

SALT STATEMENT ON POST 9/11 ANTI-IMMIGRANT MEASURES

Consistent with its mission, SALT aims to provide comprehensive, authoritative legal and policy analysis of the most crucial socio-legal issues of the day. As an organization of law professors dedicated to challenging faculty and students to develop legal institutions with greater equality, justice and excellence, SALT felt compelled to address the growing inequality and injustice confronting our students, colleagues, clients, and other members of our communities who are not citizens. Toward this end, SALT Board members Raquel Aldana (UNLV) and Steven Bender (Oregon), as part of SALT's Peace/Post 9/11 and Academic Freedom Committee, have prepared the attached SALT Statement on Post 9/11 Anti-Immigrant Measures. We believe this SALT Statement will be a very useful document for attorneys, civil rights organizations, policymakers, clients, students, law professors, and anyone who is interested in this subject of local, national and international importance.

Post 9/11, anti-immigrant groups like the Federation of American Immigration Reform (FAIR) and the U.S. English Inc. have been supporting or promoting local efforts to pass anti-alienage ordinances or include them as propositions in key local elections.¹ In the year 2006 alone, at least 78 state immigration-related bills were approved in at least 33 states.² These ordinances range from denying basic worker protections to the undocumented, to restricting their access to higher education and other state benefits, to denying them driver's licenses, to barring them from congregating as day laborers and from speaking Spanish. But is this all constitutional? So far, the answer seems to be that it is, as long as Congress legislates or sanctions the anti-alienage measures when adopted by states.

One urgent task today for judges, policymakers, scholars, and activists is to define the scope of federal power to regulate the noncitizens beyond the border in ways that are consistent with U.S. constitutional principles and human rights. Unfortunately, there are significant voids in this area, in part, because the increasing anti-immigrant political climate and the narrowing field of rights under U.S. Constitutional doctrine have forced immigrant rights advocates and scholars to adopt litigation strategies, including preemption, that work in the short term but that may ultimately strengthen the treatment of the noncitizen as a subject of foreign affairs, and not as a person subject to human rights.

In this statement, we trace the expansion of the federal plenary power doctrine within the border and its devolution in some cases to states to increase awareness

¹ See, e.g., Edward Sifuentes, *FAIR Could Join Escondido to Defend Rental Ban*, THE NORTH COUNTY TIMES, Oct. 28, 2006, available at www.nctimes.com/articles/2006/10/29/news/top_stories/22_03_2810_28_06.txt and Howard Witt, *It's Official: English-only movement Gains Traction: Hispanic Leaders Alarmed*, THE CHICAGO TRIBUNE, Oct. 15, 2006, available at www.chicagotribune.com/news/nationworld/chi-0610150356oct15,1,5722281.story.

² Summer Harlow, *Small Towns Play Big Role on Immigration: Fear of Persecution Forces Many to Move*, THE NEWS JOURNAL (Wilmington, DE), Oct. 15, 2006, available at <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/200610150328/1006/NEWS>.

of how law has functioned to exclude noncitizens from basic rights. We also critically examine the absence of or the narrow scope of constitutional limits to federal and, increasingly, to state power over immigrants. We conclude by proposing a few legal strategies and making some brief recommendations to promote greater rights for noncitizens residing in the United States.

I. A Brief History of Anti-alienage Regulation Within the Border

Anti-alienage laws of the early twentieth century show that this is not the first time that the United States has legislated the outsidersness of the noncitizen.³ However, at least in the 1970s, the U.S. Supreme Court was willing to declare similar state anti-alienage laws unconstitutional on the basis of equal protection challenges or federal preemption. In the seminal *Graham v. Richardson* case, the U.S. Supreme Court designated noncitizens, at least those with lawful permanent status, a “discrete and insular minority,” thereby triggering a strict scrutiny analysis of state laws restricting their access to public benefits available to U.S. citizens.⁴ Moreover, until the 1970s, Congress’s exercise of plenary power over immigration, while still constitutionally suspect,⁵ did not expand beyond determinations of who could be allowed to immigrate and/or naturalize, who would be excluded, and who would be removed.

Four years after *Graham*, however, the Court in *Matthews v. Diaz*⁶ largely sanctioned federal discrimination against immigrants beyond immigration control and allowed Congress to enact the very type of legislation barred to states under *Graham*. To an extent, *Graham* foreshadowed the result in *Diaz*. *Graham* also held that states may not “add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and *residence of aliens in the United States*.”⁷ This language implied that Congress’ power over immigrants expanded beyond unfettered discretion to establish eligibility criteria for legal admission and full membership status and into the “conditioning” of residence once here. The *Diaz* Court’s recognition that “the relationship between the United States and our ‘alien visitor’ has been committed to the political branches of the Federal Government” largely solidified Congress’ plenary power into areas beyond border control. In essence, since *Diaz*, federal alienage discrimination has survived constitutional scrutiny as long as Congress articulates a relationship between the regulation of noncitizens within the border and immigration policy.

Ever since, Congress has slowly occupied a broader field of “alienage” regulation into areas of noncitizens’ ordinary living within the U.S. border that have no clear relationship to immigration control. Moreover, Congress has even devolved to states some of these powers to discriminate against noncitizens and some states have interpreted federal regulation expansively to deny them other state rights, such as worker’s

³ J. Allen Douglas, *The Priceless Possession of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 DUQ. L. REV. 369 (2005).

⁴ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁵ See, e.g., Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

⁶ *Matthews v. Diaz*, 426 U.S. 67, 81 (1976).

⁷ *Graham*, 403 U.S. at 378 (quoting *Takahashi*, 334 U.S. at 419) (*emphasis mine*).

compensation. Even when states have enacted pro-immigration legislation, anti-immigrant groups argue that these laws are unconstitutional as preempted by federal law.

Concern over *Diaz* and its legacy, therefore, rests precisely in its lack of clarity as to the nature and scope of federal inside the border regulation of noncitizens and its relationship to immigration control. *Diaz*, for example, strongly hinted but did not clarify whether federal alienage classifications would survive constitutional scrutiny when the discrimination against noncitizens denied them a fundamental right, not a privilege.⁸ This scenario is not far-fetched, particularly after 9/11. While framed mostly in terms of national security, the federal government has denied noncitizens fundamental due process rights by detaining them indefinitely and incommunicado to investigate and interrogate them for potential terrorist leads.⁹ Under the recently enacted Military Commission Act of 2006,¹⁰ moreover, any noncitizen the Executive unilaterally declares an “enemy combatant” could be denied *habeas corpus* review, face military tribunals, and be charged with crimes on the basis of confessions obtained through torture.¹¹

For the past three decades especially, the regulation of noncitizens within the border has expanded into various areas, including the workplace, public benefits, higher education, driver’s licenses, housing, banking, as well as language.

A. *The Regulation of the Undocumented Worker*

A decade after *Diaz*, Congress legislated the “conditions of residence of aliens” by enacting the Immigration and Control Act (IRCA) of 1986.¹² IRCA granted amnesty to millions of undocumented persons but also made it illegal for employers to hire future unauthorized workers and for the undocumented to procure employment. Here, Congress’ reach to regulate the foreign national significantly expanded beyond the border (excluding or removing those without a work visa) and into the daily lives of immigrant workers (imposing civil or criminal sanctions for their unauthorized hire).¹³

IRCA’s passage immediately precipitated a number of employer challenges to worker’s compensation claims filed by undocumented workers. Initially, state courts consistently found no conflict between IRCA’s ban on the knowing employment of undocumented workers and state law protecting workers.¹⁴ However, in 2002, the U.S.

⁸ The Court in *Diaz* appeared to characterize welfare benefit eligibility as a privilege, not a right. *Diaz*, 426 U.S. at 80 (“[T]he fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits to all aliens. Neither the overnight visitor, the unfriendly agent of a hostile power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to share in the bounty that conscientious sovereign makes available to its citizens and some of its guests.”)

⁹ See, e.g., Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L. J. 5, 11-13 (2004).

¹⁰ Military Commissions Act of 2006 (Enrolled as Agreed to or Passed by Both House and Senate) [S. 3930.ENR], available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.+3930:> .

¹¹ *Id.* at Section 7.

¹² Immigration Reform and Control Act, Pub. L. 99-603, 100 Sta. 3359 (Nov. 5, 1986).

¹³ 8 U.S.C. §§ 1101-1537 (2003).

¹⁴ Anne Marie O’Donovan, *Immigrant Workers and Workers’ compensation After Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 30 N.Y.U. REV. L. & SOC. CHANGE 299 (2006).

Supreme Court held in *Hoffman Plastics Compounds, Inc. v. N.L.R.B.* that an undocumented worker fired in retaliation for his support of union organizing would be ineligible for backpay (i.e., lost wages resulting from the unlawful termination) because such award would conflict with IRCA's bar on the hiring of undocumented workers.¹⁵ Unfortunately, despite its narrower holding,¹⁶ employers took the *Hoffman* decision as a green light to contend that undocumented workers lack state and federal work-place rights. As a result, the decision has had a downward-driving effect upon the rights of undocumented workers.

At the federal level, the Equal Employment and Opportunity Commission (EEOC) disallowed backpay remedies under Title VI¹⁷ suits for discrimination based on national origin.¹⁸ To date, however, the EEOC and other federal agencies have refused to expand *Hoffman* beyond backpay.¹⁹ The National Labor Relations Board (NLRB), for example, barred employers from disallowing votes to unionize from undocumented workers, while the U.S. Department of Labor has stated that it will vigorously enforce federal worker protection laws, including the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), without regard to immigration status.²⁰

At the state level, employers have sought to limit or bar worker's compensation or tort damages to undocumented workers for injury-related awards, and sometimes, even for work actually performed. With few notable exceptions, most state courts have disallowed restrictions on wages for work performed.²¹ They have, however, been more willing to deny other types of work rights available to U.S. citizens, particularly those resulting from work-related injuries. Typically, under worker's compensation, an employee is entitled to three types of benefits: medical, temporary total disability, and permanent impairment benefits.²² The majority of state courts and agencies have also held that *Hoffman* does not preclude awards for medical expenses to undocumented workers.²³ However, some states have relied on *Hoffman* to bar undocumented workers from recovering wage-loss benefits or partial disability benefits under worker's compensation laws resulting from their work-related injuries.²⁴ Similarly, a few state courts have relied on *Hoffman* to restrict liability in personal injury and tort cases for lost

¹⁵ 535 U.S. 137 (2002).

¹⁶ Robert I. Correales, *Did Hoffman Plastic Compounds, Ind., Produce Disposable Workers*, 14 BERKELEY LA RAZA L. J. 103 (2003).

¹⁷ 42 U.S.C. §§ 2000e-2000e-17.

¹⁸ U.S. Equal Employment Opportunity Comm'n, *Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws*, Directives Transmittal, No. 915.002 (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

¹⁹ de la Vega and Lozano-Batista, *supra* note 17, at 49-50.

²⁰ *Id.* at 52.

²¹ *Id.* at 52-53.

²² Jose M. Rivero, *Challenges Facing Immigrant Workers in Obtaining Workers' Compensation Benefits in the Wake of Hoffman Plastics*, 2 ANN. 2005 ATLA-CLE 2877 (2005).

²³ See O'Donovan, *supra* note 14, at 304.

²⁴ *Id.* at 304-306. See also Rivero, *supra* note 23, at Section 2 and *Developments in the Law, Jobs and Borders, IV. Legal Protections for Illegal Workers*, 118 HARV. L. REV. 2224, 2230-34 (2005).

income based on projected earnings.²⁵ In addition, some courts have determined that vocational rehabilitation under workers' compensation laws may not be awarded to undocumented workers because they are ineligible to work in the United States.²⁶

But perhaps the most damaging result of *Hoffman* is that employers have resorted to intimidating discovery practices during litigation to compel courts to release the plaintiff's immigration status. In cases that have adopted the *Hoffman* approach to remedies, judges frequently allow wide-ranging inquiries into the worker's immigration history, including means and methods of entry into the United States. Even when these discovery attempts are unsuccessful, they deter plaintiffs from coming forward and asserting their rights.²⁷

Since *Hoffman*, numerous attempts to pass corrective legislation have failed. Both the Inter-American Court of Human Rights and the International Labor Organization have issued rulings finding that stripping undocumented workers of basic employment protections violate United States' international human rights obligations.²⁸

B. *Public Benefits*

In 1996, several pieces of Congressional legislation continued the trend to regulate the living conditions of the noncitizen. First, Congress removed the right of most noncitizens, both legal and undocumented, to most federally-funded means-based public benefits. Prior to 1996, documented immigrants, including lawful permanent residents (LPRs) were eligible for most federal public benefits. The Personal Responsibility Act and Work Opportunity Reconciliation Act of 1996 (PRWORA) [Pub. L. No. 104-193, 110 Stat 2105 (1996)], however, enacted new rules for welfare eligibility for immigrants "in order to assure that aliens [are] self-reliant in accordance with national immigration policy" [8 U.S.C. § 160 (a)(5)]. To do so, the PRWORA significantly restricted noncitizens' eligibility for federal public benefits and devolved to states the authority to enact similar restrictions for state-funded welfare programs and enforce the provisions of the PRWORA. Specifically, under the PRWORA, a noncitizen who is not a "qualified alien"²⁹ became ineligible for most federal public benefits (including SSI and Medicaid)

²⁵ de la Vega and Lozano-Batista, *supra* note 17, at 54-44.

²⁶ Marjorie A. Shields, *Application of Worker's Compensation Laws to Illegal Aliens*, 121 A.L.R. 5th 523, §§ 4-5 (2004).

²⁷ See, e.g., Connie de la Vegas and Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Worker's Rights in the United States*, 3 HASTING RACE & POVERTY L. J. 35, 47-58 (2005).

