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A LEGISLATIVE HOME FOR IMMIGRATION POWER

Audrey Cillo*

Introduction

The immigration problem¹ transcends time,² state borders, and even national borders.³ The problem magnetizes a spectrum of advocates, from rights-based thinkers calling for freedom of movement as an international human right⁴ to nativists demanding "America First."⁵ And as with any charged political topic, there is a power struggle over who controls immigration: the states? the federal government? Congress? the President? The United States Constitution, the Supreme Court of the United States, and scholars disagree as to who wields immigration power, paralyzing us in a state of immigration limbo. This is the real "problem."

As a mechanism for determining proper immigration control, this Note focuses on the relationship between housing and immigration. This is a timely juxtaposition; some states facilitate social integration between citizens and immigrants by claiming

^{*} Audrey Cillo is the 2018–19 Executive Editor of the *University of Pittsburgh Law Review*. She would like to give thanks to her family and Law Review colleagues for making this note possible, and for the guidance of adjunct professor Lawrence Lebowitz.

¹ This Note recognizes that the phrase "the immigration problem" often carries racially and ethnically insensitive undertones. But for the present purposes and for the sake of brevity, its use in this note is offered only as a catch phrase for describing the ongoing political debate around immigration regulation.

² See Keith Aoki & John Shuford, Welcome to Amerizona—Immigrants Out!, 38 FORDHAM URB. L.J. 1, 36–37 (2010) (discussing James Madison's call for strong immigration federalism in THE FEDERALIST No. 10).

³ Anup Shah, *Immigration*, GLOBAL ISSUES, http://www.globalissues.org/article/537/immigration (last updated May 26, 2008).

⁴ See, e.g., Jane McAdam, An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty, 12 Melbourne J. Int'l L. 1 (2011).

⁵ Lily Rothman, *The Long History Behind Donald Trump's 'America First' Foreign Policy*, TIME (Mar. 28, 2016), http://time.com/4273812/america-first-donald-trump-history/.

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sanctuary city status and passing inclusive policies promising opportunity and bodily safety at the local level,⁶ but more often, states implement exclusionist Anti-Immigration Housing Ordinances ("AIHOs") hoping to scare away immigrants.⁷ This Note takes the position that AIHOs are constitutionally problematic, likely violate the Fair Housing Act ("FHA") and the current federal immigration statute, and are ineffective at addressing the immigration problem.

Part I will map the competing sources of federal immigration power and delineate the current federal model and its failures. Part II then describes the state responses to such failures, focusing on exclusionist AIHOs and examining three case studies. Part III pivots to the judicial, constitutional, and statutory problems with state AIHOs and examines these consequences within the context of Part II's case studies. Finally, Part IV suggests that Congress, not the states or the President, should control immigration and proposes that Congress should add immigration status as a protected class under the FHA.

I. SOURCES OF FEDERAL IMMIGRATION POWER AND THE POST 9/11 STRUCTURAL SCHEME

A. Constitutional Sources of Federal Immigration Power

The Framers' structural scheme for the Constitution spread power horizontally between the three branches of federal government and left whatever powers remained to trickle down to the state governments. This structure, they thought, would be the best defense against tyranny. But the limits of such powers are often difficult to identify within the Constitution, and the rise of the administrative state further complicates the boundaries.

⁶ Amanda Sakuma, *No Safe Place*, MSNBC, http://www.msnbc.com/specials/migrant-crisis/sanctuary-cities (last visited Oct. 14, 2018); Bianca Figueroa-Santana, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219, 2219–20 (2015).

⁷ See discussion infra Part II.

⁸ David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 91 (2013).

⁹ *Id*.

¹⁰ See generally Jonathon Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1 story.html?utm term=.775d60fbd195.

Particularly within the context of immigration regulation, the careful dance of separation of powers is one that no one seems to know the exact choreography to. Constitutionally proscribed foreign relations powers are delicately strung between the three branches of government, 11 and Part III will suggest that those strings should lead back to Congress. But as a preliminary matter, neither the Constitution nor the Supreme Court assign immigration power. 12

1. The Growing Power of the President and Executive Agencies

Article II grants the President the power to receive ambassadors,¹³ but his power to enter treaties and appoint ambassadors is contingent upon the advice and consent of the Senate.¹⁴ Article II also crowns the President as commander-in-chief,¹⁵ but broad Congressional war powers nearly render the title a legal fiction.¹⁶

Most famously, Article II gives the President executive power,¹⁷ which has been interpreted to include "general administrative control over those executing the [federal] laws"¹⁸ in the form of executive directives, or orders. Executive orders are legally binding on executive agencies.¹⁹ Accordingly, the rise of the administrative state is a presidential phenomenon stretching Presidential power to include "Administrator-in-Chief," as coined by professor of law Ming H. Chen.²⁰ More broadly, these quasi-legislative orders of the President disturb the traditional notion of Congress as lawmaker, and are thus extremely powerful.

