship or residency.[45] Fifth, Hazleton did not violate the equal protection principle by imposing penalties on people who hire or rent houses to undocumented individuals because the plaintiffs could not show that the city had discriminatory intent.[46] Finally, under 42 U.S.C. §1981, which prohibits private discrimination in the making of contracts, Hazleton could not keep undocumented persons from signing leases.[47]

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38. *Id.*
39. *Id.*
40. *Id.*
41. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 485–86 (M.D. Pa. 2007).
42. *Id.* at 488–89.
43. *Id.* at 506–14.
44. *Id*. at 518–19.
45. *Id*. at 538.
46. *Id*. at 541.
47. *Id.* at 547–48.

The *Lozano* opinion spoke to the City of Hazleton's lack of legitimate power to enact laws that govern the presence and employment of unauthorized resident immigrants.[48] In 2000, Hazleton had a population of 23,000 which had grown to approximately 30,000 residents by 2007.[49] The growth in Hazleton's population was traced to Latino immigrants, both legal and undocumented.[50] Trial testimony indicated that all immigrants, both legal and undocumented, supported Hazleton's economy through consumer "spending, paying rent, and paying sales taxes."[51]

Beginning in mid-2006, Hazleton approved many regulations "aimed at combating what the city viewed as the problems created by the presence of 'illegal aliens.'"

> On July 13, 2006, Ordinance 2006–10, the city's first version of its "Illegal Immigration Relief Act Ordinance" was passed. This ordinance prohibits the employment and harboring of undocumented aliens in the City of Hazleton. On August 15, 2006, the city passed the "Tenant Registration Ordinance," Ordinance 2006–13 ("RO"). This ordinance requires apartment dwellers to obtain an occupancy permit. To receive such a permit, they must prove they are citizens or lawful residents.
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> On September 21, 2006, Hazleton enacted Ordinance 2006–18, entitled the "Illegal Immigration Relief Act Ordinance" ("IIRA") and Ordinance 2006–19, the "Official English Ordinance." These two ordinances replaced the original Illegal Immigration Relief Act. On December 28, 2006, Hazleton enacted Ordinance 2006–40, which amended IIRA by adding an "implementation and process" section. During the trial of the above matter, the city enacted the final ordinance at issue in this case, Ordinance 2007–6, which made minor, but important, changes to the language of portions of IIRA.[52]

Immigrants can lawfully be present in the United States as: 1) "lawfully admitted" or 2) "lawful immigrants," i.e., "green card holders."[53] Officially recognized permanent residence status may be acquired through family, employment, the "green card lottery" or "relief such as asylum."[54] "Undocumented aliens" are immigrants who have not received officially

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48. *Id.* at 484.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id*. at 484–85.
53. *Id.* at 485.
54. *Id.*

recognized immigration status, either because they have stayed longer than allowed or entered the country without official permission.[55] Hazleton implemented the term "illegal alien" in its ordinances to describe individuals who may have entered the country without federal authorization.[56]

The federal court properly rejected Hazleton's position that none of the plaintiffs had standing to file the lawsuit.[57] To give rise to constitutional standing, a plaintiff is required to demonstrate three factors: 1) he or she has experienced "an 'injury in fact'–an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent;'" 2) there is a causal relationship between the injury and the behavior complained of; and 3) it must be certain that "the injury will be 'redressed by a favorable decision.'"[58]

Hazleton asserted that Plaintiff Pedro Lozano, a landlord in Hazleton, did not have standing in the suit because Lozano did not suffer a redressable injury caused by the Hazleton ordinances.[59] Lozano, a legal U.S. resident and a Hazleton home-owner, rented half of his house to help pay the mortgage.[60] The Court held that Lozano suffered a concrete actual injury.[61] Lozano rented the property soon after acquiring the mortgage and on a nonstop basis until Hazleton passed the ordinances.[62] As a result of the ordinances, Lozano's tenants "ran away" after he told them that they might have to get a permit from Hazleton to rent the apartment.[63] Afterwards, Lozano was able to only "sporadically" rent the property.[64] Thus, Lozano's difficulties in finding and keeping renters established an injury."[65]

Lozano was cited in a Virginia case involving the regulation of immigrants by local authorities.[66] In *Roe 1 v. Prince William County*, immigrants and an organization consisting of "immigrants and community volunteers providing counseling, education, outreach, and referral services to immigrant workers" filed suit in a district court against the county, challenging a resolution that gave police officers permission to interrogate lawfully