²⁸ See Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & SOC. CHANGE 547 (2003-04).

²⁹ Only lawful permanent residents, people granted asylum, and refugees, certain parolees and a few other categories of immigrants were considered qualified aliens. 8 USC § 1641 (c). The PRA further restricted the right of even qualified aliens to apply for certain benefits, including food stamps; 8 U.S.C. § 1612; and Medicaid; 8 U.S.C. § 1613 (imposing a five year US residence requirement for lawful permanent residents unless they have worked in the US for 40 qualifying quarters or entered the US prior to 1996).

with few exceptions.³⁰ As a result, a state could no longer confer upon ineligible noncitizens state welfare benefits partially funded through federal funds.³¹ Also, under the PRWORA, states were not required to adopt any particular eligibility criteria for solely state-funded programs but could choose to follow the federal classification in determining eligibility as long as the minimum federal eligibility requirements were followed.³²

The PWORA, perhaps more importantly, authorized states to do what the U.S. Supreme Court barred them from doing more than two decades earlier in *Graham*. California's Proposition 187, which sought to deny benefits to noncitizens, including access to public schools,³³ in fact, became the impetus for the 1996 anti-immigrant welfare reforms. Peter Spiro, in particular, describes Proposition 187 as having the "steam valve" effect of pressuring up local anti-immigrant politics into the national landscape.³⁴ That is exactly what the PRWORA did. The PRWORA authorized states to prohibit or otherwise restrict the eligibility of immigrants for programs of general cash public assistance furnished by the state, as long as these were not more restrictive than those under comparable federal programs.³⁵ In addition, the PRWORA proscribed states from conferring benefits to undocumented immigrants, except through the affirmative enactment of law by a state legislature after the date of PRWORA's enactment.³⁶

The PRWORA additionally delegated enforcement authority to states including power "to require an applicant...to provide proof of eligibility"³⁷ and removed any prohibitions and restrictions against any state "from sending to or receiving from [immigration agencies] information regarding the immigration status, lawful, or unlawful of an alien in the United States."³⁸ Congress thus transferred to states much of the authority not only to design and implement their own benefit programs but also to determine for themselves eligibility requirements affecting legal migrants' qualification for most state and local means-tested programs.³⁹ As a consequence, state agencies

³⁰ These exceptions include emergency medical assistance; short-term, non-cash, in-kind emergency disaster relief; immunization and testing and treatment of communicable diseases; in-kind services necessary for the protection of life or safety; and programs for housing or community development assistance or financial assistance to the extent the immigrant received such benefit prior to the PRWORA's enactment. *Id.* at § 1611(b)(1)(A)-(E).

³¹ A federal public benefit includes any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States. *Id.* at § 1611(c)(1)(B).

³² *Id.* at § 1622(b).

³³ See Emilie Cooper, Note, *Embedded Immigrant Exceptionalism: An Examination of California's Proposition 187, the 1996 Welfare Reforms and the Anti-Immigrant Sentiment Expressed Therein*, 18 GEO. IMMIGR. L.J. 345 (2004).

³⁴ See, e.g., Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (discussing the "steam valve" virtues of federalism in immigration policy, under which one state's preferences, frustrated at home, are revisited in Congress).

³⁵ *Id.* at § 1624(a)-(b).

³⁶ H.R. Conf. Rep. No. 104-725, at 383 (1996), reprinted in 1996 U.S.C.C.A.N. 2771.

³⁷ Friendly House et al., CV-04-546, at 12 (citing 8 U.S.C. § 1625).

³⁸ *Id.* at 13 (citing 8 U.S.C. § 1644).

³⁹ PRWORA, §§ 402, 403.

responsible for administering public benefits programs are now required to verify immigration and citizenship status of applicants in order to ensure that both qualified and non-qualified noncitizens do not receive public benefits for which they are ineligible.⁴⁰ Verification should only occur when the benefit sought is contingent on citizenship or immigration status and applied only to persons receiving benefits. Federal verification guidelines recommend, however, that state agencies remove questions from applications that are likely to chill participation of eligible immigrant applicants.⁴¹ Further, the PRWORA included some narrow provisions on reporting applicants to immigration authorities that apply solely to three programs (SSI, public housing, and TANF) and requires reporting only persons whom the agency knows are not lawfully present in the United States.⁴²

Some states, however, have gone beyond the PRWORA and passed resolutions that would impose civil and criminal penalties against state employees who fail to verify immigration status and report to law enforcement applicants who do not qualify. For example, on November 2, 2004, Proposition 200, also known as the Arizona Taxpayer and Citizen Protection Act,⁴³ passed with a 56% approval vote from Arizona voters.⁴⁴ Proposition 200 sought to require all Arizona agencies responsible for the administration of state and local public benefits that were not federally mandated to verify the immigration status of any applicant and report to the federal immigration authorities the failure of the applicant to do so.⁴⁵ Failure to report the applicant to immigration authorities could carry criminal sanctions for the employee and her supervisor.⁴⁶ Proposition 200 also included voting registration and voting poll restrictions, alleging voter fraud by noncitizens.⁴⁷ As a result, the measure required would-be voters to present proof of U.S. citizenship, as well as two forms of identification with a name and address before receiving a ballot.⁴⁸

Critics of Proposition 200 cautioned that the millions of tax dollars needed to administer verification requirements would divert the money away from education, health

⁴⁰ *Id.* at § 432.

⁴¹ National Conference of State Legislatures, *Verification of Citizenship and Immigrant Status Required of All Applicants for Public Benefits*, available at <http://www.ncsl.org/programs/immig/Verification.htm>. See also, Joan Friedland et al., *Immigrant Benefits and Documentation Issues*, 1390 PLI/CORP. 187, 206-08 (2003).

⁴² PRWORA, § 404, amended by 1997 Budget Bill §§ 564 and 5581(a).

⁴³ Arizona 2004 Ballot Propositions, Proposition 200, Amending Sections 16-166 and 16-579, Arizona Revised Statutes; amending Title 46, Chapter 1, Article 3, Arizona Revised Statutes, by adding Section 46-140.01: relating to the Arizona Taxpayer and Citizen Protection Act, available at http://www.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/prop200.htm [Hereinafter Proposition 200].

⁴⁴ Not unlike Proposition 187 in California, Proposition 200 was favored by Latino voters, with forty-seven percent voting in its favor. See http://www.command-post.org/oped/2_archives/018055.html.

⁴⁵ Proposition 200, *supra* note 42, at §. 6.A.

⁴⁶ *Id.* at §.6.B.

⁴⁷ *Id.* at § 3.

⁴⁸ *Id.* at §§ 3-5.

care and other social service programs.⁴⁹ In addition, critics cautioned that those most affected would be U.S. citizens who would have to provide proof of citizenship (either a passport or birth certificate), which in turn, would lead to greater inefficiency in the provision of state services.⁵⁰ Critics also cautioned that Proposition 200 would discourage noncitizens from procuring health services for which they were eligible, such as immunizations and treatment for communicable diseases, potentially increasing the risk of epidemics in Arizona.⁵¹

Information on the effect of Proposition 200 suggests that some critics' fears have been borne out. For example, in Tucson, county officials expressed concern that the passage of Proposition 200 is significantly reducing the number of women seeking prenatal care and food through the Women, Infants and Children Program, even when the proposition did not apply to those programs.⁵² What is particularly problematic about Proposition 200, however, is that its intent and effect was to provoke even greater anti-immigrant feelings during an important Arizona election during which the undocumented became the scapegoat for many of the state's problems.⁵³ Proposition 200 deceptively included provisions to deny the undocumented benefits for which they were already ineligible under federal law. The allegation was one of pernicious fraud by ineligible noncitizens who nonetheless would seek and receive benefits without having to prove legal immigration status or by providing questionable forms of identification,⁵⁴ purportedly costing the state of Arizona millions of dollars.⁵⁵ Despite its rhetorical force, Proposition 200 lacked official state findings about the effect of illegal immigration on Arizona's economy, much less any assessment of welfare fraud.⁵⁶ Instead, such figures,

⁴⁹ See e.g., *What's Wrong with Prop 200?*, available at <http://www.defeat200.org/wrong.php>. See also Tamar Jacoby, *Flawed Proposition*, THE WALL STREET JOURNAL, Sept. 14, 2004 (reporting on the governor's office estimates on the cost of implementation into the tens of millions of dollars).

⁵⁰ *What's Wrong with Prop 200?*, *supra*.

⁵¹ *Id.*

⁵² Claudine LoMonaco, *Proposition 200 Immigration Effect*, AMERICAN RENAISSANCE, available at http://www.amren.com/mtnews/archives/2005/03/prop_200_immigr.php. See also, Elvia Diaz and Robbie Sherwood, *Prop. 200's Effect Minimal: Political Fallout May Loom Large in '06 Races*, THE ARIZONA REPUBLIC, Jun. 5, 2005 (reporting that Proposition 200 has discouraged Latinas from seeking prenatal care).

⁵³ The *Arizona Republic* is predicting that the real result of Proposition 200 would be to create a political battleground in upcoming Arizona elections, particularly against Attorney General Terry Goddard, who is up for re-election in 2006 and who, along with Arizona Governor Janet Napolitano, is blamed for the poor implementation of the law and is accused of being soft on illegal immigration. Diaz and Sherwood, *supra* note 51.

⁵⁴ Proposition 200, *supra* note 42, at § 2 of Text of the Proposed Amendment.

⁵⁵ According to State Representative Russell K. Pearce, welfare fraud cost Arizona taxpayers tens of millions of dollars. Rachel Alexander of IntellectualConservative.Com cited the Center of Immigration Studies (CIS) figures that welfare provided by Arizona taxpayers to illegal immigrants is \$380 million dollars. Similarly, Linda Bentley of Carefree argued that Arizona spends more than \$1 billion to provide benefits and services to more than half a million illegal aliens, which amounts to an added tax burden of \$700 a year on every household. See Proposition 200, *supra* note 42, at Argument for Proposition 200.

⁵⁶ *Id.* at Jorge Luis Garcia's, State Senator, District 27, Tucson, Argument against Proposition 200. In fact, a measure passed by the Arizona State Legislature requiring an investigation of welfare payments to the undocumented has been thwarted by the failure of legislative leaders to establish the task force to conduct the study. See *The Costs of Illegal Immigration to Arizonans: A Report by the Federation of American*

which were used in a TV ad campaign in support of the measure,⁵⁷ came primarily from a 2004 study conducted by the Federation for American Immigration Reform (FAIR), a group well-known for its anti-immigrant stance.⁵⁸ FAIR concluded that illegal immigration overall cost Arizona taxpayers more than \$1 billion per year in the cost of K-12 public education, unfunded medical expenses, and incarceration – roughly \$700 per year per household headed by a native-born resident.⁵⁹ None of these costs, however, was related to Proposition 200's alleged welfare fraud abuse. The only mention in the FAIR study of welfare payments in Arizona was in a paragraph that estimated the state's welfare deficit resulting from illegal immigrants to be \$15 million a year. FAIR calculated these costs based on a 2003 national Center for Immigration Studies (CIS) study that concluded that average non-medical welfare payments to an undocumented-immigrant household averaged \$151 per year.⁶⁰

Proposition 200 also included voting registration and voting poll restrictions to curtail alleged voter fraud by noncitizens.⁶¹ As a result, the measure required would-be voters to present proof of U.S. citizenship, as well as two forms of identification with a name and address before receiving a ballot.⁶² Opponents of the measure expressed concern that the law would discourage and harass eligible U.S. citizen voters from exercising their right to vote, by creating a state bureaucracy that would make it more difficult for voters to register.⁶³ Fears about eligible voter registration problems were not unfounded. From January to June 2005, more than 5,000 Arizonians, mostly newly transplanted and none believed to be in the country illegally, were rejected when they registered to vote.⁶⁴ In contrast, the effect of curtailing the purported fraud has been minimal. As of June 2005, six months after the law's passage, only two welfare applicants have been reported to immigration authorities for seeking state benefits illegally.⁶⁵

Immigration Reform (June 2004), available at <http://www.fairus.org/news/NewsPrint.cfm?ID=2442&c=55> [hereinafter FAIR Report] (discussing Arizona H.R. 2848, introduced March 31, 2003).

⁵⁷ Margot Roosevelt, *Border War in Arizona*, 10/11/04 *Time Mag.* 23.

⁵⁸ The FAIR Report, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ *Id.* at n. 7 (citing Steven Camarota, *Back Where We Started: An Examination of Trends in Immigrant Welfare Uses Since Welfare Reform*, Center for Immigration Studies, March 2003). It is not clear from the FAIR report how FAIR arrived at the \$15 million figure.

⁶¹ Proposition 200, *supra* note 42, at §§ 3-5.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Diaz and Sherwood, *supra* note 51 (reporting that this amounts to about one out of every three new registrations in Maricopa, Pima and Pinal County). See also C.J. Karamargin, *Pima County Turned Down 59 percent in Last 2 Weeks*, THE ARIZONA DAILY STAR, May 6, 2005 (reporting that during two weeks in May, Pima County Arizona officials rejected 59 percent or 423 of the 712 voter registration forms from prospective new voters for failure to meet the new requirements). Challenges to whether Proposition 200's voting requirements violate the Voting Rights Act are being considered in the litigation challenging the measure. *Friendly House et al., v. Napolitano*, Case No. CV04-649 TUC DCB, Complaint for Injunctive and Declaratory Relief, US District Court of Arizona (2004). A substantive analysis of the merits of these allegations is beyond the scope of this article.

⁶⁵ Diaz and Sherwood, *supra* note 51.

