MUNICIPAL OVERREACHING; Federal Preemption as it applies to Town Ordinances Outlawing the Rental of Housing to Undocumented Aliens

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Abstract:

Within the past year or so a handful of towns around the United States have passed ordinances prohibiting undocumented aliens from renting housing. This paper explores how these ordinances are incompatible with the Federal Immigration Scheme and preempted by Federal Law.

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MUNICIPAL OVERREACHING; 
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Housing to Undocumented Aliens

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.1

Recently, multiple towns across the Unites States have attempted to deal with this “shadow population” by passing ordinances prohibiting the rental of housing to undocumented resident aliens.2 This comment discusses the ordinances from Hazelton, Pennsylvania; Valley Park, Missouri; Escondido, California; and Farmers Branch, Texas.

All four ordinances have been enjoined prior to enforcement.3 The lawsuit challenging the Hazleton Ordinance has gone to trial in the Middle District of Pennsylvania but no opinion has been issued yet.4 The Valley Park Ordinance has

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2 See Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006); Valley Park, Mo., Ordinance 1708 (July 17, 2006); Escondido, Cal., Ordinance 2006-38R (Oct. 10, 2006); Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006); See also Riverside, N.J. Ordinance 2006-16 (July 27, 2006) (not included for brevity).
been struck down on state law grounds. With the exception of the Southern District of California analyzing the Escondido Ordinance, the courts’ published analyses have only briefly considered the underlying constitutional issues while assessing the probability of success for a Temporary Restraining Order or an Injunction.

The exact wording of the various ordinances has changed considerably throughout the various stages of litigation. Therefore this comment examines the deeper constitutional issues common to all four towns, and how the actions of the towns, as subdivisions of States, are preempted by the Supremacy Clause of the United States Constitution.

The Ordinances face three insurmountable constitutional defects. First, the ordinances intrude upon exclusive Federal powers. The town leaders have

5 See Reynolds v. City of Valley Park, No 06-CC-3802, (St. Louis County Cir. Ct., Mo., Mar. 12, 2007).
6 So far no court has ruled definitively on the constitutional issues relating to local ordinances prohibiting rentals to illegal immigrants. The courts have merely issued restraining orders and injunctions relying heavily on comparative harm rather delving deeply into the probability of success. The Southern District of California used a multipart standard which required an immediate and threatened injury. The greater the relative hardship to the moving party, the less probability of success must be shown. See Garrett v. City of Escondido, 465 F.Supp.2d 1043, 1049 (2006). The court found “no public benefit to its citizens, or other legitimate public purpose for enacting the ordinance and the balance of hardships tips sharply in favor of the plaintiffs.” Garrett, 465 U.S. at 1054. The Middle District of Pennsylvania listed the plaintiffs’ constitutional claims and determined that it need not analyze the likelihood of success on the merits more closely as it found that the other factors weigh heavily in favor of granting the temporary restraining order. See Lozano v. City of Hazleton, 459 F.Supp.2d 332, 338 (2006). The Eastern District of Missouri declined to find Federal Jurisdiction and refused to remove the claim or modify the state courts restraining order. Reynolds v. City of Valley Park, No. 4:06CV01487 ERW, slip op. 2006 WL 3331082, at *8 (E.D. Mo. 2006). The Dallas County Texas District Court granted a restraining order since the Ordinance was “approved and adopted in violation of the Texas Open Meetings Act, causing irreparable injury to plaintiff and other citizens” Ramos v. City of Farmers Branch, no. 06-12227-F (Dallas County, Tx., Dis. Ct., 116th Judicial District, January 11, 2007) (granting restraining order).
7 See e.g. Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006); Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006); Hazleton, Pa., Ordinance 2006-40 (Dec. 28, 2006).
8 See Reynolds v. Sims 377 U.S. 533, 575 (1964) (“Political subdivisions of States-counties, cities, or whatever-never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.”).
announced their intentions to regulate immigration which is prohibited under *DeCanas*. Second, there is no federal definition of “illegal alien” that satisfies the towns’ purposes. Any attempt to create a definition of “illegal alien” or determine to whom the ordinances would apply is inherently an exclusively Federal power. Third, under *Hines v. Davidowitz* the towns are prohibited from creating burdens separate from or greater than those authorized by Federal law. The Federal statute prohibiting “harboring” aliens has never been interpreted broadly enough to authorize an indefinite prohibition on rental housing. It has been narrowly interpreted to prohibit only harboring related to smuggling, while there is ample evidence that the Federal Government willfully tolerates resident illegal aliens.