¹¹ See discussion infra Part I (A)(1)–(3).

¹² See discussion infra Part I (A)(1)–(2).

¹³ U.S. CONST. art. II, § 3, cl. 4.

¹⁴ *Id.* art. II, § 2, cl. 2.

¹⁵ Id. art. II, § 2, cl. 1.

¹⁶ See discussion infra Part I (A)(1)–(2).

 $^{^{17}}$ U.S. Const. art. II, \S 1, cl. 1.

¹⁸ Myers v. United States, 272 U.S. 52, 163-64 (1926).

¹⁹ See 44 U.S.C. § 1505 (2018).

²⁰ Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 360–61 (2017).

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Executive order power is, nevertheless not omnipotent, and Congress can pass a law to override an executive order, subject to the President's veto power. Still, the President exercises soft power by means of general agency oversight, which is largely unreviewable as it relies "on the 'power to persuade' [agencies] . . . rather than legal control over intra-agency discretion, interagency decisions, and state policies."

2. The Legislature and Delegation

Article I, Section 8 gives Congress the powers to provide for the common defense, to regulate foreign commerce, to establish a uniform rule of naturalization, to regulate the value of foreign coin, to define and punish piracies and felonies committed on the high seas and against the law of nations, to declare war, and to raise and support armies and a navy.²³ Article I, Section 9, adds the power to prohibit the migration and importation of persons, and to make all laws necessary to carrying out these powers.²⁴

For most of the nineteenth century, Congress and the states enjoyed concurrent regulation of immigration.²⁵ It was not until the turn of the twentieth century that Congress established itself as the supreme regulatory force in the field.²⁶ Accordingly, the beginning of the twentieth century shifted immigration strategy from treaty powers to the legislative process.²⁷

The Immigration and Nationality Act ("INA"), the current federal statutory code concerning immigration, ²⁸ determines who is eligible for what category of visa

²¹ See generally NCC Staff, Executive Orders 101: What Are They and How Do Presidents Use Them?, NAT'L CONST. CTR. (Jan. 23, 2017), https://constitutioncenter.org/blog/executive-orders-101-what-are-they-and-how-do-presidents-use-them/.

²² Chen, *supra* note 20, at 363–64.

²³ U.S. CONST. art. I. § 8.

²⁴ Id. art. I, §§ 8-9.

²⁵ See, e.g., Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837) (endorsing joint exercise of state and federal power over immigration); see also Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power over Immigration, 86 N.C. L. REV. 1557, 1570 (2008) (discussing the 1882 Congressional establishment of the Immigration Fund Act, which included states in immigration regulation).

²⁶ Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 483–84 (2009).

²⁷ *Id*.

²⁸ 8 U.S.C. §§ 1101–1178.

and for how long.²⁹ However, pinning down the enforcement of the INA is a more nuanced task due to the complexities of the Department of Homeland Security³⁰ and because Congress delegates a great deal of power.³¹ Much of this delegation goes to executive agencies, boosting Presidential power.³² Additionally, the INA specifically punts power to the President:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.³³

And the statute includes cryptic delegation (or lack thereof) to the states:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who . . . is an alien illegally present in the United States... but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General.34

While Congress ostensibly holds most immigration power as author of the INA, its broad delegation neutralizes its dominance. Still, Congress has made many additions to the body of immigration law, which take the form of amendments to the INA but are codified separately and with varying delegation.³⁵

²⁹ *Id*.

³⁰ See infra Part I (B).

³¹ See U.S. CONST. art. I, § 1.

³² See supra Part I (A)(1).

^{33 8} U.S.C. § 1182(f) (2018).

³⁴ Id. § 1252(c).

³⁵ See Marshall Coover, Put Me in the Game, Coach: Texas Should Accept the Invitations from Congress, the Federal Judiciary, and the U.S. Department of Justice for States to Join the Immigration Law

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3. The Judiciary and Immigration Exceptionalism via the Plenary Power Doctrine

Lastly, Article III gives the Judiciary original jurisdiction in cases involving ambassadors or consuls,³⁶ as well as the authority to hear all cases arising under the laws and treaties of the United States, including those that involve foreign nations.³⁷ But the Court gives immigration cases exceptional treatment.³⁸ Under the plenary power doctrine, this section demonstrates how the Court strays well outside the bounds of constitutional norms when it deals with immigration matters.