55. *Id.*
56. *See id*. at 499.
57. *Id.* at 488.
58. *Id.* at 487–88 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
59. *Id.* at 488.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 488–89.
64. *Id.* at 489.
65. *Id.*
66. Roe 1 v. Prince William County, 525 F. Supp. 2d 799, 806 (E.D. Va. 2007).

detained persons on their federal immigration status.[67] The plaintiffs asserted that the resolution was causing tenants and clients to leave the county, thus negatively affecting the plaintiffs' economic opportunities.[68]

The *Roe* court engaged in flawed reasoning to support its conclusion that the resolution did not have an adverse impact on the plaintiffs' economic opportunities.[69] However, the economic loss experienced by the plaintiffs was clearly traceable to the language in the resolution.[70] Despite the *Roe* order, the resolution produced an actual and concrete injury to the plaintiffs because the county board was substantially certain that immigrants would depart from the county, with a foreseeable targeted loss of profits. As a result of the resolution, federal immigration issues made immigrants unable to receive contractual benefits from local businesses. This result led Plaintiffs' businesses to suffer an actual or imminent economic loss.

In *Toll v. Moreno* the Supreme Court held that a state may not impose regulations on immigrants lawfully admitted in this country without approval from Congress.[71] Under an expanded version of the *Toll v. Moreno* rationale, it seems that the states, unless given approval by Congress, should also not impose regulations that burden or impose discriminatory regulations on undocumented immigrants who can establish that they have been residing in a community long enough to meet the state's durational requirement for the issuance of benefits to lawfully admitted residents.[72] In *Roe 1 v. Prince William County*, the plaintiffs' injuries resulted from the burden of their freedom to contract with individuals because of their federal immigration status. The passage of a resolution by the county board in Prince William County is evidence of a hostile attitude toward undocumented immigrants, very similar to the tenant registration requirement which created a concrete and actual injury for Lozano in *Hazleton.*

As a result of Hazleton's regulations affecting landlords, Lozano suffered an actual or imminent injury adequate to satisfy the constitutional standing requirements.[73] Likewise, the Prince William County resolution reduced the

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67. *Id.* at 802.
68. *Id.* at 806.
69. *See id*. at 806–07.
70. *Id*. at 807, n.1. ("Resolution 07–984 'directs staff to implement processes . . . to prevent business licenses from being issued to persons who cannot demonstrate legal presence.' Pls.' Mem. in Opp'n Ex. 4. However, as mentioned above, there is no indication that this Order has the status of law. Additionally, Plaintiffs claim of economic injury is ascribed not to business licenses being denied, but to the fact that 'a large number of residents are moving out of [the County],' resulting in a decrease in the number of clients. Pl.'s Mem. in Opp'n at 11; Compl ¶¶ 43–44, 50, 52").
71. Toll v. Moreno, 458 U.S. 1, 12–13 (1982) (citing De Canas v. Bica, 424 U.S. 351, 358 n. 6 (1976)).
72. *See id*.
73. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 488 (M.D. Pa. 2007).

plaintiffs' potential undocumented immigrant customers.[74] A local governmental regulation creates an actual or imminent economic injury adequate to satisfy the constitutional standing requirements when the local regulation inhibits the rights of immigrants (whether undocumented or not) to purchase goods or services, thus placing restrictions on the right to contract with U.S. citizens.[75] Following the Supreme Court's rationale used in reaching its holding in the *Toll v. Moreno*[76] opinion, the federal district court in the *Prince William County* case should have recognized that an undocumented immigrant who is denied a local business license because of his or her federal immigration status suffers an injury. A county resolution which intentionally impacts one's ability to sell goods and services to undocumented immigrants is not a valid local regulation of immigration unless approved by Congress. In *Hazleton*, the court rejected the argument that Lozano's injuries could not be "recognized by the law" because they "constitute[d] a complaint about an inability to rent to illegal immigrants."[77] As the district court explained, the Hazleton ordinances caused Lozano's injuries.

> Potential renters' concerns with the registration requirements of the ordinances and the attitude towards immigrants their passage conveyed undermined Lozano's ability to secure tenants. Lozano had informed the prospective tenants that the ordinance's registration requirements mandated that they bring immigration documents to the City, and those prospective renters never returned. In addition, complying with the ordinances requires action that will cause him time and expense and expose Lozano to potential adverse enforcement actions. If the ordinances did not exist, the landlord plaintiffs would not be required to follow these procedures. The injury Lozano claims is therefore caused by the defendant's actions.[78]

Redressability was also available in *Lozano* because if the court declared Hazleton's ordinances unconstitutional, they would no longer cause Lozano (and the other landlord plaintiffs) economic injury.[79] The Hazleton ordinances