I. DESCRIPTION OF THE ORDINANCES

Valley Park prohibits illegal aliens from leasing or renting property, and further prohibits “any property owner or renter/tenant/lessee in control of property” to knowingly allow an alien to use, rent or lease their property.⁹ Any person who violates the Valley Park Ordinance shall be fined not less than five hundred dollars.¹⁰ Any for-profit entity that aids and abets illegal aliens “shall be denied approval of a business permit, the renewal of a business permit, city contracts or grants for a period not less than five years from its last offense.”¹¹

Farmer’s Branch prohibits owners and/or property managers from entering into any lease, rental agreement, or rental renewal or extension without obtaining a passport or other documentation designated by Immigration and Customs Enforcement as acceptable evidence of citizenship status from each member of

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⁹ Valley Park, Mo., Ordinance 1708 § 3(A) (July 17, 2006).
¹⁰ Valley Park, Mo., Ordinance 1708 § 3(B) (July 17, 2006).
¹¹ Valley Park, Mo., Ordinance 1708 § 2 (July 17, 2006).
the tenant family except non-citizens 62 years of age or older, or minor children.12
The ordinance includes an exception for existing tenancies where the head of the
household or his or her spouse have eligible immigration status and the family
does not include anyone other than the head of household, his or her spouse and
their parents or children.13 If denied occupancy because of immigration status the
family is entitled to a hearing before a City Building Official or their designee.14

The City of Hazleton established a mandatory occupancy permit system.
No person is allowed to occupy any rental unit without first obtaining an
occupancy permit.15 All permit applicants, including children, have to furnish
their: name, addresses, the name of the landlord, the date of the lease
commencement and “proper identification showing proof of legal citizenship
and/or residency.”16 If an owner allows occupants to inhabit a rental unit without
first obtaining an occupancy permit, the owner shall be sentenced to pay a fine of
$1,000.17 If the owner defaults, he shall be imprisoned for up to 90 days.18
Additionally if there is a violation and an owner does not act with due diligence
by taking bona fide steps to correct the violation, including but not limited to
pursing remedies under a lease agreement with an occupant or tenant, the owner
shall have to pay a fine of $100-300 or be imprisoned.19

The City of Escondido has a similar permit system. Upon receiving a
signed written complaint, the city shall request identity data from the property

12 Farmers Branch, Tex., Ordinance 2892 § 2-3 (Nov. 13, 2006).
13 Farmers Branch, Tex., Ordinance 2892 § 3(iii) (Nov. 13, 2006).
14 Farmers Branch, Tex., Ordinance 2892 § 3(viii) (Nov. 13, 2006).
16 Hazelton, Pa., Ordinance 2006-13 §7b(1)(g) (Aug. 15, 2006).
17 Hazelton, Pa., Ordinance 2006-13 § 10(b) (Aug. 15, 2006).
18 Hazelton, Pa., Ordinance 2006-13 § 10(a) (Aug. 15, 2006).
owner and forward it to the federal government for a determination of immigration status.\textsuperscript{20} Once the city has received confirmation of immigration status from the federal government the city shall provide notice of the violation to the owner of the dwelling unit who then has 10 days to “correct a violation” or the city shall suspend the business license of the dwelling unit, and prohibit the owner from collecting any rent, payment or fee.\textsuperscript{21} “Correct a violation” was assumed to mean “evict the tenant,” by the Southern district of California.\textsuperscript{22}

II. THE SUPREMACY CLAUSE IN THE CONTEXT OF IMMIGRATION.

The modern framework for analyzing the scope of national power and whether a town or state regulation intrudes upon it is established in \textit{DeCanas v. Bica}.\textsuperscript{23} In \textit{DeCanas}, the Supreme Court analyzed the constitutionality of a California labor law that prohibited the employment of “an alien who is not entitled to lawful residence.”\textsuperscript{24} The Supreme Court fashioned a three prong test, and found the California Labor law was not preempted by federal legislation since none of the prongs were met.\textsuperscript{25}

Under the first prong of \textit{DeCanas}, a state or municipal law is preempted, if it is an attempt to regulate immigration, “which is essentially a determination of who should or should not be admitted into the country and the conditions under which a legal entrant may remain.”\textsuperscript{26} If the statute or ordinance passes the fist

\textsuperscript{20} Escondido, Cal., Ordinance 2006-38R § 16E-2 (Oct. 10, 2006).
\textsuperscript{21} Escondido, Cal., Ordinance 2006-38R § 16 E-2 (Oct. 10, 2006).
\textsuperscript{24} DeCanas, 424 U.S. at 353.
\textsuperscript{25} See DeCanas, 424 U.S. at 354, 356, 363.
\textsuperscript{26} DeCanas, 424 U.S. at 355; But see Plyler v. Doe 457 U.S. 202, 238 (1982) (Affirms that federal power extends to all aliens, not merely legal entrants/aliens).
prong, it will still be pre-empted if “it stands an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA [Immigration and Nationality Act].”27 Finally, the statute or ordinance will still be unconstitutional if it infringes on an area where Congress intended federal law to have exclusive jurisdiction, or the nature of the regulated subject matter permits no other conclusion. 28

Other cases and commentaries have analyzed the elements slightly differently, but all of the variations include the same elements.29 In this comment I will explore the first prong of DeCanas independently, then I will discuss remaining prongs together, since the analyses run together and Hines v. Davidowitz, which provides an excellent foil, does the same.