Meanwhile, the political rhetoric of Proposition 200 continues to be emotional and divisive. *The Wall Street Journal* insightfully captured the politics of why FAIR and other anti-immigrant groups spent nearly half a million dollars to promote Proposition 200: “They expect it to win big...and plan to use these skewed results to advance their agenda in Washington...and wave [the victory] around like a bloody shirt...the outcome [would] vindicate...their claim that the American public doesn’t like immigrants and opposes immigration reform.”⁶⁶

Proposition 200 is merely the beginning of a nation-wide campaign by anti-immigrant groups to sponsor similar bills in Arizona and other states.⁶⁷ At least seven other states—Arkansas, Alabama, Colorado, Georgia, Tennessee, Virginia, and Ohio—have introduced bills or ballot measures similar to Proposition 200.⁶⁸ Also in the 2006 elections, Arizona passed four additional anti-immigrant measures, some of which achieved what the Arizona legislature failed to pass into law:⁶⁹ Proposition 100 will deny bail to undocumented noncitizens under certain conditions; Proposition 102 will prohibit punitive damages in lawsuits filed by undocumented noncitizens; Proposition 200 will prevent undocumented noncitizens from using state funds for child care and education, including disallowing them to claim in-state tuition at colleges and universities; and Proposition 103 will establish English as the official state language.⁷⁰

C. *Undocumented College Students*

Higher institutions of learning were also affected by the 1996 welfare reforms that restricted student aid eligibility to foreign nationals. As a result, every year, approximately 65,000 students graduating from U.S. high schools face limited prospects for completing their education or working legally in the United States because their parents brought them to the U.S. as undocumented children.⁷¹ Section 505 of the Illegal

⁶⁶ Jacoby, *supra* note 48.

⁶⁷ According to the International Relations Center, a nonprofit policy study center established in 1979, since Proposition 200 passed last fall, its backers have presented 20 other bills targeting immigrants in the Arizona legislature and have worked to sponsor similar bills in other states. Margot Vernes and Adriana Navarro, *Anti-Immigrant Legislation in Arizona: Leads to Calls for a State Boycott* (June 1, 2005), available at www.americaspolicy.org.

⁶⁸ See Yvonne Wingett, *Prop. 200 Spurs Efforts Nation Wide*, ARIZONA REPUBLIC, Jan. 24, 2005; Stephen Dinan, *Efforts Against Illegals Broadens*, THE WASH. TIMES, Jan. 22, 2005 and Veranes and Navarro, *supra* note 56.

⁶⁹ Arizona legislators passed legislation that would have denied even more public programs to the undocumented, including adult education classes, child care assistance, and lowered in-state tuition at Arizona public universities. Arizona HB 230, available at <http://www.ahsaa.net/archives/hb2030.htm>. In May 2005, however, Governor Napolitano vetoed the bill, stating “[w]hile I agree that public programs should not be available to those who consciously decide to come here illegally, this bill goes too far by punishing even longtime residents of this state who were brought here as small children by their parents.” *Arizona Governor Vetoes Measures on Immigration*, THE ASSOCIATED PRESS, May 22, 2005. That same day, Governor Napolitano also vetoed a bill that would have given Arizona police the power to enforce federal immigration laws. *Id.*

⁷⁰ Leslie Schulman, *Anti-Immigrant Measures Pass in Arizona, Colorado*, JURISTS LEGAL NEWS & RESEARCH, Nov. 8, 2006, available at <http://jurist.law.pitt.edu/printable.php>.

⁷¹ Jeffrey S. Passel, Ph.D., The Urban Institute, *Further Demographic Information Relating to the DREAM Act*, available at http://www.nilc.org/immlawpolicy/DREAM/DREAM_Demographics.pdf.

Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA] proscribed states from conferring upon undocumented immigrants any post-secondary education benefits based on residency status within the state unless the state was willing to offer the same to any other U.S. citizen or national regardless of residency status [Pub. L. No. 104-208, 110 Stat. 3009-546 (*amending* 8 U.S.C. § 255(b)(1) (1996)]. At the same time, the PRWORA denied post-secondary monetary assistance to the undocumented in the form of grants, loans, and work-study. Any state wishing to make an undocumented person eligible for any state or local public benefit would have to enact a state law affirmatively providing for such eligibility.⁷² Subsequently, Congress included section 1623, which appears to withdraw state discretion to grant in-state tuition to undocumented students.⁷³ That provision reads: “notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State...for any postsecondary education benefit.”

The effect of these measures has been to discourage higher education institutions from admitting noncitizens into their programs and to strengthen arguments in favor of restricting access. Despite this effect, state responses to the 1996 laws have been mixed. A few states have sought to deny admission to the undocumented into public universities. In Virginia, for example, the attorney general issued a 2002 memorandum to all public universities and colleges and to the executive director of the State Council for Higher Education in Virginia stating, “the attorney general is strongly of the view that illegal and undocumented aliens should not be admitted into our public colleges and universities at all.”⁷⁴ This memorandum caused Virginia’s colleges and universities to implement, or to continue to enforce, policies that deny admission to the undocumented.⁷⁵ When challenged, the U.S. District Court of Virginia upheld the admission bar to higher education of the undocumented, as long as the state resorted to federal standards for establishing who is and is not undocumented.⁷⁶ Other state legislatures have passed or introduced legislation to either grant or deny in-state tuition benefits to the undocumented.⁷⁷ To date, at least nine states have passed laws to grant in-state tuition to undocumented or temporary residents,⁷⁸ while two states have passed laws denying benefits.⁷⁹ In addition, about twenty-one other states have attempted to adopt legislation to grant in-state tuition to the undocumented, while two have sought to deny it.⁸⁰

⁷² 8 U.S.C. § 1621(d).

⁷³ Rebecca Ness Rhymer, Note, *Taking Back the Power: Federal vs. State Regulation on Postsecondary Education Benefits for Illegal Immigrants*, 44 WASHBURN L. J. 603, 619-20 (2005).

⁷⁴ Memorandum from the Commonwealth of Virginia Attorney General, *Immigration Law Compliance Update* at 5 (Sept. 5, 2002).

⁷⁵ Merten, 305 F.Supp. at 591.

⁷⁶ *Id.* at 602-4.

⁷⁷ See, e.g., National Immigration Law Center, *Chart of State Proposed or Enacted Legislation Regarding Immigrant Access to Higher Education*, available at http://www.nilc.org/immilawpolicy/DREAM/DREAM_Bills.pdf (last updated November 11, 2003).

⁷⁸ These are Texas, California, New York, Utah, Washington, Oklahoma, Illinois, and Kansas and New Mexico. See National Immigration Law Center, *Basic Facts About In-State Tuition for Undocumented Immigrant Students*, available at www.nilc.org.

⁷⁹ The two states are Alaska and Mississippi. *Id.*

⁸⁰ María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373 (2005). Those states in favor include: Colorado, Delaware, Florida,

Unfortunately, constitutional protection against federal or state discrimination targeting undocumented students in higher education has extended only to lawful permanent residents and certain temporary residents (non-immigrants) who can establish “residency” in the United States. In 1977, the Supreme Court struck down New York’s bar to state funded scholarships to all immigrants except refugees and those lawful permanent residents who had not applied or lacked the intent to apply for citizenship.⁸¹ In *Nyquist*, however, the Court left open the possibility that a different outcome might result if the bar to state scholarships discriminated only against non-immigrants who, by federal law, were precluded from establishing the residency requirement that is often required for higher education scholarships.⁸² Thus, some states, like Maryland, narrowed *Nyquist*’s scope to permit states to continue discriminating against non-immigrants, as long as the state measure imposed a residency requirement that also applied to citizens. Subsequently in 1982, days after the Court decided *Plyler v. Doe* to guarantee undocumented children access to K-12 public schools,⁸³ the Court struck down the University of Maryland’s policy of charging out-of-state tuition rates to G-4 visa holders because under federal immigration policy, G-4 visa holders could establish residency.⁸⁴ The holding, however, left open the door to distinctions targeting non-immigrants that could not establish residency in the United States. It also left open the possibility that states could discriminate against undocumented students who, by virtue of their unauthorized stay in the United States, would be ineligible for residency. In sum, since *Nyquist* and *Toll*, states have upheld the constitutionality of charging out-of-state tuition fees for higher education to non-immigrant and/or undocumented students, as long as any state residency requirements are consistent with federal immigration policy.⁸⁵

D. *Driver’s Licenses*

The issue of driver’s license restrictions to undocumented noncitizens (and also temporary legal residents) also took center stage post 9/11. Like Proposition 187, the

Georgia, Hawaii, Kansas, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, and Wisconsin. Those states opposed include Arizona and Virginia.

⁸¹ *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

⁸² *Nyquist*, 432 U.S. at 4. In dicta, the Court acknowledged the policy barred also non-immigrants but stated that “[s]ince many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, the bar...is of practical significance only to resident aliens.”

⁸³ 457 U.S. 202 (1982).

⁸⁴ *Toll v. Moreno*, 458 U.S. 1 (1982).

⁸⁵ See, e.g., *Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001) (upholding denial of in-state residency tuition to TN/TD visa holder); Off. Op. Att’y Gen. No. JM-241, 1984 WL 18207 (validating a state statute that permitted non-immigrants to present evidence to establish residency for purposes of tuition in accordance with federal law); Letter from Jim Mattox, Attorney General of Texas, to Kenneth Ashworth, Commissioner, Texas College & University System (Dec. 12, 1984) available at <http://www.oag.state.tx.us/opinions/op47mattox/jm-0241.htm>. (foreign nationals who are permitted by Congress to adopt the United States as their domicile while they are in this country must be allowed the same privilege as citizens and permanent residents of the United States to qualify for Texas residency for purposes of tuition at state universities, despite the limitation in section 54.057 of the Texas Education Code).

driver's license debate began at the state level especially when states learned that some of the 9/11 hijackers used a driver's license to rent apartments, open bank accounts, and board planes. Erroneously, the argument became that but for the driver's license, the hijackers would not have been able to engage in the ordinary tasks necessary to execute the attack, including boarding the planes.⁸⁶

During the 2001-02 congressional session alone, twenty-one states enacted driver's license security legislation to restrict or deny immigrants' access to driver's licenses,⁸⁷ a trend that continued with few exceptions. By January 2005, twenty-four states had legislation requiring a lawful presence requirement for the issuance of driver's licenses, while only eleven states expressly did not.⁸⁸

Then in 2004 and 2005, Congress considered driver's licenses to implicate a national security issue and, therefore, stepped in to "federalize" and impose national standards on the issuance of driver's licenses. Specifically, the U.S. Congress signed into law the Intelligence Reform and Terrorism Prevention Act ("IRTPA") on December 17, 2004⁸⁹ and the Real ID Act of 2005 on May 10, 2005.⁹⁰ IRTPA and the Real ID Act require that all state-issued driver's licenses comply with proof of identity standards and machine-readable identity (biometric) information, such as a picture or other unique identifier. In addition, the Real ID Act imposes Social Security Numbers (SSN) and legal residency requirements on state-issued driver's licenses, at least if these are to be used as a form of identification before federal agencies for official purposes.⁹¹ Further, the Real ID Act authorizes the issuance solely of temporary driver's licenses and identification cards for persons holding temporary visas or whose petitions are pending, which shall expire when the person's authorized stay in the United States expires or for one year if there is no definite end period.⁹²

To be eligible to receive federal funding to implement the Real ID Act, states would be required to participate in an interstate database to share information about drivers with other states.⁹³ States are not obligated to comply with IRTPA and the Real

⁸⁶ Most of the hijackers had some type of nonimmigrant visa and could have boarded the plane with their foreign passports. It is true that most of them also had driver's licenses, but these became extremely useful to law enforcement to track their identities and their living patterns. Ironically, in fact, their possession of driver's licenses facilitated the investigation of the 9/11 terrorist attacks. THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES, Official Government Edition, available at <http://www.gpoaccess.gov/911/index.html>.

⁸⁷ Testimony of Betty Karnette before the Subcommittee on Highways and Transit of the Committee on Transportation and Infrastructure of the House of Representatives 7 (Sept. 5, 2002). See also, María Pabón López, *More than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L. J. 91 (2005).

⁸⁸ National Immigration Law Center, Overview of States' Driver's License Requirements (last updated Jan. 5, 2005), available at [ww.nilc.org](http://www.nilc.org), last checked March 2005.

⁸⁹ The Intelligence Reform and Terrorism Prevention act of 2004, S. 2845, 108th Congress, at §7212(b)(2)(A)-(F).

⁹⁰ REAL ID Act of 2005, H.R. 1268, 109th Congress, P.L. 109-13 (May 2005).

⁹¹ *Id.* at § 202(c).

⁹² *Id.* at § 202 (c)(2)(C).

⁹³ *Id.* at § 203.

ID ACT; however, there are important incentives for states to do so. Residents from states that opt not to comply, for example, would be turned away when they tried to conduct business with a federal agency, unless that person had a federally-issued ID, such as a passport. Recognizing that compliance is likely necessary, many states have complained that the REAL ID Act and IRTPA were passed unfunded, and that the cost to states will be high.⁹⁴ Nevertheless, within four months of the passage of IRTPA and the Real ID Act, twenty-four states introduced legislation to conform state law to the federal requirements.⁹⁵

A few states, including Tennessee, have issued driving certificates in lieu of driver licenses.⁹⁶ These driving certificates are not to be used as a form of personal identification but solely authorize the holder to drive. In fact, “for driving purposes only,” is usually inscribed in the certificate itself to distinguish it from driver’s licenses. Driving certificates, however, solve only part of the problem by licensing foreign motorists to drive and to be eligible for car insurance. These certificates do nothing to address the lack of personal identification that would allow foreign nationals to engage in “ordinary living.” Yet, that is precisely the desired intent.