At the nation's start, the political branches of the federal government barely touched immigration, but the Court recognized its power to do so nonetheless.³⁹ In a foreshadowing of the century to come, in 1812, Justice Marshall opined that, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."⁴⁰

But in the eyes of the young Congress, immigration was an asset, not a problem; thousands of Chinese laborers were employed to build railroads for Westward expansion. But once the final bolts were placed, and as World War I drew closer, Congress began legislating immigration policy with the Chinese Exclusion Acts of 1882. Growing from Justice Marshall's theme, the plenary power doctrine was unleashed from the inevitable litigation that followed in *The Chinese Exclusion Cases*. As

Enforcement Team, 39 TEX. TECH L. REV. 315, 324 (2007) (discussing, for example, the Immigration Reform and Control Act of 1986 and the Enhanced Border Security and Visa Entry Reform Act of 2002).

 $^{^{36}}$ U.S. Const. art. III, \S 2, cl. 2.

³⁷ *Id.* art. III, § 2, cl. 1.

³⁸ See generally David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. REV. 583 (2017).

³⁹ See Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

⁴⁰ Id. at 136.

 $^{^{41}}$ See generally Alexander Saxton, The Indispensable Enemy: Labor and the Anti-Chinese Movement in California (1971).

⁴² See Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882).

⁴³ See Chae Chan Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

In *Chae Chan Ping v. United States*, for example, the Court upheld the Exclusion Acts on the grounds that the political branches of the federal government had complete, *i.e.* plenary, authority to exclude immigrants on any basis, including race and nationality.⁴⁴ Thus, to the Court, the excludability of immigrants represented a non-justiciable political question.⁴⁵ The Court also relied upon treaty agreements with China, and argued that China could file a complaint with the "political department" of the United States as a possible remedy.⁴⁶ But in all of this discussion of political questions, political branches, and the political department, the Court did not define to which political branch it was referring: Congress or the President.⁴⁷ Nevertheless, these cases are best understood as a starting point for the federal government's supremacy over immigration. The Court separated state interests from immigration and said, "[f]or local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."⁴⁸

The Court's rationales in *The Chinese Exclusion Cases* were not just extraconstitutional based on the plenary power doctrine, but were also structurally based on separation of powers⁴⁹ and pragmatically grounded in national security interests.⁵⁰ Emphasizing this exceptional treatment in *Fong Yue Ting v. United States*, the Court found that Chinese laborers were presumptively deportable not because of the Constitution, but because of the inherent powers attached to a

⁴⁴ See Chae Chan Ping, 130 U.S. 581 at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.").

⁴⁵ *Id.* at 609 ("Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.").

⁴⁶ *Id*.

⁴⁷ Cox & Rodríguez, *supra* note 26, at 467 (discussing *Chae Chan Ping*, "[t]he conception of the United States government that emerges from this case thus has a decidedly unitary cast: the legislative and executive branches form a single political department . . . ").

⁴⁸ Chae Chan Ping, 130 U.S. at 606.

⁴⁹ See, e.g., Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.").

⁵⁰ *Id*.

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sovereign nation.⁵¹ The overall result was a jurisprudence based on unparalleled deference to the vague political branches, where lack of constitutional protections were irrelevant because of the "regulatory regime that, in the Court's own words, 'would be unacceptable if applied to citizens.'"⁵²

Of course, the Court has over time extended some rights to noncitizens,⁵³ but the plenary power doctrine endures.⁵⁴ For example, the Court continues to treat constitutional challenges of federal regulations differently than it reviews constitutional challenges of state and local regulations.⁵⁵ In the 1971 *Graham v. Richardson* decision, for example, the Court declared alienage a suspect class for the first time and applied strict scrutiny to reject *state laws* that denied public assistance to some legal resident noncitizens.⁵⁶ But just five years later in *Mathews v. Diaz*, the Court invoked the plenary power doctrine and upheld *federal* alienage distinctions for receiving certain Medicare benefits.⁵⁷ Most recently, the U.S. Supreme Court upheld President Trump's controversial travel ban case in an exceptional but, as discussed *infra*, unsurprising decision.⁵⁸ Overall, under an equal protection analysis, federal immigration laws receive rational basis review, but state immigration laws generally trigger strict scrutiny.⁵⁹

B. Post 9/11 Re-branding of the Immigration Problem and the Current Federal Model

The terrorist attacks of September 11, 2001 changed U.S. immigration law forever. A causation discussion of the attacks is for another day, but for present purposes, this Note acknowledges that many believe lax enforcement of immigration

⁵¹ Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893).