III. THE HOUSING ORDINANCES INTRUDE UPON EXCLUSIVE FEDERAL POWERS

[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution … and has since been given continuous recognition by [the Supreme] Court. … [F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, and one power.30

However, “The [Supreme] Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se

28 DeCanas, 424 U.S. at 356.
pre-empted by this constitutional power, whether latent or exercised.”31 In fact, DeCanas points to a line of cases cited in Takahashi v. Fish & Game Comm'n, and Graham v. Richardson, which upheld state discrimination against aliens lawfully within the United States.32 “Standing alone the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the county, and the conditions under which a legal entrant may remain.”33

As applied to State or local action, the most “likely reading of ‘conditions under which an [alien] may remain’ would be one encompassing laws that effect an alien’s ability to remain in a specific jurisdiction.”34 Interpreting it as the ability to remain in the country, would “require[] a far broader interpretation … that [sic] what the Supreme Court’s jurisprudence would allow.”35

Far from “standing alone,” as the Supreme Court described the California labor laws, the town leaders have made their objectives and intent public.36 The Mayor of Hazleton has clearly enunciated his goal in enacting the housing ordinance, “I will get rid of the illegal people. It’s this simple: They must leave.”37 Mayor Barletta also stated that he wants to make Hazleton “the toughest

32 DeCanas, 424 U.S. at 355 (quoting) Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 415-422 (1948); Graham v. Richardson, 403 U.S. 365, 372-373 (1971) (the analysis would be redundant if all state regulation of aliens was ipso facto regulation of immigration).
33 DeCanas, 424 U.S. at 355.
36 DeCanas, 424 U.S. at 355.
37 Michael Powell & Michelle Garcia, Pennsylvania City Puts Illegal Immigrants on Notice, WASHINGTON POST, Aug. 22, 2006, at A03.
place on illegal immigrants in America.” 38 To achieve this goal, the Hazleton Ordinance specifically provides that, “[t]he city shall not be precluded from pursing an enforcement action against any occupant or tenant who is deemed to be in violation.” 39 Thus the unambiguous intent and effect of the ordinance is, forcing aliens out of their houses and out of the town.

Similarly, the Mayor of Valley Park is “concerned that Valley Park could wind up as a haven for illegal immigrants.” 40 He is “out to stop that from happening,” 41 by enacting an Ordinance in which, “[i]llegal aliens are prohibited from leasing or renting property.” 42 Councilwoman Marie Waldron of Escondido, goes even further to say that the Ordinance she proposed is needed to counter “a lack of initiative to address illegal immigration at the federal level, and that the country’s sovereignty was under attack by a wave of illegal immigrants.” 43

In contrast to these attempts to dictate national policy at a local level, the California labor laws at issue in DeCanas were a valid attempt “to strengthen [the states] economy by adopting federal standards” as authorized by Congress. 44 The DeCanas prohibition was against employing aliens, not being an alien. 45 There

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38 Michael Powell & Michelle Garcia, Pennsylvania City Puts Illegal Immigrants on Notice, WASHINGTON POST, Aug. 22, 2006, at A03.
42 Valley Park, Mo., Ordinance 1708 § 3(A) (July 17, 2006).
45 See DeCanas 424 U.S. at 353 (quoting California Labor Code Ann. § 2805(a) by Stats.1971, p. 2847, c. 1442, § 1 (“No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States”)).
were no sanctions for undocumented employees under the California labor laws. Therefore, the DeCanas Court could infer that the California labor laws had merely a “purely speculative and indirect impact on immigration,” and did not become a constitutionally proscribed regulation of immigration.

While it is easy to determine that an ordinance encroaches on exclusively federal powers when the Mayor charged with enforcing the ordinance announces his intentions. The impact of the housing ordinances alone is sufficient to find that the ordinances are preempted. In Graham v. Richardson, the Supreme Court found that the denial of public assistance to aliens prevents securing “the necessities of life, including food, clothing and shelter,” this denies “entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible.” Graham dealt with aliens lawfully within the county, while the housing ordinances are directed against “illegal aliens.” However, attempting to make this distinction creates further preemption issues for the towns.

Unlike, the employment law in DeCanas, the Federal government has never determined what makes someone an “illegal alien” forbidden from renting housing. Therefore the towns face a preemption dilemma. They can either

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46 See DeCanas, 424 U.S. at 353 (quoting California Labor Code Ann. § 2805(b) by Stats.1971, p. 2847, c. 1442, § 1 (“A person found guilty of violation of subdivision (a) is punishable by…”)) (See Id. for subdivision (a)).
47 See DeCanas, 424 U.S. at 355-356.
49 See Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006); Valley Park, Mo., Ordinance 1708 (July 17, 2006); Escondido, Cal., Ordinance 2006-38R (Oct. 10, 2006); Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006).
50 Title 8 of the United States Code, which deals with Aliens and Immigration, refers to “housing” repeatedly, however none of these references prohibits illegal aliens from renting dwelling units. For example: 8 U.S.C. § 1101 (2007) (Eligibility of H-2 agricultural workers for legal assistance.
create and enforce their own classifications of illegal aliens forbidden from renting housing, which is explicitly preempted as a regulation of immigration, or the towns can enter a field preempted by Congress and expand or amend a federal classification to fit a housing prohibition in a way which most likely conflicts with a federal policy.