Proponents of driver restrictions wish to avoid converting driver’s licenses into a type of government sanction for unauthorized migrants to live in the United States. Senator Richard J. Durbin [D-IL] stated during a speech to Congress: “If you can produce a driver’s license, we can assume you are legal, you are legitimate, you are for real.”⁹⁷ The opposite, then, is true. The real intent of driver’s license restrictions is to “delegitimize” foreign nationals by rendering them invisible, robbing them of their personhood, and ultimately, forcing them out of the U.S. territory entirely.

E. The “English Only” Laws

Slightly over half the states and numerous local governments have adopted comprehensive laws that declare English the state’s official language. Some go further to require the protection and preservation of English, while others go further still to outlaw the use of other languages in government business. These laws have roots in xenophobic hostility toward Southern and Eastern European immigrants in the early 1900s that prompted many states to require English language in schools and in some cases more

⁹⁴ The National Conference of State Legislatures said that compliance would cost \$500 million to \$700 million, although Rep. Sensenbrenner (R-WI), the sponsor of the Real ID Act said the cost is closer to \$100 million. Darryl Fears, *Senate Backs Measure to Tighten ID Requirements*, THE WASHINGTON POST, May 11, 2005. See also, Suzanne Gamboa, *States May Disobey Driver’s License Rules*, THE ASSOCIATED PRESS, May 10, 2005.

⁹⁵ National Immigration Law Center, *2005 State Driver’s License Legislation*, available at http://www.nilc.org/immspbs/DLs/state_dl_proposals_042605.pdf.

⁹⁶ Tennessee Immigrant and Refugee Rights Coalition, *The Tennessee Driving Certificate: Background, Pitfalls, and Lessons Learned*, available at http://www.tnimmigrant.org/TN_Coalition/Legislation/TNCertificate_LessonsLearned.doc.

⁹⁷ Opening Statement of Senator Richard J. Durbin, Chairman of the Subcommittee on Governmental Affairs of the U.S. Senate, *A License to Break the Law? Protecting the Integrity of Driver’s Licenses 3* (April 16, 2002) [hereinafter Durbin Statement].

comprehensively. Modern English language laws, however, are aimed at Spanish-speaking Latinas/os as well as Asian immigrants.

Official language laws, such as Colorado's constitutional provision [Colo. Const. Art. II, § 30a, "[t]he English language is the official language of the State of Colorado"], probably have little legal effect, carrying the equivalent legal consequence of other state symbols such as the state bird.⁹⁸ California's English language initiative illustrates the intermediate variety of these language laws by declaring English the state's official language and instructing the legislature and California officials to "take all steps necessary to insure the role of English as the common language of the State of California is preserved and enhanced." Further, "[t]he Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California" [Cal. Const. Art. III, § 6]. As with official English laws, these intermediate language laws apparently have little substantive effect on government operations. California's Attorney General interpreted the law to permit other language translations to accompany English in official publications, and a California appeals court rejected a lawsuit to prevent the California State Bar from printing and distributing a legal pamphlet in Spanish intended for persons under arrest.⁹⁹

The most far-reaching English language laws (known as English-Only laws) are found in a few states such as Utah that require English for all government business except in specified circumstances, such as when necessary for public health or safety reasons [Utah Code § 63-13-1.5]. Prior to its invalidation, Arizona's language law provided similarly that the state must act in English and in no other language except in specified circumstances [Ariz. Const. Art. XXVIII]. Arizona's Attorney General construed this constitutional provision narrowly to allow use of non-English languages in the day-to-day operation of government, but the Arizona Supreme Court decided the law was meant to have widespread application to more than just official acts of government. For example, the law was meant to prohibit a public school teacher from speaking in Spanish to Latina/o parents about their child's education, and to prevent a town hall discussion in Spanish between Arizona voters and their elected officials. As so construed, the Arizona Supreme Court struck down the law in 1998 as unconstitutionally infringing on the First Amendment free speech rights of the public, public employees, and elected officials.¹⁰⁰ But Arizona voters in 2006 revived a modified version of the former English-Only law by a landslide margin.

⁹⁸ In concluding that the Illinois official English law did not prohibit local elections officials from assisting voters in Spanish, a federal appeals court noted the Illinois law appears with those naming the state bird and the state song, and has "never been used to prevent publication of official materials in other languages." Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575, 577 (7th Cir. 1973). After passage of Colorado's official English initiative, the Colorado governor and the Denver mayor ordered that government policies on bilingual assistance would remain in effect.

⁹⁹ Levy v. Davis, 2003 WL 157555 (Cal. Ct. App. 2003) (unpublished opinion).

¹⁰⁰ Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998). Similarly, the Supreme Court of Oklahoma struck down a proposed English-Only initiative as violating the Oklahoma constitution's free speech provisions by inhibiting communication with government officials. In re Initiative Petition No. 366, 46 P.3d 123 (Okla. 2002). Before its repeal by voters in 1993, the Antibilingual Ordinance of Dade County, Florida, had been construed by the county attorney as forbidding Spanish-language recordings of the government's Tel-Consumer hotline aimed to protect Spanish-language consumers.

Anti-Spanish and Anti-Asian sentiment led a few localities in the 1980s and 1990s to join state governments in regulating against non-English languages. This local regulation took several forms. A few jurisdictions embraced symbolic “Official English” regulation that deemed English as the locality’s official language of government—for example, four Chicago suburbs enacted Official English in 1996. Others, such as Dade County, adopted more restrictive English-Only laws requiring local government to act only in English. Still others, such as Monterey Park and Pomona, California, and six towns in Bergen County, New Jersey, chose to target business signs of immigrant businesses such as markets and restaurants, requiring their signs to be written in whole or in some specified part in English.¹⁰¹ And some local governments, such as Elizabeth, New Jersey, and a Los Angeles county municipal court,¹⁰² required municipal employees to speak only English on the job. Finally, in 1989, voters in Lowell, Massachusetts looked beyond their municipal borders and adopted a resolution requesting the state legislature and Congress to declare English the state and U.S. official language.

Prompted by the anti-Latina/o immigrant sentiment in the early 2000s, particularly the xenophobia surrounding the 2006 election and failed Congressional efforts at comprehensive immigration reform, numerous localities took immigration enforcement into their municipal hands and recently considered and adopted English language regulation. For example, in 2006, Hazleton, Pennsylvania adopted an English language ordinance along with other anti-immigrant restrictions¹⁰³, as did Pahrump, Nevada (population 33,241), which declared English the town’s official language.¹⁰⁴ Other towns adopting English language regulations in 2006 included Farmers Branch, Texas, and Taneytown, Maryland.

The Hazleton ordinance, labeled the Official English Ordinance, declares English as “the official language of the City of Hazleton.”¹⁰⁵ Further, the ordinance contains English-Only provisions requiring official actions to be taken in English and no other

¹⁰¹ Pomona’s sign ordinance, enacted in 1988 and targeting Asian language characters, required foreign language business signs to “devote at least one-half of the sign area to advertising copy in English alphabetical characters.” A federal district court judge soon struck down the Pomona sign ordinance as violating free speech and equal protection constitutional guarantees. *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328 (C.D. Cal. 1989).

¹⁰² See *Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles*, 838 F.2d 1031 (9th Cir. 1988) (upholding the preliminary injunction against enforcement of a court rule requiring municipal court employees to speak English at work), vacated as moot, 490 U.S. 1016 (1989). See also *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) (finding sufficient evidence to present jury question whether municipal English-Only policy for all employees created a hostile work environment that adversely affected Spanish-speakers).

¹⁰³ Ordinance 2006-10, *Illegal Immigration Relief Act Ordinance*, available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0003.pdf>

¹⁰⁴ Lynnette Curtis, *Pahrump Targets Illegal Immigrants, Ordinance Declares English Town’s Official Language, Limits flying Foreign Flags, Denies Benefits*, LAS VEGAS REVIEW JOURNAL, Nov. 15, 2006.

¹⁰⁵ Ordinance 2006-10, *supra* note 102, at Section 6.

language, except for certain enumerated areas such as when necessary to protect public health or safety.¹⁰⁶

Before the effective date of the Hazleton ordinance (set to take effect on September 11, 2006), the Puerto Rican Legal Defense and Education Fund and other groups filed suit to enjoin the ordinance (and related Hazleton anti-immigrant ordinances) as unconstitutional.¹⁰⁷ The language ordinance is of dubious constitutionality given its conflict with the free speech rights of government employees and officials, and local citizens. In late October 2006, a federal judge temporarily enjoined enforcement of the Hazleton anti-immigrant ordinances, noting they could cause “irreparable injury” to immigrants.¹⁰⁸ There are several reasons why these language laws are bad public policy, apart from their questionable legal validity.

Although the Hazleton ordinance does not explicitly mention the Spanish language, anti-Latina/o immigrant tensions sparked its adoption, as well as the other recent English language and anti-immigrant local government regulations. This is apparent given the changing demographics of these communities while they absorb and scapegoat an influx of low-wage worker Latina/o immigrants. Hazleton, for example, attracted Latina/o immigrants leaving behind larger cities in New York and New Jersey. Attributing these new language laws to anti-Latina/o sentiment also reflects the dominant discourse of the undocumented immigrant debate surrounding the 2006 elections. More than ever, the debate today over undocumented immigration is a proxy for discussion of the “Mexico problem.” Language laws, even the symbolic Official English laws, therefore stand as monuments to anti-immigrant and anti-Latina/o sentiment. They do nothing to offer constructive solutions to our broken immigration system. Rather, they symbolize the purported inferiority of Spanish, and therefore reach beyond undocumented immigrants to stigmatize all Latinas/os.

Proponents of these anti-Latina/o measures try to sugarcoat their motives. Inspired by the U.S. English approach to couch anti-Spanish laws in the rhetoric of empowering immigrants to learn English, and perhaps also by the Texas judge in the 1990s who ordered a Latina to speak only English at home to avoid “relegating her [5-year-old daughter] to the position of a housemaid,” Hazleton’s mayor explained the ordinance as aiding immigrants: “We make it easy [by embracing non-English languages] for people to come [to the U.S.] and never speak English. We think we’re helping them, but we’re not.”¹⁰⁹

¹⁰⁶ The ordinance does undercut this English-Only component some by providing that unofficial or nonbinding translations or explanations of such official actions “may be provided separately in languages other than English.” Query how this ordinance would operate if the official action was, for example, a ruling by a municipal judge in open court. Presumably, a bilingual judge capable of speaking Spanish would need to issue her ruling in English to a Spanish-speaking party, but could then follow that ruling with a Spanish language translation.

¹⁰⁷ Pedro Lozano et al. v. City of Hazleton, Complaint, Civ. Action No. 3:06cv1586, available at http://www.aclu.org/images/asset_upload_file582_26463.pdf.

¹⁰⁸ Lozano et.al., v. Hazleton, Temporary Restraining Order No. 3:06cv1586.

¹⁰⁹ Wendy Koch, *Push for “Official” English Heats Up*, USA TODAY, Oct. 9, 2006 at A1.

No doubt a more effective means of actually helping immigrants learn English is to offer and fund English language classes. Latinas/os overwhelmingly want to learn English, and indeed do so as fast as or faster than past immigrant groups, but any classes for English learners are often overcrowded and underfunded.

State and municipal English language laws generally are restricted to government speech and do not purport to regulate languages used in homes, business (other than business sign restrictions), or churches. Still, these language laws in practice have sparked a private backlash against Spanish-speakers that targets non-government speech. For example, after the passage in 1986 of California's English language initiative, civil rights organizations received complaints that employers adopted English-Only rules to govern their employees in such private businesses as hospitals, hotels, manufacturing firms, insurance companies, banks, and charitable organizations. Following voter approval in 1998 of the Colorado English-language initiative, a Colorado school bus driver told students that speaking Spanish on the bus was illegal. After the Florida English-language initiative passed, a bank rejected checks written in Spanish, residents told Latinas/os to "Speak English. It's the law now," and a Florida supermarket manager suspended a cashier for speaking Spanish. None of these discriminatory reactions were consistent with the narrow scope of the English language laws in those states, and illustrate the tendency of the public to wildly misconstrue the meaning of these English language laws. Despite the narrow interpretation of these laws by courts and other legal authorities such as state Attorneys General, the experience of these harmful impacts on private use of languages other than English suggests that those who respect language rights ought to oppose the adoption of these laws and the strengthening of existing English language laws.

Local English language laws stifle civic participation of recent immigrants unable to speak English. Their voices in the community are vital, not only for their health and safety, but to enable them to contribute to the social, educational, and governmental fabric of the community and to help dispel false assumptions about these newcomers.

F. Housing and other Business Restrictions

Another recent anti-immigrant trend at the local level has been the regulation of businesses, including landlords, who do business with the undocumented. In August 2006, the town of Hazleton, Pennsylvania, for example, passed Ordinance 2006-13, captioned "Establishing a Registration Program for Residential Properties."¹¹⁰ The Ordinance requires all occupants of rental units to obtain an "occupancy permit."¹¹¹ In order to obtain such a permit, an applicant must provide "proper identification showing proof of legal citizenship and/or residency."¹¹² All Hazleton landlords are barred from

¹¹⁰ See Pedro Lozano et al. v. City of Hazleton, Complaint, Civ. Action No. 3:06cv1586, *available at* http://www.aclu.org/images/asset_upload_file582_26463.pdf (discussing Hazleton's anti-immigrant ordinances).

¹¹¹ *Id.*

¹¹² *Id.*

renting from unregistered tenants.¹¹³ Landlords must also attest to their compliance to the City Council, and the Hazleton Code Enforcement Office may receive complaints of non-compliance from any business entity or resident of the town of Hazleton.¹¹⁴ Within three days of the Complaint, the landlord may produce “identity information” for the tenant to verify citizenship, though the type of identify information requested is not defined in the Ordinance.¹¹⁵ If the landlord does not provide the identity requested, the Code Office may suspend the landlord’s business permit, unless the landlord “corrects” the violation within three business days.¹¹⁶ Although the Ordinance does not define the nature of the “correction,” its logic suggests that the landlord must evict the “illegal alien” tenant within three days.