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74. *Roe 1*, 525 F. Supp. 2d at 806–07.
75. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).
76. *See generally* Toll v. Moreno, 458 U.S. 1 (1982).
77. *Lozano*, 496 F. Supp. 2d at 489.
78. *Id.*
79. *Id.* at 490.

highlight what one commentator calls "three insurmountable constitutional defects."[80]

> First, the ordinances intrude upon exclusive federal powers as the city leaders announce their intentions to regulate immigration which is prohibited under DeCanas v. Bica. Second, there is no federal definition of "illegal alien" that satisfies a municipalities' [sic] purposes; therefore, a municipality would have to create a definition of "illegal alien" or some other criteria to determine to whom the ordinances should apply–an act a municipality cannot do without infringing upon some exclusive federal power. Third . . . the municipalities are prohibited from creating burdens separate from or greater than those authorized by federal law.[81]

The Court determined that there was no reason to find that the *Hazleton* tenants were not entitled to take possession of an apartment in the United States.[82] There was no evidence "that removal orders exist[ed] for any of the anonymous tenant plaintiffs," and none of those plaintiffs had been arrested or pursued by federal immigration authorities.[83] At the time of their depositions, "none of these plaintiffs would have been forced by any determination of the federal government to leave the City."[84] The federal court properly held that it would not "ignore every principle of due process" and accept defendant Hazleton's contention that because the tenant plaintiffs could not obtain residency permits in Hazleton, they did not have constitutional standing to "complain about being required to do so."[85]

Hazleton's argument against granting standing to undocumented immigrants is repeatedly heard in debates about the national immigration issue: "because illegal aliens broke the law to enter this country, they should not have any legal recourse when rights due them under the federal constitution or federal law are violated."[86] The federal court in Hazleton rejected this argument: "[w]e cannot say clearly enough that persons who

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80. Hayden O'Byrne, Note, *Municipal Overreaching: Federal Preemption As It Applies To Town Ordinances Outlawing The Rental Of Housing To Undocumented Aliens*, 14 TEX. HISP. J. L. & POL'Y 69, 71 (2008).
81. *Id.* (citing DeCanas v. Bica, 424 U.S. 351, 354 (1976) and Hines v. Davidowitz, 312 U.S. 52, 61 (1941)).
82. *Lozano*, 496 F. Supp. 2d at 498.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

enter this country without legal authorization are not stripped immediately of all of their rights because of this single illegal act."[87]

The tenant plaintiffs established standing by alleging that "the rental registration requirements and harboring provisions of IIRA violate[d] their rights under federal law and the United States Constitution, including their right to privacy."[88] The tenant plaintiffs suffered "concrete and particularized injuries" that were "actual or imminent" because they were either required to be evicted or to abandon their rented homes.[89] Plaintiffs' privacy rights would be injured "if forced to turn over private information in order to gain a rental permit."[90] The tenant plaintiffs also established the causation requirement necessary for constitutional standing: "[b]ut for IIRA's requirements that plaintiffs obtain a rental permit by presenting documentation that proves their legal immigration status, plaintiffs would not face the loss of their apartments or the exposure of potentially private information."[91] Plaintiffs' injuries were redressable, because the court issued a "permanent injunction against the enforcement of the ordinances that caused the plaintiffs' injuries."[92]

In *Graham v. Richardson* the United States Supreme Court properly concluded that it is a violation of the Equal Protection Clause for a state to deny welfare benefits to a person because he or she is not a citizen of the United States.[93] If a state cannot deny immigrants welfare benefits, it certainly violates the Equal Protection Clause to adopt an irrational public policy that denies an undocumented immigrant the right to rent or purchase a house in a local community. Such a policy places undocumented immigrants at an unreasonable risk of becoming perpetually homeless, while still allowing them welfare benefits.

In *Plyler v. Doe* the United States Supreme Court held that under the Equal Protection Clause, a state could not deny education to undocumented school age children.[94] Likewise, the equal protection rationale of *Plyler v. Doe* should prohibit the state from arbitrarily denying undocumented immigrants rental housing or burdening them with local registration requirements designed to implement a local policy in violation of the broad exclusive constitutional power assigned to Congress to regulate immigration.[95]

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87. *Id.*
88. *Id.* at 497.
89. *Id.*
90. *Id.* at 498.
91. *Id.*
92. *Id.*
93. Graham v. Richardson, 403 U.S. 365, 374 (1971).
94. Plyler v. Doe, 457 U.S. 202, 221–22 (1982).
95. *See* Mathews v. Diaz, 426 U.S. 67, 85 (1976).