Since the elements of DeCanas tend to overlap and the exclusive federal power prong of DeCanas is the least flexible, courts have favored finding preemption on other grounds. For example, in 2005, undocumented aliens in a small town in New Hampshire were prosecuted on the theory that they were trespassing in the United States since they were not privileged to “remain in that place.” A state court found that the prosecutor’s interpretation of trespass was preempted since Congress had thoroughly regulated the field of immigration. The court did not even consider that it was a constitutionally impermissible intrusion on the conditions under which and immigrant may remain, even thought that
argument existed. Similarly in *Hines v. Davidowitz*, in which the Supreme Court struck down a Pennsylvania Alien registration scheme, the court “pass[ed] immediately to [the] final question, expressly leaving open all of appellee’s other contentions, including the argument that the federal powers in this field, whether exercised or unexercised is exclusive.”

IV. CONFLICTS ANALYSIS FRAMEWORK.

“The Supremacy Clause requires the invalidation of any state legislation that burdens or conflicts in any matter with any federal laws or treaties.” The States enjoy none of the broad powers regulating aliens and immigration that are reserved for the federal government, “they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.” While there are numerous discrepancies between the various versions of the four ordinances and federal law, there are several conflicts that seem insurmountable in any context.

V. THE FIELD OF CLASSIFYING ALIENS IS PREEMPTED, THE TOWNS CANNOT ARTICULATE A CLASSIFICATION THAT DOES NOT CONFLICT WITH FEDERAL LAW.

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55 *DeCanas*, 424 U.S. at 358.
56 Various provisions of the housing ordinances have been found to improperly intrude into an exclusively federal area, and have then been altered, modified or retracted in an attempt to save the ordinance. For example, *compare* Hazleton Pa., Ordinance 2006-13 with 2006-35, (Sections 7(b) and 10(b) have been removed); *See*, e.g., Hazleton Pa., Ordinance 2006-40 (amending Ordinance 2006-18); Garret v. City of Escondido, 465 F.Supp.2d 1043, 1050 (2006) (the City of Escondido submits an “Interpretation Memorandum” in which mayor asserts how the ordinance will be implemented).
In *DeCanas* the Supreme Court assumed arguendo that “in referring to ‘illegal aliens’ the prohibition of [the statute] only applies to aliens who would not be permitted to work in the United States under pertinent federal laws and regulations.” However, unlike employment where Congress has made it clear to whom the laws apply, and the limits on preemption are explicitly laid out in a few sentences, the federal government does not issue any guidelines or definitions as to who is an illegal/unauthorized alien for the purposes of renting unsubsidized housing.  

Justice Powell addressed this definition of terms problem in his *Plyler v. Doe* concurrence, “because federal law clearly indicates that only certain specified aliens may lawfully work in the country and because these aliens have documentation establishing this right, the State in *DeCanas* was able to identify with certainty which aliens had federal permission to work in this country.” However, in *Plyler* or in the context of housing, “there is no comparable federal guidance … no federal regulations identify those aliens who have a right to attend public schools,” or rent housing. Therefore the State must “make predictions as to whether individual aliens will be found deportable. But it is impossible for a state to determine which aliens the Federal Government will eventually deport.”

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57 *DeCanas*, 424 U.S. at 354.
58 8 U.S.C § 1324a (h)(2)(3) (“(2) The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. (3) As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.”).
59 *Plyler*, 457 at 241, Fn 6, (Powell, J., concurring).
60 *Plyler*, 457 at 241, Fn 6, (Powell, J., concurring).
61 *Plyler*, 457 at 241, Fn 6, (Powell, J., concurring).
The towns’ attempts to define “illegal immigrant” demonstrate this conundrum. Since only the Federal government can make immigration determinations, and Congress has not created a definition of illegal aliens for the purpose of denying housing, the towns use enormous definitions of “illegal alien” that offer little if any guidance. Escondido, Valley Park and Hazleton have all adopted each others definitions of “illegal alien,” In all three towns

“Illegal alien” means an alien who is not lawfully present in the United States according to 8 U.S.C. §1101 et. seq. The City shall not conclude that a person is an illegal alien unless and until an authorized representative of the City has verified with the federal government, pursuant to United States Code Title 8, subsection 1373(c), that the person in an alien who is not lawfully present in the United States.62

In referring to 8 U.S.C. §1101 et. seq, the towns are attempting to use the entirety of a 466 page annotated federal statute, and the pages or statutes that follow it.63 This is hardly practical definition to begin with, but in narrowing it down the towns use the term “not lawfully present in the United States,” which does not appear anywhere in the 466 pages, thus making the definition impossible to interpret.64 The term “not lawfully present” appears elsewhere in Title 8, but it is used in varying contexts and offers little guidance.65

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62 Hazleton, Pa., Ordinance 2006-18 §3(D) (Sept. 8, 2006); Escondido, Cal., Ordinance 2006-38R §2 (Oct. 10, 2006); Valley Park, Mo., Ordinance 1715 § 3(d) (Sept. 26, 2006) (emphasis varies).
65 Compare 8 U.S.C. § 1357(d) (2007) (“In the case of an alien who is arrested … for a violation of any law relating to controlled substances, if the [immigration] official has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States, … the officer … shall promptly determine whether or not to issue such a detainer.”) with 8 U.S.C. § 1621(d) (2007) (“A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit”).
Further, just because aliens are “not lawfully present in the United States” it does not mean they will be forced to leave. Consider the case of an unlawfully present alien who asserts a successful defense to deportation under the Convention Against Torture, or a resident alien who is ordered deported for missing a court appearance scheduled by a bogus attorney.66

The towns might consider attempting to define illegal aliens as those who must be removed from the country, but this involves a lengthy administrative and judicial process, which “makes it impossible for the State to determine which aliens are entitled to residence, and which will eventually be deported.”67

This entire analysis might not even be necessary. The Federal government has consistently used the term “illegal alien” to refer to a convicted felon in the country illegally, and to a lesser extent aliens in the process of sneaking into the country.68 A court could easily find that these definitions preempt whatever definition of “illegal alien” the towns decide to use.