In September of 2006, the ACLU filed a complaint in the U.S. District Court for the Middle District of Pennsylvania against the City of Hazleton to challenge the Ordinance on behalf of several named plaintiffs, including several undocumented noncitizens (adults and children) and U.S. citizen children of the undocumented affected by the Ordinance.¹¹⁷ The ACLU also filed for a temporary restraining order, which the Pennsylvania District Court granted on October 31, 2006.¹¹⁸ At least for now, however, the Hazleton ordinance has spurred other towns to pass similar laws.¹¹⁹ It may seem that efforts to restrict housing might ultimately die down at the local level, yet, given the current federal climate, they may end up in federal legislation. In the Fall of 2005, the House passed the Border Protection, Anti-Terrorism, and Illegal Immigration Control Act [H.R. 4437], which defines “alien smuggling” so broadly that it would essentially be a crime to render most assistance to or to conduct any business with the undocumented.¹²⁰ This bill did not ultimately become law, but its passage by the House suggests that its adoption in the future is at least possible.

II. Legal Challenges to Anti-Alienage Measures

A. Current Strategies

The focus of civil rights groups has been to challenge state anti-alienage measures before they spread across states or are federalized. The juxtaposition of *Graham* and

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Because Hazleton’s Ordinance also makes it unlawful for a landlord to rent to the undocumented, the ACLU complaint named plaintiffs also include a few affected landlords. Landlords who lose violate the Ordinance must pay fines, may have their license suspended or revoked, and may not collect rent from any tenants while the license is suspended. For this assignment, however, I want your focus to be on noncitizen plaintiffs who are barred from renting housing in the town.

¹¹⁷ *Lozano et al. v. Hazleton, First Amended Complaint, Civ. Action No. 6-cv-56-JMM, filed 10/30/06.*

¹¹⁸ *Lozano et.al., v. Hazleton, Temporary Restraining Order No. 3:06cv1586.*

¹¹⁹ *Pa. Town’s Immigration Law Challenged*, The Associated Press, October 30, 2006, available at <http://www.nytimes.com/aponline/us/AP-Illegal-Immigrants-Crackdown.html>.

¹²⁰ H.R. 4437: Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, 109th Congress. See also, American Immigration Law Association, Position Paper, *Top 10 “Poison Pills” in H.R. 4437*, available at <http://www.aila.org/content/default.aspx?docid=18449>.

Diaz has sometimes permitted equal protection and federal preemption challenges to state alienage measures, even if similar measures would be upheld if passed by Congress.

Increasingly, however, the preemption and equal protection challenges to state-anti-alienage measures are also being squeezed out for three principal reasons. First, to avoid equal protection constitutional challenges, states have looked to the federal government to sanction discrimination against noncitizens when their own legislation is constitutionally barred, as was the case with Proposition 187. Second, even in the absence of affirming federal legislation, courts have largely insulated state alienage measures from significant equal protection and preemption challenges. States have successfully redefined the class of protected “persons” under the Fourteenth Amendment to exclude the undocumented and even non-immigrants from equal protection. While this strategy failed in *Plyler*, the reasoning in that case suggested that a different result could be possible if the class discriminated against did not involve children and/or a quasi-fundamental right.¹²¹ Third, the same year that the Court ruled in *Diaz*, states also successfully limited federal preemption in *DeCanas v. Bica*, particularly as applied to the undocumented, by arguing that not all state legislation that involves noncitizens is related to immigration policy.¹²² There, the U.S. Supreme Court upheld the constitutionality of a California statute that penalized employers for hiring undocumented workers, reasoning that the protection of California’s vital state interests—e.g., strengthening the economy—need not give way to federal preemption to regulate noncitizens in the absence of paramount federal legislation.¹²³ Deciphering what *DeCanas* meant by “paramount federal legislation” has been difficult, but the phrase has generally permitted states to discriminate freely against the undocumented. As a result, states are largely free from any judicial restraint to discriminate against the undocumented, unless the discrimination targets undocumented children, implicates a fundamental right, or contradicts federal legislation.

Consider, for example, state denial of welfare benefits to non U.S. citizens after PRWORA’s enactment. For twenty-five years, *Graham* barred states from denying noncitizens welfare benefits that it made available to citizens, although states applied *Graham* restrictions solely to laws affecting lawful permanent residents, not to undocumented or non-immigrant residents.¹²⁴ After PRWORA, however, it became

¹²¹ *Plyler v. Doe*, 457 U.S. 202, 219 (1982) (“The children who are plaintiffs in these cases are special members of this [undocumented immigrants] underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.”)

¹²² *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). (“But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”)

¹²³ *Id.* at 355-58. Under *DeCanas*, paramount federal immigration legislation exists when (1) “the nature of the subject matter permits no other conclusion”; (2) “Congress has unmistakably so ordained that result”; or (3) state legislation “stands as an obstacle to the accomplishment an execution of the full purposes and objectives of Congress in enacting the INA.” *Id.* at 56-65.

¹²⁴ See, e.g., *Sudomir v. McMahon*, 767 F.2d 1456, 1459-1462 (9th Cir. 1985) and *Khasminskaya v. Lum*, 54 Cal.Rtr.2d 915 (1st District, Div. 5 1996) (holding that state law conditioning general assistance on permanent lawful residence and denying it to asylum applicant did not violate equal protection). *But cf.*

nearly impossible to win a preemption or equal protection challenge to any state provision denying welfare benefits to noncitizens, as long as states employed PRWORA standards to deny either federal or state public benefits.¹²⁵ PRWORA also appears to have ousted state power in the field of regulation of public benefits to immigrants. Preemption issues thus may trump even state pro-immigrant legislation seeking to restore through exclusively state-funded programs benefits stripped to immigrants under PRWORA. Some courts are interpreting PRWORA to be such a comprehensive regulatory scheme that it restricts immigrant eligibility for all public benefits, however funded. States, therefore, have no power to legislate in the area, even if to restore or grant benefits to immigrants through exclusively state-funded programs, unless expressly authorized by Congress to do so.¹²⁶ Indeed, courts have upheld state legislation post-PRWORA to restore benefits to a select group of legal immigrants but solely when such legislation is pursuant to permissive federal authority.¹²⁷

In contrast, PRWORA's provision that state legislatures must expressly legislate to confer benefits to the undocumented has been held to proscribe the authority of subdivisions of states to confer benefits on the undocumented in the absence of state legislation.¹²⁸ Moreover, when states have legislated to restore state benefits to noncitizens, PRWORA has "shielded" states from *Graham* constitutional challenges when states later decide to remove those benefits. This is what happened when in 2003, citing an enormous budget shortfall, Colorado targeted for savings the optional Medicaid program, under which 3,500 PRWORA ineligible legal immigrants had received life-sustaining medical coverage.¹²⁹ The Tenth Circuit upheld Colorado's move, choosing to interpret the *Graham* restriction that "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause," as solely to require that "Congress provide a clear expression of Congressional intent to permit states to

Darces v. Woods, 679 P.2d 458 (CA 1984) holding that denial of AFDC benefits to undocumented family members violated state constitution's equal protection clause).

¹²⁵ See, e.g., CID v. South Dakota Department of Social Services, 598 N.W.2d 887, 892 (1999) (upholding state's termination of Medicaid, food stamps, and Temporary Assistance for Needy Families PRA-ineligible welfare benefits); Alvarino v. Wing, 684 N.Y.S.2d 845 (Sup. Ct. 1998) (upholding denial of state funded food assistance to PRA-ineligible lawful permanent residents).

¹²⁶ See League of United Latin American Citizens, 997 F. Supp. 1255 ("Congress' intention to displace state power in the area of regulation of public benefits to immigrants is manifest in the careful designation of the limited instances in which states have the right to determine alien eligibility for state or local public benefits.")

¹²⁷ Teytelman v. Wing, 773 N.Y.S.2d 801, 804 (2003) (discussing New York's adoption of its own Food Assistance Program to assist certain groups of legal immigrants who lost benefits as a result of the welfare reform law pursuant to Congress authorization to states as part of the 1997 revision to the welfare reform); Doe & Another, 773 N.E.2d 404, 407 (Mass. 2002) (discussing Massachusetts adoption of new supplemental transitional aid to families with dependent children program funded solely with state funds to mitigate the loss of benefits under the PRA).

¹²⁸ See Office of the Attorney General of Texas, Opinion No. JC-0394 (July 10, 2001) (finding that the PRA prohibits Harris County Hospital District from providing discounted health care to persons residing in Harris County without regard to their immigration legal status).

¹²⁹ Soskin v. Reinertson, 353 F.3d 1242, 1244-6 (10th Cir. 2004). Coverage included chemotherapy, nursing home care, home health care, surgical care, and life-sustaining prescription drug coverage. *Id.* at 1246.

discriminate against aliens before it would tackle the constitutional issues.”¹³⁰ In other words, the Tenth Circuit reframed the question to ask not “whether Congress can authorize [an equal protection] constitutional violation...[but] what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens.”¹³¹ The Tenth Circuit then read PRWORA as expressly granting to states the discretion to assess whether they could bear the burden of providing optional coverage. When a state decides against optional coverage, the Tenth Circuit reasoned, it was simply addressing “congressional concern (not just parochial state concern) that ‘individual aliens not burden the public benefits system.’”¹³² “This may be bad policy, but it is Congressional policy, and we, [the Tenth Circuit held], review it only to determine whether it is rational.”¹³³

Similarly, states like Massachusetts have adopted selective restrictions (i.e. residency or naturalization requirements) once struck down as suspect under *Graham*’s equal protection analysis,¹³⁴ applying a rational basis standard to the legislation instead. To do so, courts have reasoned that certain distinctions in congressionally authorized state legislation that gives citizens an advantage over noncitizens but restores benefits to some is not invidious when the classification is not suspect—i.e., residency requirements—and the legislation is benign.¹³⁵

Subsequently, on November 30, 2004, the Friendly House and other plaintiffs filed a complaint with a federal district court in Arizona to enjoin the implementation of Proposition 200.¹³⁶ Plaintiffs argued that Proposition 200 regulates immigration and the treatment of immigrants within Arizona, and is therefore preempted by federal law.¹³⁷ Plaintiffs also argued that because Proposition 200 did not define “state and local public benefits,” it could be interpreted to apply to a wide range of public benefits, including public education, marriage licenses, and the right to counsel in violation of equal protection, substantive due process, and other rights under the Sixth Amendment.¹³⁸

¹³⁰ *Id.* at 1254.

¹³¹ *Id.*

¹³² *Id.* at 1255.

¹³³ *Id.*

¹³⁴ In *Graham*, the Court rejected attempts to condition welfare benefits on an applicant’s possession of citizenship, or, if the beneficiary was not a citizen, on having resided in the country for a specified number of years. *Graham v. Richardson*, at 371-2.

¹³⁵ *Doe v. Comm. Of Transitional Assistance*, 773 N.E.2d 204 (Sup. Jud. Ct. of Mass., Suffolk 2002); *Doe & Another*, 773 N.E.2d 404, 409-13 (Mass. 2002) (upholding six-month state residency requirement for supplemental transitional aid to families with dependent children); *Doe v. McIntire*, 2001 WL 95457 at 5-11 (Mass.Super. 2001) (upholding six-month state residency requirement for cash assistance benefits). Not all courts, however, have followed this logic. New York state courts, for example, have found the differentiations between different types of noncitizens that are unique to alienage, such as requirements of U.S. residence of intent to become citizens, is a discrimination which is directed at and harms only noncitizens. *Aliessa v. Novello*, 96 N.Y.2d 418, 428-33 (2001); *Teytelman*, 773 N.Y.2d at 808.

¹³⁶ *Friendly House et al. v. Napolitano*, Complaint for Injunctive and Declaratory Relief (on file with author).

¹³⁷ *Id.* at ¶. 43.

¹³⁸ *Id.* at ¶¶ 62, 65 and 69. In addition, plaintiffs argued that Proposition 200 violated the procedural due process of the state employees required to verify and report immigration status for its failure prescribe the notice procedures governing the implementation of the measure, as well as the voting rights of citizens by

Initially, the U. S. District Court for Arizona granted a temporary injunction. In December 2004, however, the court lifted the injunction against the enforcement of Proposition 200 finding that the initiative as interpreted by the Arizona Attorney General¹³⁹ was not preempted by federal law and did not violate substantive due process because it complied with PRWORA and federal immigration standards.¹⁴⁰ The court noted that when enacting PRWORA, Congress “clearly intended that States and local governments would insure that illegal aliens not receive public benefits.”¹⁴¹ Plaintiffs appealed the district court ruling to the Ninth Circuit, and on August 9, 2005, the Ninth Circuit dismissed the appeal for want of jurisdiction.¹⁴² More specifically, the Ninth Circuit held that “[p]laintiffs have not met their burden of demonstrating an injury-in-fact,” and consequently remanded the case to the district court without prejudice.¹⁴³

Of course, states still cannot expand the ineligibility of immigrants for welfare beyond PRWORA,¹⁴⁴ or adopt immigration eligibility standards that differ from those established in PRWORA.¹⁴⁵ Another potential restriction relates to the verification and reporting requirements of these measures, although courts disagree as to whether PRWORA devolves this power to states. When reconsidering Proposition 187 in light of PRWORA, the U.S. Central District of California affirmed that the measure’s immigration verification and reporting provisions regulated immigration by creating a comprehensive scheme to detect and report the presence and effect the removal of the undocumented.¹⁴⁶ The court declined to hold that PRWORA’s provisions permitting

prescribing registration requirements not authorized by federal law. *Id.* at ¶¶ 71-103. As these arguments are not directly related to the rights of noncitizens in the area of alienage law, their analysis is beyond the scope of this paper.