In *Gray v. City of Valley Park*, the federal district court in Missouri found that the plaintiffs did not meet the constitutional standing requirement, although compliance with an employment provision (similar to the one in *Lozano*) would cause those plaintiffs' expense and time.[96] The rationale of the federal trial court in *Gray v. City of Valley Park*[97] demonstrates why Congress should regulate immigration and protect the constitutional rights of all immigrants. As Karla Mari McKanders put it, because "federal courts cannot fix the immigration problem . . .Congress must act to fix the current system."[98] First, Congress should "enact legislation that clearly manifests its intent to occupy the field of employment regulation of undocumented workers."[99] Also, Congress should "find ways to address the problems of hiring undocumented workers and day laborers."[100]

In *Lozano,* the federal district court admonished that the "genius of our Constitution is that it bestows equal rights even to those who may evoke the least sympathy" among us as a people.[101] Hazleton, in its "zeal to control the presence of a group deemed undesirable, violated the rights of such people, as well as others within the community."[102]

It is clear that the *Hazleton* court considered undocumented immigrants to be a "disfavored group" without any protection from an oppressive local political process.[103] After giving Hazleton a civics lesson on its failure to protect the equal rights of all persons, including undocumented immigrants, the federal district court could have gone one step further than any explicit United States Supreme Court precedent. The court could have declared that undocumented immigrants are an insular and discrete minority who are a suspect class in need of judicial protection from discriminatory state and local laws under the implicit rationale in footnote four of *Carolene Products*.[104]

Under Supreme Court precedent, classifications made by a state "based on alienage, like those based on nationality or race, are inherently suspect and

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96. Gray v. City of Valley Park, Mo., No. 4:07CV00881, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008).
97. *Id*. at n.13. ("Throughout their briefing, Plaintiffs rely heavily upon the recent Pennsylvania decision, in which a substantially similar local ordinance was found to be preempted by federal law. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). The Court respectfully notes that the Pennsylvania decision is not binding, and therefore, the Court will conduct its own thorough analysis of the issues presented.")
98. Karla Mari McKanders, *Welcome To Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances And What The Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1, 44 (2007).
99. *Id.* at 46.
100. *Id.*
101. *Lozano*, 496 F. Supp. 2d at 555.
102. *Id.*
103. *Id.*
104. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

subject to close judicial scrutiny."[105] A state is prohibited from racially segregating jailed prisoners to prevent gang violence without meeting the strict scrutiny standard.[106] Therefore, a county or state should not be allowed to impose separate but equal local registration requirements exclusively on undocumented immigrants without also surviving the strict scrutiny test.

The United States Supreme Court has failed to speak truth to local power by refusing to acknowledge undocumented immigrants residing in the United States as a suspect class.[107] The Supreme Court should view as inherently suspect under the Equal Protection Clause any state or local regulation designed to regulate where an undocumented immigrant residing in the United States may live or work, without the express approval of Congress. The nationality of undocumented immigrants, like race, should be considered inherently suspect and should be subject to strict judicial scrutiny. Currently, undocumented immigrants in America are a leading paradigm of a "discrete and insular minority" in need of protection from arbitrary state laws.[108]

The existence of hostile feelings toward undocumented immigrants does not mean that immigrants who violate laws when entering the United States should be subject to arbitrary local ordinances that violate the Constitution. Our American legal system must apply strict scrutiny to local laws targeting undocumented immigrants as an insular and discrete minority in order to protect their rights with evenhandedness.[109] Fundamental to our American constitutional system is the concept that even those accused of entering America unlawfully possess constitutional rights.[110] Those rights may not be abrogated by local regulation of immigration in violation of the constitutional command that only Congress may regulate the terms and condition under which an immigrant may enter or remain in the United States.[111]

It is conceded that most state and local governments follow the U.S. Constitution and do not attempt to regulate immigration.[112] Those that do attempt to self regulate should be prohibited from continuing their practices, in view of recent Court decisions finding local laws targeting undocumented immigrants unconstitutional.[113] In *Buck v. Stankovic*, the federal trial court

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105. Graham v. Richardson, 403 U.S. 365, 372 (1971).
106. Johnson v. California, 543 U.S. 499, 515 (2005).
107. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).
108. *See Carolene Prod. Co.*, 304 U.S. at 152 n.4.
109. *Id.*
110. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 555 (M.D. Pa. 2007).
111. De Canas v. Bica, 424 U.S. 351, 354 (1976).
112. Jay T. Jorgensen, *The Practical Power Of State And Local Governments To Enforce Federal Immigration Laws*, 1997 B.Y.U. L. REV. 899, 917 (1997).
113. *See, e.g., Lozano*, 496 F. Supp. 2d at 555.