68 See 8 U.S.C. § 1365(b) (2007) (“An illegal alien … is any alien convicted of a felony who is in the United States unlawfully and-- (1) whose most recent entry into the United States was without inspection, or (2) whose most recent admission to the United States was as a nonimmigrant and-- (A) whose period of authorized stay as a nonimmigrant expired, or (B) whose unlawful status was known to the Government.”); 8 U.S.C. § 1252c(a) (2007) (state and local law enforcement officials are authorized to arrest and detain an individual who- (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction.); 8 U.S.C. § 1356 (r)(3) (2007) (funds for detention of illegal aliens); 8 U.S.C. §1365 (2007) (the attorney general shall submit a report
*DeCanas* does provide some broad language that the Immigration and Nationalization Act does not preempt the entire field of immigration.\(^69\) However *DeCanas* was decided in 1976, and the Immigration and Naturalization Act has been amended and expanded repeatedly since then.\(^70\) More recently courts have...
adopted the view that, “the federal government, through the INA, has certainly occupied the field of formulating the governing definitions and standards for determining a person’s immigration status.”

The latest Farmers Branch Ordinance carefully does not use the term “illegal alien,” instead the city council is attempting to adopt “citizenship and immigration certification requirements for apartment complexes to safeguard the public, consistent with the provisions of 24 CFR 5, et seq.” However, Farmers Branch expands the burdens of undocumented aliens to include an outright prohibition on housing, not merely the denial of housing subsidies authorized by the federal government in 24 C.F.R. §5. This prohibition conflicts with 24 C.F.R. §5.508 which endorses the complete opposite position by allowing federal housing subsidies even “[i]f one or more family members elect not to contend that they have eligible immigration status.”

VI. MAKING IMMIGRATION DETERMINATIONS BURDENS THE FEDERAL GOVERNMENT

Even if the towns could somehow determine an appropriate classification for which to deny housing to immigrants, the standard would have to be


\[\text{Farmers Branch, Tex., Ordinance No. 2903 §3(1) (election to be held May 12, 2007).}\]

\[\text{24 C.F.R. §5.508 (2007).}\]
interpreted by the Federal government since immigration determinations are
unquestionably exclusively a federal power.\textsuperscript{74}

There currently is no list or automatic federal mechanism to determine
immigration status for housing. The Systematic Alien Verification for
Entitlements program (SAVE) the towns suggest they would use, only determines
eligibility for entitlement benefits not lawful presence.\textsuperscript{75} Rather, “[u]ntil an
undocumented alien is ordered deported by the Federal Government, no State can
be assured that the alien will not be found to have federal permission to reside in
the country.”\textsuperscript{76}

For any of these housing ordinances to actually be enforced, it would seem
that a Federal official would have to proceed through the entirety of Title 8, or at
least 466 pages, to find a classification that has not been created by Congress,
every time a town thinks it has found an “illegal alien.” This procedure represents
an insufferable burden on the federal government that “stands an obstacle to the
accomplishment and execution of the full purposes and objectives of Congress in
enact[ing] the INA [Immigration and Nationality Act].”\textsuperscript{77} In comparison, even

\textsuperscript{75} Garret v. Escondido, 465 F.Supp.2d 1043, 3:06-cv-02434-JAH-NLS at *10 (Nov. 3, 2006)
(City of Escondido’s opposition to plaintiffs’ application for a temporary restraining order)(“ the
SAVE Program, which the City Manager has indicated likely will be the primary manner in which
the City will verify rental applicant’s immigration status.”); Farmers Branch, Tex., Ordinance No.
2903(election to be held May 12, 2007) (“The City of Farmers Branch has determined that it is a
necessity to adopt citizenship and immigration certification requirements for apartment complexes
to safeguard the public, consistent with the provisions of 24 CFR 5, et seq.”); 24. C.F.R. §5.512
(2006) (provides that the primary verification system will be the SAVE system); 65 Fed. Reg.
58301(2007) (“A Systematic Alien Verification for Entitlements (SAVE) response showing no
service record on an individual or an immigration status making the individual ineligible for a
benefit is not a finding of fact or conclusion of law that the individual is not lawfully present”
)(emphasis added).