¹³⁹ In November of 2004, Arizona Attorney General Terry Goddard issued an opinion answering the question of what was meant by “state and public benefits” for the purposes of Proposition 200 because the phrase was not defined in the ballot. 104 Op. Ariz. Att’y Gen. 010 (2004). Goddard concluded that to avoid a vagueness and preemption challenge to Proposition 200, the term “state and local benefits” should be interpreted to include only programs in Title 46 of the Arizona Revised Statutes in order to avoid conflict with the Federal Welfare Reform Act. *Id.* at 10-12. Title 46 includes program of different State agencies that are administered at the state and local level. *See, e.g.*, A.R.S. §§46-136 (work projects for the unemployed, general assistance, food stamps) (state); -139 (housing assistance in child protective service cases) (state); -193 (respite care for the elderly) (state); -292 to -300.6 (Temporary Assistance for Needy Families and related programs) (state), -241 – to -241.05 (short-term crisis assistance (local). *Id.* at 4, n. 8.

¹⁴⁰ *Friendly House, et al., v. Napolitano*, CV-04-649, Dec. 22, 2004 (D. AZ), *available at* [http://www.azd.uscourts.gov/azd/CourtInfo.nsf/A4E7B5ACC5F9790007256F5C0082E936/\\$file/Order+re+TRO.pdf?openement](http://www.azd.uscourts.gov/azd/CourtInfo.nsf/A4E7B5ACC5F9790007256F5C0082E936/$file/Order+re+TRO.pdf?openement).

¹⁴¹ *Id.* at 12.

¹⁴² *Friendly House v. Napolitano*, 419 F.3d 390, 392 (9th Cir. 2005).

¹⁴³ *Id.* at 932-33.

¹⁴⁴ For example, the PRA preserved the *Plyler* holding and states cannot regulate to deny access to elementary public schools to children. *League of United Latin American Citizens et al.*, 997 F. Supp. 1255 (striking down Section 7 of Proposition 187, which sought to deny public elementary and secondary education to undocumented children because the PRA preserved *Plyler* under 8 U.S.C. § 1643).

¹⁴⁵ *Id.* at 1258 (striking down Section 8 of Proposition 187 denying public postsecondary education because the measure used its own immigration ineligibility criteria other than the “qualified alien” criteria employed by the PRA). *See also* *Kurti v. Maricopa County*, 33 P.3rd 499 (AZ Div. 1, Dept. E 2001) (striking down Arizona statute that denied non-emergency health care services to qualified immigrants under federal guidelines).

¹⁴⁶ *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244, 1252.

cooperation between local and immigration agencies could be interpreted to authorize the Proposition's requirement that state officials, teachers, health care providers and other unknown individuals verify and report illegal immigration status.¹⁴⁷ Yet, more recently, the U.S. District Court of Arizona upheld the constitutionality of Proposition 200's parallel verification and reporting requirements, based solely on PRWORA's conferral of some enforcement authority on states, which the court construed as evidencing Congress' intent to improve the detection and detention of immigrants present in the United States in violation of the law.¹⁴⁸

If the post-PWORA litigation is any indication of the future direction of constitutional challenges to state anti-alienage measures, immigrant advocates must grapple with an increasingly limited number of viable legal strategies to challenge anti-alienage measures in the courts. The federal preemption doctrine can still sometimes work. However, its effectiveness hinges on the political climate at the federal level being more favorable to immigrants than it has been at the state level. As such, the doctrine is too wrapped up in the ebbs and flows of politics, which hardly favor immigrants who generally become the scapegoat for economic and national security concerns. Thus, for example, right before Congress passed legislation regarding driver's licenses, some civil rights litigants considered challenging New York's denial of driver's licenses to noncitizens based on preemption.¹⁴⁹ With the passage of IRPTA and the REAL ID Act, however, such a challenge would most likely fail because federal legislation now establishes broad federal authorization for the state restrictions. Indeed, in this climate, a preemption challenge would even undermine the few state attempts to pass legislation that favors the conferral of driver's licenses to all persons, regardless of immigration status.¹⁵⁰

It may be that capitalizing on the political divergence between the federal and state governments in their treatment of immigrants can still be a strategy when favorable political conditions are likely to persist at the federal level to counter states' anti-immigrant sentiment. For example, if passed, the proposed Development, Relief, and Education for Alien Minors (DREAM) Act of 2003,¹⁵¹ which favors greater access for the undocumented to higher education, would become a powerful tool for pro-immigrant plaintiffs to resort to preemption to challenge state anti-alienage measures that conflict with federal policy. Similarly, civil rights groups challenged and successfully enjoined the Hazleton housing restriction by citing to provisions of the Immigration and

¹⁴⁷ *Id.* at 1252, n.9.

¹⁴⁸ Friendly House et al., CV-04-546, at 11-14.

¹⁴⁹ Nina Bernstein, *Immigrant Group to Sue State Over License Crackdown*, THE N.Y. TIMES (Aug. [date] 2005) (discussing plans by the Puerto Rican Legal Defense and Education Fund to file a class-action lawsuit challenging New York's policy of requiring SSN for the issuance of driver's licenses because it usurps federal responsibility).

¹⁵⁰ Some scholars have challenged state laws that are pro-immigrant based on a federal preemption argument. See, e.g., Paul L. Frantz, *Undocumented Workers: State Issuance of Driver Licenses Would Create a Constitutional Conundrum*, 18 GEORGETOWN IMM. L. J. 505 (arguing that California's attempt to grant driver licenses to the undocumented is an unconstitutional attempt to regulate and control immigration).

¹⁵¹ S. 1545, 108th Cong. (2003); H.R. 1684, 108th Cong. (2003).

Nationality Act that prohibit the hiring or the “aiding or abetting” of the undocumented.¹⁵² Yet, the converse could also true. In the absence of the DREAM Act, anti-immigrant groups like the Federation for American Immigration Reform (FAIR) have been employing preemption to challenge state laws benefiting access to higher education for the undocumented on the basis that these are counter to current federal immigration policy.¹⁵³ Some state courts, indeed, have begun to strike down state laws that award in-state tuition to non-immigrants and the undocumented who are ineligible for U.S. residency as preempted under IIRIRA and the PRWORA.¹⁵⁴ It may seem that the more recent efforts to deny housing or to pass English only restrictions might ultimately die down at the local level; and yet, given the current federal climate, they may just end up also in federal legislation.

Perhaps more importantly, in the long run at least, the federal preemption strategy is not free from the adverse effects of anti-alienage laws. First, an argument for federal preemption acquiesces to the *Diaz* rationale and uncritically expands Congress’s plenary power doctrine beyond immigration control into areas affecting foreign nationals’ living conditions within the border. Why should, for example, access to higher education be related to Congress’ power over immigration? And why should Congress’ power in this area be plenary? Not only should the *Diaz* rationale be distinguished but its entire holding questioned in favor of constitutional doctrine that protects foreign nationals against discrimination as persons, regardless of whether that discrimination is created by states or by the federal government.

The second reason federal preemption challenges to anti-alienage measures have adverse consequences is that by focusing solely on structural issues, preemption challenges finesse the substantive considerations that are vital to challenging the United States’ limited conception of rights. The trend in the United States is to deny persons’ rights to self-determination through access to social, economic and cultural rights (i.e., positive rights).¹⁵⁵ However difficult it is to win positive rights arguments, these must be raised boldly, persistently, and creatively. Any evolution in the expansion of rights in the United States will undoubtedly be slow, but it is certain not to happen at all if such

¹⁵²Lozano et al. v. City of Hazleton, Temporary Restraining Order, No. 3:06cv1586, *available at* <http://www.pamd.uscourts.gov/opinions/Munley/06v1586-prot.pdf>. See also Pedro Lozano et al. v. City of Hazleton, Complaint, Civ. Action No. 3:06cv1586, *available at* http://www.aclu.org/images/asset_upload_file582_26463.pdf.

¹⁵³ The latest preemption challenge involved Kansas state law, K.S.A. 76-731a, which conferred in-state tuition benefits to all individuals who attended an accredited Kansas high school for three years, regardless of citizenship status. Under this law, undocumented students who met the high school attendance requirement would qualify for in-state tuition. The challenge was brought by out-of-state students and their parents who were ineligible for in-state tuition under the law. On July 5, 2005, a U.S. District Court for the District of Kansas dismissed the lawsuit based on plaintiff’s lack of standing. *Kristen Day v. Sebelius, et. al.*, Case No. 4-4085-RDR, Memorandum and Order (July 5, 2005) (on file with author).

¹⁵⁴ See, e.g., *Regents of the Univ. of California v. Bradford*, 225 Cal.App.3d 972, 978-80 (striking down the university’s interpretation of state statute residency requirements to favor the undocumented who were not proscribed by federal immigration law from establishing residency because such an interpretation would be inconsistent with federal immigration law) and Off. Op. Att’y Gen. No. I86-091, 1986 WL 81307 (Ariz. A.G.).

¹⁵⁵ See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 U.C.L.A. L. REV. 857 (2001).

arguments are never raised. In this regard, resorting to sound empirical data and other less likely sources of law, including state constitutions and comparative or international law, could be useful in raising the judiciary's consciousness about the pernicious effects of limiting individual rights.

Third, preemption challenges also fail to address the important considerations regarding the substance on which social membership and rights should rest. To date, membership in the United States has rested on citizenship rather than on the scope and nature of the relationship that persons maintain as members of society. Yet, the reality is that the United States has a significant number of foreign nationals living within its borders who work, study, have families, own property, pay taxes, and otherwise make significant contributions to this society. It is time for the United States to conceptualize "civil rights" to comport with modern realities to account for the large presence of people of color, especially Latinos/as, in this country who are not citizens.

Immigrant rights advocates are well aware of the drawbacks of preemption challenges without similar efforts to overturn *Diaz*. Still, these groups continue to employ preemption for very pragmatic reasons. The strategic ease with which anti-immigrant groups have resorted to introducing anti-immigrant propositions and local ordinances has resulted in the proliferation of these measures all over the country, resulting in a drain of civil rights resources. During a talk at Lat Crit, Hector Villagra, Director of ACLU in Orange County, who has litigated against local anti-alienage ordinances in California, explained that it is simply more feasible to defeat, at least politically, anti-immigrant efforts at a national level because pro-immigrant groups can join forces to influence Congress.¹⁵⁶ Further, Congress' legislative process permits greater public input and deliberation into the legislative process, than do local governments. These reasons are very compelling. But as long as Congress continues the trend to regulate the "living conditions" of the alien, the federal political process alone cannot be trusted to protect the rights of immigrants. The time is ripe to reconsider the constitutional limits on the federal and state governments to regulate the immigrant.

B. Recommended Legal Strategies

To pave the way toward meaningful constitutional protection for noncitizens in the United States, it is imperative that *Diaz* be reconsidered. Courts have yet to offer an adequate doctrinal basis for constitutional exceptionalism in the area of federal alienage discrimination. In *Diaz*, the Court resolved the ultimate question of the extent of federal power over the noncitizen as if the answer were too obvious to warrant serious discussion. Rather, the court applied a lenient version of the rational-basis test, tying, without much explanation, the denial of welfare benefits of lawful noncitizens to Congress' plenary powers over immigration.¹⁵⁷ However, Congress' powers over immigration law regarding the admission, removal and naturalization of noncitizens, is distinct from "alienage" law or the regulation of noncitizens' conditions of residence,

¹⁵⁶ See Lat Crit IX Conference Program, available at <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/documents/LCXIProgramFinal.pdf>.

¹⁵⁷ *Diaz*, 426 U.S. at 79-80.

such as access to education, welfare benefits, and employment.¹⁵⁸ The Court, however, appears to erase this distinction when it upholds the only rationale offered for the program: “those who qualify under the test Congress has chosen [i.e. lawful permanent residents with five year’s residence in the United States] may reasonably be presumed to have a greater affinity with the United States than those who do not.”¹⁵⁹

The starting point for challenging *Diaz* is to narrow the field of when it is legitimate for Congress to discriminate against the “alien.” Some scholars, like Michael Walzer, distinguish between a nation’s legitimate authority to restrict admission at the border and the regulation of the “alien” once here.¹⁶⁰ According to Walzer, once immigrants reside within a political community and labor here, they must be treated as members of that community, or, if not full members, then they must be on a swift track to citizenship or membership.¹⁶¹ Yet, Walzer’s position presupposes that the sovereign—the state—consented to the admission in the first place. That is, Walzer is primarily concerned with those “aliens” who are within a nation’s territory as lawful permanent or temporary residents.

Immediately, the limitation of Walzer’s approach is that most anti-alienage measures are directed at the undocumented who either crossed the border illegally or violated the terms of their admission. Yet, conventional ideas of morality simply cannot capture the complex and ambiguous character of the relationship between the undocumented and U.S. society and laws. The mass influx of undocumented immigrants cannot be blamed solely on the immigrant, particularly when labor recruitment and incentives by U.S. employers, combined with immigration policy that caters or acquiesces to these pull factors, are significant contributors.¹⁶² It is irreconcilable, therefore, for the United States government and public to “legitimize” *de facto* the presence of the undocumented by employing them, selling them products and services, and taxing them, while at the same time “delegitimize” them as a matter of law.

Moreover, the illegality of immigrants is not solely a matter of individual choice but also a legal and social construction as reflected in immigration policy that has been intimately tied to race.¹⁶³ In the past, for example, Congress legislated directly to exclude Asians from U.S. immigration or citizenship.¹⁶⁴ Today, the same exclusion of other

¹⁵⁸ See Evangeline G. Abriel, *Rethinking Preemption for Purposes of Alien and Public Benefits*, 42 UCLA L. REV. 1597, 1625-27 (1995); Gerald R. Neuman, *The Lost Century of Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1897 (1993); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 328 (1977).