issued a preliminary injunction enjoining Luzerne County, Pennsylvania from requiring a plaintiff to prove that he was a United States citizen before being granted a marriage license.[114] The federal judge granted plaintiffs the requested preliminary injunction because they "demonstrated a reasonable probability of success on the merits of their argument that Defendant's policy violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[115]

Villas at Parkside Partners v. City of Farmers Branch involved a city ordinance similar to those in *Lozano*.[116] The district court entered a permanent injunction blocking the enforcement of the ordinance, and held that the ordinance was unconstitutional.[117] When Farmers Branch attempted to regulate immigration in its own way, separate from the federal government, its ordinance was preempted as a result of the Supremacy Clause.[118]

It is the author's view that a variety of hostile local laws deciding the terms and conditions under which an undocumented immigrant may reside in a community conflicts with the constitutional command that Congress establish uniform immigration regulations for the terms in which any immigrant may reside in this country.[119] By striking down local regulations in Hazleton which were intended to "harshly punish undocumented immigrants for trying to live and work there, and employers and landlords for providing them with homes and jobs" the district court "has dealt what we can only hope is a decisive blow against a dangerous trend of freelance immigration policies by local governments."[120] State and local governments are prohibited from indirectly enforcing their own immigration-related laws against undocumented immigrants through housing and employment registration requirements not approved by Congress.[121]

CONCLUSION

The goal of Hazleton's mayor, Louis J. Barletta, was to make Hazleton "one of the toughest places in the United States" for undocumented

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114. Buck v. Stankovic, 485 F. Supp. 2d 576, 587 (M.D. Pa. 2007).
115. *Id.* at 585.
116. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 861 (N.D. Tex. 2008).
117. *Id.* at 879.
118. *Id.*
119. *See* U.S. CONST. art. I, § 8, cl. 4.
120. Editorial, *Humanity v. Hazleton,* N.Y. TIMES, July 28. 2007, at A14, *available at* 2007 WLNR 14479697.
121. *See* Mathews v. Diaz, 426 U.S. 67, 85 (1976).

immigrants.[122] This goal was defeated by the district court's decision to give effect to the constitution when dealing with immigration.[123] Judge James M. Munley, of the Middle District Court in Pennsylvania, spoke a simple constitutional truth to Mayor Barletta and every American.[124] It is a constitutional reality that immigration is an exclusive federal responsibility.[125] State and local governments are prohibited from taking over a "carefully drawn federal statutory scheme" to control immigration.[126] While "Congress may be botching its job," it "has not delegated it" to Mayor Barletta, or any other state or local government.[127]

> Mayor Barletta says he is angry at the federal failure to control immigration. Good for him; he should join the club. But he should realize that it was his side–his restrictionist soul mates in the United States Senate–that last month took the most ambitious attempt in a generation to restore lawfulness and order to immigration, loaded it with unworkable cruelties, then pushed it into a ditch. They celebrated their victory, but their shortsighted insistence on border enforcement above all else will leave places like Hazleton to grapple with a failed immigration policy for years to come.[128]

We the people have twelve million immigrants now living in our country as undocumented residents.[129] We use heavy handed criminal justice tactics against those offenders who unlawfully enter this country, thus employing poor public policy because those tactics divert both attention and resources from serious federal offenses.[130] Our current federal immigration policy is filling the federal courts and prisons with undocumented employees who are incarcerated for non-violent crimes.[131] The current law enforcement treatment of undocumented immigrants involves redirecting vast law-enforcement

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122. *Humanity v. Hazleton*, *supra* note 120.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. van Uitert, *supra* note 3.
130. Editorial, *Enforcement Gone Bad*, N. Y. TIMES, Feb. 22, 2009, at WK, *available at* 2009 WLNR 3439142. ("A report last week from the Pew Hispanic Center laid bare some striking results . . .[i]t found that Latinos now make up 40 percent of those sentenced in federal courts, even though they are only about 13 percent of the adult population. They accounted for one-third of federal prison inmates in 2007.").
131. *Id.*

resources away from pursuing violent and harmful offenders.[132] America needs to control its borders with an effective immigration system that prevents twelve million people from coming to America without documentation.[133] We the people should insist that Congress enact comprehensive legislation to make undocumented immigrants authorized employees, citizens and taxpayers.[134]

132. *Id.*

133. *Id.* ("For all the billions spent on fences, raids, patrols and prisons, the number of illegal immigrants has steadily grown to about 12 million last year from four million in 1992. So has the need to overhaul the many parts of a festering, broken system . . . to throw sunlight on the shadow economy, to deter unlawful hiring . . . All those priorities have languished in the deportation era.")

134. *Id.*