\textsuperscript{76} Plyler v. Doe, 557 U.S. 202, 241 n.6 (Powell, J., concurring).
\textsuperscript{77} DeCanas, 424 U.S. at 363 (internal quotations omitted) (quoting Hines v. Davidowitz, 312 U.S.
52, 67 (1941); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132,141 (1963); See Garret v.
relatively well defined employment laws, like the I-9 requirement, have been
difficult to apply.\textsuperscript{78}

\section*{VII. CONSIDERING BURDENS ON IMMIGRATION OFFICIALS IS
PROBLEMATIC IN THE PRE-EMPTION ANALYSIS.}

Despite the potential burden, considering the impact of the ordinances on
immigration officials is problematic in the preemption inquiry. Congress
explicitly forbade Federal entities or officials from “prohibit[ing] or in any way
restrict[ing]” local governments sending to or receiving from, the Immigration
and Naturalization Service information regarding the citizenship or immigration
status… of any individual.\textsuperscript{79} Finding an ordinance unconstitutional on the basis
of burdening Federal authorities seems like a violation of the prohibition on
interference.

The Southern District of California ignored this restriction and considered
the burdens on immigration officials in the preemption inquiry. There is some
evidence that Congress did not intend for courts to be included.\textsuperscript{80} However the
court provided no reasoning in support of this position.\textsuperscript{81}

\textsuperscript{78}See Bonnie K. Gibson, \textit{DHS Publishes Proposed “Safe-Harbor” Procedures for
\textsuperscript{79}8 U.S.C.A § 1373(a)(2007).
\textsuperscript{80}See generally Huyen Pham, \textit{The Constitutional Right Not To Cooperate}, 74 U.Cin. L. Rev.
1373, 1392 (2006) (Suggests that this statute was enacted in response to State and local sanctuary
movements that arose in the 1980’s to disrupt enforcement of immigration laws in protest over
U.S. foreign policy in Latin America).
\textsuperscript{81}Garret v. City of Escondido, 465 F.Supp.2d 1043 (S.D. Cal. 2006) (restraining order) (no
mention of 8 U.S.C. § 1373(a)).
The Court went on to misinterpret the statute itself, by misreading 8 U.S.C. § 1373(c). Section 1373(c) states that the INS “shall respond to an inquiry… seeking to ascertain the citizenship or immigration status of any individual … for any purpose authorized by law, by providing the requested verification or status information.” According to the Court, Escondido’s request was for a private-benefit; therefore it was not authorized by law and was overly burdensome. However, “authorized by law” only applied to the INS responding, not a town requesting information which is governed by Section 1373(a). Therefore the Court did not use a proper basis for determining that requests were burdensome.

Even though under any analysis the burdens on the Federal government have the potential to be enormous. The Court erred by ignoring the clear language of 8 U.S.C § 1373(a) and misapplying the “authorized by law” limitation. As long courts can find an ordinance invalid on other grounds, courts need to be wary of 8 U.S.C. § 1373(c) and interfering with requests.

VIII. HINES V. DAVIDOWITZ

In Hines v. Davidowitz the Supreme Court examined the constitutionality of a Pennsylvania alien registration act. The Act required adult aliens to register once a year, provide information, pay a $1 annual fee, receive an alien identification card, carry it at all times and show the card whenever it may be

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85 8 U.S.C. § 1373(a) (2007) (“ a Federal, State, or local government entity or official many not prohibit or in anyway restrict, any government entity or official from sending to, or receiving from the INS information regarding the citizenship status, lawful or unlawful, of any individual.”).
demanded by any police officer or state agent. After the Pennsylvania Act was passed, but before it was enforced, Congress enacted a Federal Alien Registration Act. The Federal Act contained different provisions including only a single registration, and no requirement that aliens carry a registration card. The Supreme Court found that,

When the national government by treaty or by statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No State can add to or take from the force and effect of such treaty or statute.

While passing on the question of whether or not the Pennsylvania Act intruded into an exclusively federal domain, the court affirmed that “Our system of government imperatively requires that federal power in the field effecting foreign relations be left entirely free from local interference.” Indiscriminate and repeated burdens on foreigners bear an inseparable relationship to the welfare and tranquility of the states. “Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of national government that… the law of the state… must yield.”

*Hines v. Davidowitz*, was not qualified with any distinction between illegal and legal aliens, instead *Hines* was based on the idea that the regulation of aliens inherently involves international interests, and must be governed from a national

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91 Hines v. Davidowitz, 312 U.S. 52, 62, 63 (1941).
level. This view is consistent with *DeCanas*, where the California labor law restricting alien employment was explicitly authorized by Congress. However it is distinct from prohibitions on rental housing where the towns have been unable to cite any Federal authority permitting the towns’ interference with international interests by prohibiting foreigners from renting *unsubsidized* housing, and an independent review of the INA found nothing to support that conclusion.

**IX. SUBSIDIZED v. UNSUBSIDIZED HOUSING**

There are federal statutes restricting *subsidized* housing. For example, 8 USCS § 1621, entitled “Aliens who are not qualified aliens or non-immigrants ineligible for State and local public benefits,” provides that an alien who does not meet certain criteria is not eligible for any “state or local public benefit,” which is defined in part as “any retirement, welfare, health, disability, *public or assisted* housing.”

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94 See generally, Hines v. Davidowitz, 312 U.S. 52, 62, 63 (1941) (“As Mr. Justice Miller well observed of a California statute burdening immigration: ‘If (the United States) should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?’”).