¹⁵⁹ 426 U.S. at 83.

¹⁶⁰ Michael Walzer, *The Distribution of Membership*, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1-36 (1981).

¹⁶¹ *Id.* at 23-26.

¹⁶² See BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 118-33 and 155-83 (2004)(discussing, *inter alia*, the Bracero program, the 1996 amnesty and accompanying under-enforced employer sanctions) and Nestor Rodriguez, “Workers Wanted”: *Employer Recruitment of Immigrant Labor*, 31 WORK AND OCCUPATIONS 453 (2004).

¹⁶³ See, e.g., VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 162-66 (2005) and HING, *supra* note 161, at 1-8.

¹⁶⁴ HING, *supra* note 161, at 28-61.

groups from the United States is less direct but the consequences no less dire. Immigration law's numerical restrictions and the elite nature of work visa categories, for example, severely restrain Mexican legal immigration, despite the historical interdependence between Mexican workers and U.S. employers.¹⁶⁵ The majority of Mexican workers in the U.S. are ineligible for visas, even temporary ones, while most Mexican nationals eligible for family-based immigration must wait years to legalize.¹⁶⁶ Ultimately, to view the "alien's" illegality as solely a matter of individual choice is to ignore the private and public structures that promote and perpetuate that status.

Challenging anti-alienage measures, then, requires at the outset a reconceptualizing of sovereign consent to admission that takes into account a nation's *de facto* acquiescence of the undocumented through such measures as his residence and his level of engaged participation in this community. Already, the immigration laws create certain substantive immigration rights on the basis of stakes, primarily for purpose of family unification.¹⁶⁷ The proposal here, however, is to expand "stakes" to account for "aliens'" contributions to U.S. society, including, for example, through their labor. States ought minimally to regulate employers to require basic labor and worker rights protections to all workers irrespective of immigration status by virtue of the status as workers. The case is simpler when the employer knowingly hires the undocumented worker and exploits him to violate U.S. labor and worker laws because the employer's "dirty hands" clearly outweighs any wrongdoing on the part of the worker. But even when the worker has "deceived" the employer by producing "fake" documents to work, this fact does not obliterate the employer's obligation to the worker for his labor. If the worker is injured on the job and his injuries render him disabled, that worker should receive all benefits that would have been available to a U.S. citizen worker similarly situated. It is the "alien's" condition as worker with his employer and not his immigration status that should govern the regulation the government imposes on the consequences born from that relationship.

Another limitation to Walzer's position that all "aliens" once here should enjoy all rights available to citizens is that, in fact, the rightful parameters of the rights that should attach to citizenship are deeply uncertain and highly contested in American law.¹⁶⁸ Another challenge to *Diaz*, then, should focus on defining these parameters by distinguishing between what is considered a denial of a fundamental right or a privilege. In 1977, Professor Gerald M. Rosberg made the following observation about *Diaz*:

¹⁶⁵ *Id.* at 97-111.

¹⁶⁶ Today, Mexican nationals who qualify under family-based immigration, except for immediate relatives (spouses or minor unmarried children of U.S. citizens) must wait between seven and 22 years before their visas become available. Adult or married children of U.S. Citizens, for example, have a wait period of 22 years. Visa Bulletin for July 2005, available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2539.html. In addition, the 3/10 year bar for unlawful stay in the United States severely infringes on family unification. See Emma O. Guzman, *The Dynamics of The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting of American Families*, 2 SCHOLAR 95 (2000).

¹⁶⁷ See e.g., Victor C. Romero, *The Child Citizenship Act and the Family Reunification Act: Valuing the Citizen Child as Well as the Citizen Parent*, 55 FLA. L. REV. 489 (2003).

¹⁶⁸ LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 52 (2006).

It might be that restrained review is appropriate in *Diaz* because of the relative unimportance of the right or opportunity denied to aliens by virtue of the statutory classification. The government provides insurance coverage against medical expenses for those who elect to participate. It is not designed to guarantee medical care for those who cannot otherwise afford it. This case does not involve, in other words, anything that could reasonably be called a “right to medical services.”¹⁶⁹

Shifting the Discourse of Privileges to Rights

Minimally, *Diaz*, should narrowly apply only when the discrimination pertains to a privilege, and should be disallowed when it affects a fundamental right. This position is consistent with a couple of important fundamental rights cases decided by the U.S. Supreme Court over more than two centuries which established that there are limits to the exercise of federal governmental power in regulating the immigrant inside the border.¹⁷⁰ In *Wong Wing*, for example, the Court held that Congress could not criminally punish “aliens” for violating immigration laws without guaranteeing due process.¹⁷¹ Then, in *Plyler*, the Court struck down a Texas law that barred undocumented children access to K-12 public schools, declaring this to be a quasi-fundamental right.¹⁷²

One limitation to the fundamental rights distinction is that it may do little to advance the rights of “aliens” because most anti-alienage measures are said to deny privileges, not fundamental rights. Almost three decades later, the characterization of the welfare benefits in *Diaz* represents the limited conception of rights in the United States, that excludes social, economic, and cultural rights. The employment of more progressive sources of law, in some cases state constitutions or international or comparative law, however, could advance the acceptance of positive or new rights in the United States.

Consider, for example, the resort to state constitutional law and practices to reconceptualize welfare benefits as rights, not privileges. Despite PRWORA’s devolution, over half of the states are spending their own money to cover at least some of the immigrants who are ineligible for federally funded programs, although these programs offer fewer benefits. Strong public policy reasons, particularly related to the adverse consequences of denying basic health care to immigrants (e.g., increase in communicable diseases; decreased prenatal and preventive health care; complications from untreated chronic diseases) have pushed states to utilize state funds to provide essential health services removed by PRWORA.¹⁷³ More importantly, a few states have even recognized a state constitutional right to certain welfare benefits.

¹⁶⁹ Rosberg, *supra* note 157, at 282.

¹⁷⁰ See BOSNIAK, *supra* note 167, at 53-56.

¹⁷¹ *Wong Wing v. United States*, 163 U.S. 228 (1886).

¹⁷² 457 U.S. 202 (1982).

¹⁷³ Julia Field Costich, *Legislating a Public Health Nightmare: The Anti-Immigrant Provisions of the “Contract with America” Congress*, 90 KY. L. J. 1043, 1044.

Under the U.S. Constitution, welfare benefits are a “matter of statutory entitlement for persons qualified to receive them,” which creates a procedural due process but not a substantive constitutional right for qualified recipients.¹⁷⁴ Past attempts to classify public benefits under the U.S. Constitution or to link them to fundamental or quasi-fundamental rights have failed.¹⁷⁵ A few state courts, however, have interpreted their state constitutions to create a greater right to welfare benefits than the U.S. Constitution, a move that could be used to trump federal legislation regulating welfare benefits to immigrants. For example, Section 1 of Article XVII of the New York State Constitution provides that “[T]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner or by such means, as the legislature may from time to time determine.”¹⁷⁶

New York state courts have held that this provision imposes upon the state an affirmative duty to aid the needy: “As this provision demonstrates, care for the needy is not a matter of ‘legislative grace’, it is a constitutional mandate.”¹⁷⁷ The courts, however, have left to the discretion of the Legislature the extent of such aid and the manner in which it is provided.¹⁷⁸ The requirement does prohibit state legislatures from refusing to aid those legal residents whom it has already classified as needy for reasons unrelated to their need.¹⁷⁹ In a few cases, New York courts have refused to allow federal immigration policy to trump state statutes seeking to implement the constitutional affirmative duty to provide for the needy.¹⁸⁰

¹⁷⁴ *Atkins v. Parker*, 472 U.S. 115, 128. In other words, courts have considered that any property rights to public benefits are defined by the statutes or customs that create the benefits. When the statute authorizing the benefits is amended or repealed, the property right disappears. *Id.* at 129. *See also* *Austin v. City of Bisbee*, 855 F.2d 1429, 1436 (9th Cir. 1988).

¹⁷⁵ One such attempt has been, for example, to expand the scope of *Plyler* to challenge the Omnibus Budget Reconciliation Act of 1981 (OBRA)’s social security number requirement from households before a child could qualify for school meal programs. *Alcaraz v. Block*, 746 F.2d at 604. There, plaintiff’s argument was that denying the school meal program to undocumented children implicated such a “weighty” interest that the stricter *Plyler* scrutiny should apply to the program. The Ninth Circuit rejected this rationale, in great part, because unlike in *Plyler*, here, Congress had specifically authorized the SSN requirement. *Id.* at 605. Similarly, the Second Circuit rejected an attempt to argue for a heightened level of scrutiny by pregnant undocumented mothers being denied prenatal care under the rationale that such denial represented also harm to their children. *Lewis v. Thompson*, 252 F.3d at 582. The Second Circuit rejected the argument that the mothers could make their own right weightier through the harm to their children. *Id.* at 585-86.

¹⁷⁶ The Constitution of the State of New York as Revised, with Amendments Adopted by the Constitutional Convention of 1938 and Approved by vote of the People of November 8, 1938, as Amended and In Force January 1, 2002.

¹⁷⁷ *Aliessa*, 96 N.Y.2d at 428.

¹⁷⁸ *Teytelman*, 773 N.Y.S.2d at 809 and *Mark G. v. Sabol*, 677 N.Y.2d 292 (1st Dept. 1998). But cf. *CID v. South Dakota Department of Social Services*, 598 N.W. 2d 887, 890 (declining to hold that Article VI, § 14 of the South Dakota Constitution does not confer a property right to state benefits).

¹⁷⁹ *Teytelman*, 773 N.Y.S.2d at 809; *Bernstein v. Toia*, 373 N.E.2d 238 (1977).

¹⁸⁰ *See, e.g., Minimo, et al., v. Perales*, 565 N.Y.S.2d 626 (1990) (rejecting application of Omnibus Budget Reconciliation act of 1981, which required that an immigration sponsor’s income be counted for purposes of determining benefit eligibility of the immigrant for state welfare legislation). *See also* *Aliessa*, 96 N.Y. 2d at 429 (holding that the 5 year residency requirement to otherwise eligible immigrants for State

Another approach is to challenge the characterization of a law's effect as involving a privilege not a fundamental right. For example, rhetorically, the driver's license debate as a national security issue has been framed primarily as a denial of a privilege to immigrants, which has muted any significant debate on civil rights implications.¹⁸¹ However, the denial of driver's licenses has significant civil rights implications for immigrants and U.S. citizens and must be reconsidered in light of these pernicious effects.¹⁸² The challenge rests in reframing the debate to overcome two tendencies: the undervaluing of the personhood of foreign nationals and the undervaluing of rights generally in the context of war.

The consequences of driver's license denials to the foreign nationals affected are dire. The denial is not simply of a "privilege" to drive. The denial of a driver's license exacerbates the underclass status of thousands of immigrants living in the United States because the inability to drive is not a mere inconvenience; it may, in fact, be necessary to earn a living. Furthermore, denial of a driver's license amounts to a denial of identity. The original purpose of the driver's license may have been (and perhaps should remain) to certify the safety of drivers on the road. However, in the absence of a national identification system in the United States, driver's licenses have become *de facto* the primary form of identification U.S. residents must use to conduct most essential activities of daily living, whether with private or public entities.

Driver's licenses are widely accepted and sometimes required to obtain services from federal and state agencies, open a bank account, request credit, rent an apartment or buy a home, for example. Moreover, the lack of driver's licenses deeply affects the nature of immigrants' interactions with law enforcement by increasing the racial profiling of Latinos/as during traffic stops (i.e., for immigration enforcement), which, in turn, decreases the trust that local police departments have worked to build for more effective community policing through promises that police will not engage in immigration enforcement.¹⁸³

The real effect of driver's license denials is to "delegitimize" foreign nationals by rendering them invisible, and, ultimately, robbing them of their personhood. Governments can insist that a person within its jurisdiction make use of her legal identity in all official acts: e.g., birth, marriage, inheritance, legal contracts, wills, taxes, and court filings. Correspondingly, the greater the sphere occupied by the state and state-like institutions, the more frequent the instances in which an official name becomes the only appropriate identity.¹⁸⁴ The hegemony of state institutions such as schools, Social Security, hospitals, military service, property registration, taxpaying, and transportation,

Medicaid coverage violated article XVII, § 1 of the state constitution because the requirement had nothing to do with need and deprived immigrants of otherwise basic necessity benefits).

¹⁸¹ "Alien" status to rationalize policies that would be unacceptable if framed in terms of the civil rights of citizens. KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL 4-12 (2004).

¹⁸² Kevin Johnson, *Driver's Licenses and Undocumented Immigration: The Future of Civil Rights Law*, 5 NEV. L. J. 213, 215 (2004).

¹⁸³ *Id.* at 224-26.

¹⁸⁴ *Id.* at 41.

ensure the dominance of state-identification practices.¹⁸⁵ Finally, although not compelled, the private sector, including banks, lessors, vendors, and employers can insist on proof of official identity—increasingly driver’s licenses—to conduct business. When so much of everyday life depends on state-issued identification systems, individuals who are denied access to an official identity lose the fundamental right to personal identity.

A right to an identity thereby should encompass a public sphere, where the state has a duty to protect and confer the individual’s legal or official identity. It is essentially this right that every comprehensive international human rights instrument on civil and political rights conceptualizes. These instruments codify the right of every person to recognition as a person before the law, including the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States.¹⁸⁶ Similarly, the specialized International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families prescribes that “[e]very immigrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.”¹⁸⁷ It may be that the conferring of other types of identification, like a matricula consular, by foreign governments to their own citizens residing in the United States will remedy some of these problems.¹⁸⁸ However, this trend should not erase the United States’ obligation to confer an identity on persons within its territory.