95 *DeCanas*, 424 U.S. at 362, (quoting) 7 U.S.C. § 2051 (1970) (“(t)his chapter and the provisions contained herein are intended to supplement State action and compliance with this chapter shall not excuse anyone from compliance with appropriate State law and regulation.”).

housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit….”

Given the title and context of the section, it is impossible to ignore the term “benefits” and argue that this language supports a prohibition on all alien housing. As previously mentioned, 24 C.F.R. § 5.508 makes families eligible for housing assistance on a pro-rated basis even “[i]f one or more family members elect not to contend that they have eligible immigration status.”

Adding burdens to a carefully considered Federal scheme is the type of obstacle to the Immigration and Naturalization Act that the Supreme Court considered when holding that “No state can add to or take from the force and effect of such treaty or statute.”

X. THE ORDINANCES CONFLICT WITH THE TERM “HARBORING”

Hazleton, Valley Park and Escondido mistakenly turn to the word “harbor” to justify their housing ordinances. 8 U.S.C. § 1324(1)(A)(iii) provides criminal penalties for any person who

knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

However, the Supreme Court has long recognized that “harboring” in the context of immigration was related to smuggling. In attempting to determine the

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99 Hines v. Davidowitz, 312 U.S. 52, 59-60, 62-63 (1941) (Pennsylvania required aliens to carry an identity card, when the INA did not).
100 Hazelton, Pa., Ordinance 2006-18 §2(B); Escondido, Cal., Ordinance 2006-38 R § 1(3); Valley Park, Mo., Ordinance 1708 § 2(E).
appropriate penalties for “harboring” the Supreme Court in United States v. Evans recognized that its task was “to apply the penalties designed for smuggling to all offenses covered by the section.”\textsuperscript{102} The court then considered the possibility of whether a hypothetical innkeeper would be guilty of harboring and incur the penalties provided for smuggling if he furnished lodging to an alien unlawfully overstaying his visa, or an alien who entered illegally at some remote earlier time, if the innkeeper knew of the guest’s illegal presence.\textsuperscript{103} The court concluded that this was the broadest possible reading of “harboring,” but the court could not determine Congress’s intent and declined to “blindly” extend the penalties.\textsuperscript{104}

Since Evans, the Supreme Court has used narrow definitions of “harboring” in the context of immigration, limiting the scope of the term to harboring in process of alien smuggling.\textsuperscript{105}

A complete reading the present harboring statute reveals a similar narrow interpretation of harboring. The sub-sections of 8 U.S.C. § 1324 chronologically trace the path of a smuggled alien. 8 U.S.C. § 1324(a)(1)(A)(i) prohibits bringing or attempting bring an alien into the United States at a place other than a designated port of entry.\textsuperscript{106} Subsection (ii) prohibits transporting, moving or

\textsuperscript{102} United States v. Evans, 333 U.S. 483, 490 (1948).
\textsuperscript{103} See Evans, 333 U.S. at 489-490.
\textsuperscript{104} Evans, 333 at 493, 495 ("we can only guess … which one of the several possible constructions Congress thought to apply …. It is better for congress… to revise the statute than for us to guess at the revision it would make.").
\textsuperscript{105} See, e.g., McNary v. Haitian Refugee Center, Inc. 489 U.S. 479, 483 (1990) ( "for the purposes of this section [criminalizing the bringing in and harboring of aliens not lawfully entitled to enter and reside in the United States,]" ) (brackets original); Florida v. Royer, 460 U.S. 491, 530 (1982) ("we allowed government officials to stop… automobiles which were suspected of harboring illegal aliens … at reasonably located checkpoints"); United States v. Valenzuela-Bernal 458 U.S. 858, 865 (1982) ("the transportation or harboring of large numbers of illegal aliens").
attempting to transport aliens once they are in the country. Subsection (iii) prohibits concealing, harboring or shielding aliens from detection.

8 U.S.C. § 1324(b), the forfeiture provision of the statute, further demonstrates that Congress intended a narrow view of “harboring” since the statute only provides for the seizure and forfeiture of a conveyance, including any vessel, vehicle or aircraft. Part (b) does not provide for the seizure and forfeiture of any structure or dwelling. Taken together these four subsections show that Congress intended to use a narrow interpretation of “harboring” that interrupted the movement and smuggling of aliens, not a broad one that penalizes the hypothetical innkeeper.

Escondido created two definitions for the term “harboring” with no relationship to smuggling or any other federal objective. The definitions are “to let, lease, or rent, a dwelling unit, to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of the law,” or “to suffer or permit the occupancy of the dwelling unit by an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law.” Valley Park simply dispenses with the connection to smuggling and finds that “the provision of housing to illegal aliens is a fundamental component of harboring.” These broad readings of harboring which would penalize the

112 Valley Park, Mo. Ordinance 1708 §(2)(E) (July 17, 2006).
hypothetical innkeeper, have simply never been recognized by Congress or the Supreme Court.

In contrast to the towns’ contention that “harboring” applies indefinitely to anyone illegally in the country, regardless of the harborers’ connection to smuggling, there is strong evidence Congress envisioned a cut off upon residency.113

XI. EQUAL PROTECTION WITHIN PREEMPTION

The inability to justify the housing ordinances as part of a federal scheme, while singling out children, results in the preemption of the ordinances on quasi-equal protection grounds. Federal Courts have struggled determining how exactly equal protection concerns fit within the immigration preemption analysis.114 Yet, the equal protection principles underlying the Supreme Courts holding in Plyler v. Doe would block housing ordinances that did not exempt children.