The challenge to framing the consequences of driver’s license denials as a fundamental right to a name, however, is that the undocumented, by virtue of their immigration status in the U.S., do not have a right to be present in the U.S., and technically, therefore, should not have access to the jobs or services that possessing a driver’s license could facilitate. This issue returns us to the conception of membership, not on the basis of status, but on the human reality of thousands who live in the United States, sometimes all their lives, without status, and the complex circumstances that perpetuate their non-immigration status. The reality of undocumented immigrants’ humanity and their steady integration into U.S. communities especially should challenge traditional conceptions of membership. As Schuck observes: “New ‘social contracts between these aliens and Native American society are being negotiated each day, and

¹⁸⁵ *Id.*

¹⁸⁶ Article 6 of the Universal Declaration on Human Rights, G.A. res. 217A(III), U.N. Doc. A1810 at 71 (1948) (“Everyone has the right to recognition everywhere as persons before the law”); Article 16 of the ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (same); Article 2 of the American Convention on Human Rights, O.A.S.T.S. No. 36 (same); and Article 5 of the African (Banjul) Charter on Human and People’s Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, does not contain a parallel provision; however, the European Court on Human Rights has interpreted Article 8 of the same, which protects a right to privacy, to encompass a right to a name. Case C-168/91, Konstantinidis v. Stadt Altensteig-Standesamt, 1993 E.C.R. I-1191.

¹⁸⁷ Article 24 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A at 262, U.N. Doc. A/45/49 (1990) [hereinafter Migrant Workers Convention].

¹⁸⁸ Johnson, *supra* note 181, at 228-31 (discussing the increasing popularity of the matricular consular card).

these cannot be nullified with invocations of sovereignty, as classically understood.”¹⁸⁹ Once the undocumented enter an American community, they quickly establish significant relationships with individuals and institutions where they live; some live the rest of their lives in the United States, immigration law notwithstanding.¹⁹⁰ To their immediate communities, these individuals are neither strangers nor outcasts but vital elements in their neighborhoods.

Moreover, the argument that driver’s licenses would legitimize the status of the undocumented in this country is simply a fallacy. In the past, Congress conferred legal status upon the undocumented, despite substantial opposition from persons who view amnesty as rewarding illegality.¹⁹¹ They did so out of recognition of the equity of labor contributions by the undocumented and stakes from long-term residence in the United States and a wish to eliminate the underclass. Granting undocumented noncitizens driver’s licenses would not, however, confer upon them a right to stay in the United States. Instead, it simply recognizes a reality: the undocumented are persons who are present in the United States. They have names, they breathe, they eat, they feel, they toil, they laugh, and they cry. They exist!

Alienage as Race-Based Discrimination

In addition, *Diaz*’s challenge should rest on the need to return to a strict scrutiny standard in any alienage discrimination case, based solely on the “relative invidiousness of the particular differentiation.”¹⁹² For the noncitizen, the stigmatization and burden born from discrimination has been no less when the source has been the federal government, rather than the states. Yet, the *Diaz* court applied a rather lenient version of the rational-basis test where a few years earlier it had subjected comparable state legislation to strict scrutiny in *Graham*.¹⁹³

So why should the Court apply strict scrutiny to federal alienage classifications today? One compelling reason is that the “alien” construction functions as a proxy for race or nationality. In the early state anti-alienage cases like *Yick Wo v. Hopkins*,¹⁹⁴ and *Truax v. Raich*,¹⁹⁵ for example, the Court spoke of discrimination based on “race or nationality,” as if the two were essentially interchangeable. Despite the seemingly race neutral regulation in those cases, the Court simply recognized their racial animus.¹⁹⁶

¹⁸⁹ Scott, et. al., *supra* note 184, at 44.

¹⁹⁰ *Id.* at 43.

¹⁹¹ HING, note 161, at 156-62.

¹⁹² Rosberg, *supra* note 157, at 287.

¹⁹³ *Graham v. Richardson*, 403 U.S. 365. One unsatisfactory explanation for the different standard is the Court’s inartful framing of the discrimination as a distinction based on different types of “aliens” rather than between citizens and “aliens.” 426 U.S. at 82 (“Since it is obvious that Congress has not constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden” of demonstrating that line is invalid).

¹⁹⁴ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁹⁵ *Truax v. Raich*, 239 U.S. 33, 41 (1915).

¹⁹⁶ In *Yick Wo*, the Court struck down a city ordinance under which all Chinese who owned laundromats had been denied permits by the board of supervisors. 118 U.S. 356. In *Truax*, the Court struck down an

More recently, it has been well documented that anti-alienage measures serve as a proxy for raced-based discrimination. For example, Kevin Johnson has traced the racial animus that motivated the passage of Proposition 187¹⁹⁷ and the driver's license debate in California.¹⁹⁸ This context should not be ignored by the Courts when considering challenges to the PRWORA or the Real ID Act. The law must ensure that states do not circumvent constitutional guarantees by using immigration status to mask race based discrimination.

More recently, the Proposition 200 campaign in Arizona, backed by anti-immigration groups, also has been motivated by racial animus. Not only was Proposition 200 a campaign based on unfounded allegations of fraud against the undocumented, it took place in the context of a rising anti-immigrant movement by groups like FAIR and the Minuteman Project.¹⁹⁹ These groups disassociate themselves from racist groups;²⁰⁰ however, their activities and language are openly hostile to immigrants. The Welcome in the Minuteman Project's website, for example, describes illegal immigration as an invasion that will destroy American culture:

The Minuteman Project is not a call to arms, but a call to voices seeking a peaceful and respectable resolve to the chaotic neglect by members of our local, state, and federal governments charged with applying U.S. immigration law.

It is a call to bring national awareness to decades-long careless disregard of effective U.S. immigration law enforcement. It is a reminder to Americans that our nation was founded as a nation governed by the "rule of law," not by the whims of mobs of ILLEGAL aliens who endlessly stream across U.S. borders.

Accordingly, the men and women volunteering for this mission are those who are willing to sacrifice their time, and the comforts of a cozy home, to muster for something much more than acquiring more "toys" to play with

Arizona statute requiring any employer of at least five persons to have no less than 80% citizen employees. 239 U.S. 33, 41.

¹⁹⁷ JOHNSON, *supra* note 180.

¹⁹⁸ Johnson, *supra* note 180 at 232-35.

¹⁹⁹ The Minuteman Project began in April 2005 as an initiative by a group of private U.S. citizens from southern Arizona, Chris Simcox and Jim Gilchrist, to monitor the country's border and capture persons trying to cross the border illegally to hand them over to federal authorities. On April 2, 1005, Project volunteers began to patrol the U.S. border between Naco and Douglas in Cochise County, a span of twenty-three miles along the Arizona-Sonora border. See <http://www.minutemanhq.com/Project> and Wikipedia, the Minuteman Project, *available at* http://en.wikipedia.org/wik/Munuteman_Project. [be careful citing Wikipedia]

²⁰⁰ The Minuteman Project's website, for example, reads: "MPP has no affiliation with, nor will accept any assistance by or interference from separatists, racist or supremacy groups or individuals, not matter what the race, color, or creed." See <http://www.minutemanhq.com/Project>. Yet, it is reported that coinciding with the April 2005 operation, fliers from a white supremacist group called National Alliance were distributed in Douglas, Nogales, and Bisbee. See http://en.wikipedia.org/wik/Munuteman_Project.

while their nation is devoured and plundered by the menace of tens of millions of invading illegal aliens.

Future generations will inherit a tangle of rancorous, unassimilated, squabbling cultures with no common bond to hold them together, and a certain guarantee of death of this nation as a harmonious “melting pot.”

The result: political, economic, and social mayhem.

Historians will write about how a lax America let its unique and coveted form of government and society sink into a quagmire of mutual acrimony among the various sub-nations that will comprise the new self destructive America.²⁰¹

Moreover, while the Minuteman Project instructs its volunteers to remain “peaceful,” civil rights groups fear their activities will lead to false imprisonment and other types of abuses.²⁰²

Even if racial animus is not explicit in the adoption of anti-alienage measures, courts should still consider applying a stricter standard of review because of their disparate impact on communities of color. Although not exclusively, anti-alienage measures principally target the undocumented who are overwhelmingly comprised of Mexicans, Central Americans, and other people of color.²⁰³

IV. SALT Conclusions and Recommendations

1. SALT opposes the U.S. immigration policy of barring millions of undocumented persons who reside and work in the United States from legalization. Congress should create an immigration legal system that is responsive to the ongoing long-term presence of undocumented noncitizens in the United States and U.S. dependence on their labor. Otherwise, this significant population will remain vulnerable and subject to exploitation and exclusion from law’s protection. SALT is heartened that Congress is contemplating the adoption of comprehensive immigration reform and urges Congress to include family unification, labor

²⁰¹ <http://www.minutemanhp.com/project/AboutMMP.html>. Similarly, FAIR sometimes employs terms that dehumanize immigrants. In its report on the alleged cost of illegal immigration to the state of Arizona, FAIR uses the phrase “immigrant stock,” where stock is a term used to refer to animals kept or raised on a farm. FAIR Report, *supra* note 65.

²⁰² The ACLU, in fact, monitored the group’s activities during the month of April and documented at least one case of unlawful imprisonment. *See*

<http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=17965&c=22>.

²⁰³ According to the Pew Hispanic Research Center, Mexicans make up by far the largest group of undocumented migrants at 5.9 million or 57 percent (of an estimated 10.3 million) in the March 2004 estimates. In addition, another 2.5 million undocumented migrants or about 24 percent of the total are from other Latin American countries. About 9 percent are from Asia, 6 percent from Europe and Canada, and 4 percent from the rest of the world. Jeffrey S. Passel, *Estimates of the Size and Characteristics of the Undocumented Population 2* (March 21, 2005), available at <http://pewhispanic.org/files/reports/44.pdf>.

protections, and paths to legalization as fundamental components of any legal reform.

2. SALT opposes legislation and practices that discriminate on the basis of alienage and deny basic rights to noncitizens residing in the United States, including
 - a. Judicial approval of U.S. employers who deny basic worker rights and benefits to undocumented workers they employ, which is particularly egregious when workers are injured on the job. A worker's lack of legal immigration status should have no bearing on whether they are entitled to law's protection. Further, the exclusion of undocumented workers from work and labor laws undermines these same protections for U.S. citizens and legal immigrants, particularly when immigration enforcement is strategically used to undermine labor organizing. SALT urges judges not to read immigration restrictions to conflict with laws that protect the fundamental rights of workers.
 - b. Restrictions on noncitizen access to health services and other public benefits necessary for survival, including housing and food. SALT urges the United States to expand the constitutional substantive right to life and liberty to include a society's guarantee of those basic needs that are necessary for survival for all persons who are unable to provide for themselves. More specifically, SALT urges Congress to repeal PRWORA and urges Congress and/or state legislatures to adopt legislation that guarantees access to basic food, housing, and health to all persons residing in the United States, irrespective of immigration status.
 - c. Restrictions on undocumented students access to institutions of higher education. The exclusion of youth, many of whom have grown up in the United States, from college only perpetuates an underclass of persons who are striving to better themselves through education. SALT urges Congress to repeal the IRIRRA provisions that compel states to charge out-of-state tuition to noncitizens. SALT further urges Congress to include in the comprehensive immigration reform paths to legalization for college students who are undocumented.
 - d. Driver's license restrictions to undocumented noncitizens and temporary legal residents. Denying driver's licenses to noncitizens is inconsistent with national security goals given that law enforcement agencies rely heavily on driver's license databases agencies when investigating potential crime. Further, it denies persons residing in the United States an identity, which is necessary to conduct even the most ordinary tasks, such as opening a bank account or renting an apartment. Some argue that this is precisely the desired result since undocumented noncitizens have no right to be in the United States. Immigration enforcement should not be conducted, however, based on the denial of basic liberties and rights of

persons living among us. The federal government always has the power to remove persons who are not lawfully present in the United States. But persons should not be forced out of this country by making them suffer. SALT, therefore, urges Congress and state legislatures to repeal the laws that prevent noncitizens from obtaining driver's licenses.

- e. English only language laws which solely symbolize ill-will toward immigrants and all Latinas/os while failing to address constructively the labor, economic, citizenship, human rights, and other issues our country must confront in crafting comprehensive immigration reform laws. In addition, these language laws fail to provide the means for immigrants to actually acquire English proficiency. SALT urges Congress and state legislatures to repeal all laws that restrict the use of other languages in the United States.
 - f. Housing and other commercial restrictions that deny business and noncitizens the freedom to contract. The logic behind these laws is to force undocumented noncitizens out of the United States by rendering them homeless or shutting down their opportunities to enter into contracts or conduct business in the United States. Immigration enforcement should not be conducted, however, based on the denial of basic liberties and rights of persons living among us. The federal government always has the power to remove persons who do not have the right to be present in the United States. But persons should not be forced out of this country by making them suffer, nor should businesses be made to bear the cost of failed immigration enforcement. SALT, therefore, urges states to repeal all propositions that restrict noncitizens' business transactions, including their ability to procure housing.
3. SALT opposes the expansion of *Diaz* and its rationale beyond immigration control and into the regulation of the "living conditions" of noncitizens in the United States. Courts should question broad assertions that all laws that regulate noncitizens implicate foreign affairs or immigration control. With these broad assertions, the federal government and states have passed laws or approved propositions that deny basic rights to noncitizens residing among us. Yet, it is the role of the judiciary to safeguard the constitution and to uphold the Bill of Rights and other fundamental rights recognized under our domestic laws and international obligations. SALT, therefore, urges courts to reverse the holding in *Diaz* and not allow the federal government to have unfettered discretion to discriminate against noncitizens.