113 See, e.g., Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General) (“We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals.”); act of Aug. 5, 1997, Section 4723 of Pub. L. 105-33 (codified 8 U.S.C. § 1611 (2007))(The secretary of Health and Human Services shall allot funds to States based on number of undocumented aliens. “[t]he undocumented aliens in a State under this section shall be determined based on estimates of the resident illegal alien population.”)(emphasis added); Robert Pear, Bush Ties Drop in Illegal Immigration to His Policies, NY TIMES Apr. 10, 2007 at A16 (“Under President Bush’s proposal “illegal immigrants who have roots in our country and want to stay could do so in some circumstances”)(internal quotation omitted).

Plyler “reject[ed] the claim that ‘illegal aliens’ are a ‘suspect class,’” since “entry into the class itself is a crime.”\(^{115}\) However, “[t]hese arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.”\(^{116}\) Children “can affect neither their parents’ conduct nor their own status.”\(^{117}\) “[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice … [and] is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”\(^{118}\) “It is thus difficult to conceive of a rational justification for penalizing these children.”\(^{119}\) The Plyler court recognized that “courts must be attentive to congressional policy,” but was unable to find any federal policy that could affect the equal protection balance.\(^{120}\) The court disregarded the states policy arguments since “[t]he States enjoy no power with respect to the classification of aliens. This power is “committed to the political branches of the Federal Government.”\(^{121}\)

The Hazleton and Valley Park Ordinances include children.\(^{122}\) The towns cannot to rebut the presumption that the Ordinances lack a rational basis to treat “illegal alien children” differently, since the towns cannot “demonstrate that the

\(^{116}\) Plyler, 457 at 219-220 (emphasis added).
\(^{118}\) Plyler, 457 at 220.
\(^{119}\) Plyler, 457 at 220.
\(^{120}\) Plyler, 457 at 224-225.
\(^{122}\) Hazleton, Pa., Ordinance 2006-13 § 7(b) (Aug. 15, 2006) (“all occupants shall obtain an occupancy permit” no exception for children); Valley Park, Mo., Ordinance 1708 § 3(A) (July 17, 2006) (“illegal aliens are prohibited from leasing or renting property. Any property owner or renter/tenant/lessee in control of property, who knowingly allows an illegal alien to use, rent or lease their property shall be in violation of this section.” no exception for children).
[illegal alien] classification is reasonably adapted,” from the federal policy against harboring.\textsuperscript{123} The federal definition of “harboring” is not broad enough and the towns have not identified any other federal policy that might justify the housing ordinances.

\textit{Plyler} involved the right to a free public education, while the Ordinances in question involve the right to rent unsubsidized housing. While they are distinct and courts have been reluctant to expand \textit{Plyler}, it seems as though the equal protection-preemption arguments as applied to housing would only be stronger since, “Public education is not a ‘right’ granted to individuals by the Constitution.”\textsuperscript{124} While towns, as subdivisions of states, are prohibited from “impairing the Obligation of [rental] Contracts.”\textsuperscript{125}

\section*{XII. THE HOUSING ORDINANCES CONFLICT WITH GENERAL U.S. IMMIGRATION POLICY}

Prohibiting the rental of housing, fundamentally conflicts with 8 U.S.C. § 1601, which states,

\begin{quote}
Self-sufficiency has been a basic principle of United States immigration law since this country’s earliest immigration statutes. It continues to be the immigration policy of the United States that aliens within the Nation’s borders not depend on public resources to meet their needs, but rather rely on their own capabilities….\textsuperscript{126}
\end{quote}

Penalizing aliens for becoming self-sufficient would have the effect of reducing this clear statement of congressional intent to mere hyperbole.

\textsuperscript{124} See Tiffany Walters Kleinert, \textit{Local and State Enforcement of Immigration Law: an Equal Protection Analysis} 55 DePaul L. Rev. 1103, 1124 (spring 2006) (“Prior cases by undocumented aliens challenging laws on the basis of equal protection have been unsuccessful in receiving a heightened level of scrutiny used in Plyler. But the importance of the interest involved has never reached the level of public education for children.”); Plyler v. Doe 457 U.S. 202, 221 (1982).
\textsuperscript{125} U.S. Const. art. I, § 10, cl. 6.
XIII. CONCLUSION

The towns’ inability to find any federal legislation relating to housing prohibitions dooms the ordinances. Unlike, the fields of employment or benefits where there are federally created structures in place to identify immigration status, there is nothing to guide states in determining who is allowed to rent housing. The towns cannot create their own classifications, nor can they manipulate an existing one. Thus, it would be extremely burdensome if not impossible for a federal immigration official to determine who is in violation of the town ordinances.

In contrast to the towns’ position, the federal government has promulgated an immigration policy that tolerates undocumented aliens that have established residency, and rewards self-sufficiency. The towns have no business rejecting the federal policy and substituting their own ideas as to how to defend the nation’s sovereignty. It violates the Supremacy Clause and is unconstitutional.