⁵² Rubenstein & Gulasekaram, supra note 38, at 596 (quoting Mathews, 426 U.S. at 80).

⁵³ See, e.g., Plyler v. Doe, 457 U.S. 202 (1982); Graham v. Richardson, 403 U.S. 365 (1971); Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

⁵⁴ See generally Michael Kagan, Plenary Power Is Dead! Long Live Plenary Power!, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015).

⁵⁵ See, e.g., Graham, 403 U.S. 365.

⁵⁶ *Id.* at 365.

⁵⁷ Mathews, 426 U.S. 67.

⁵⁸ Trump v. Hawaii, 138 S. Ct. 2392 (2018).

⁵⁹ Stumpf, supra note 25, at 1606.

laws were to blame. 60 And maybe they were, at least in part; all of the hijackers entered the United States legally with tourist and student visas. 61 Regardless, the attacks brought immigration to the center stage and made people who otherwise did not think about immigration care deeply about its regulation. The result was the rebranding of the immigration problem as a national security problem. 62

Notably, Congress responded by completely reorganizing homeland defense⁶³ in what turned out to be the biggest federal government reorganization since World War II.⁶⁴ The Immigration and Naturalization Service ("INS"), which included twenty-two separate agencies, was eliminated and swallowed up by the massive Department of Homeland Security ("DHS").⁶⁵

The change did not go smoothly.⁶⁶ The agencies absorbed answered to Congress, not the President, but lacked clear guidance of their specific missions and their relationship to the DHS.⁶⁷ A current example is the lack of guidance for border agents on family separation and the resulting inaccurate records rendering reunification impossible.⁶⁸ The net effect is waste of agency expertise and

⁶⁰ See, e.g., Rajah v. Mukasey, 544 F.3d 427, 438–39 (2d Cir. 2008) (holding the post-9/11 National Security Entry-Exit Registration System ("NSEERS") program did not violate due process because of the strong national security interests at stake).

⁶¹ Identity and Immigration Status of 9/11 Terrorists, FED'N FOR AM. IMMIGR. REFORM (Jan. 2011), https://fairus.org/issue/national-security/identity-and-immigration-status-911-terrorists.

⁶² See generally David A. Harris, *Immigration and National Security: The Illusion of Safety Through Local Law Enforcement Action*, 28 ARIZ. J. INT'L & COMP. L. 383 (2011) (discussing how advocates for stricter immigration enforcement shifted the theme of their position from economics and labor to national security in the post-9/11 climate).

⁶³ See Charles Perrow, The Disaster after 9/11: The Department of Homeland Security and the Intelligence Reorganization, HOMELAND SECURITY AFFAIRS (Apr. 2006), https://www.hsaj.org/articles/174.

⁶⁴ Jennifer Mitchell & Jason Pate, The Department of Homeland Security: Goals and Challenges, NTI (Apr. 1, 2003), http://www.nti.org/analysis/articles/homeland-security-goals-challenges/.

⁶⁵ *Id*.

⁶⁶ See generally Perrow, supra note 63.

⁶⁷ Id

⁶⁸ Bill Chappell & Jessica Taylor, *Defiant Homeland Security Secretary Defends Family Separations*, NPR (June 18, 2018, 7:55 PM), https://www.npr.org/2018/06/18/620972542/we-do-not-have-a-policy-of-separating-families-dhs-secretary-nielsen-says (arguing that there is no family separation policy, but rather a zero-tolerance policy meaning that "DHS is no longer ignoring the law"); *see also* Tal Kopan & Laura Jarrett, *Health and Human Services Now Says Further Guidance is Needed on Family Reunification*, CNN (June 20, 2018, 10:24 PM), https://www.cnn.com/politics/live-news/immigration-border-children-separation/h 1e7c348285de54f305f971ff283e2a1f.

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widespread institutional failure.⁶⁹ Frustrated, states are seeking to regulate immigration for themselves.

II. STATES RESPOND WITH ANTI-IMMIGRATION HOUSING ORDINANCES

In light of the persistence of "the immigration problem" and federal inadequacies, many state and local governments turned to do-it-yourself fixes with broad state police powers as the tool. Police powers are recognized as part of individual state sovereignty and exist "concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." The scope of these sovereignty-based police powers is limited to protecting public health, public morals, and public safety. 71

Whether immigration regulation is a proper use of state police power is disputed, but the role of the states in immigration regulation has judicial origins; notwithstanding the Court's immigration exceptionalism, it has hinted that that the states may participate in immigration policy-making, and police powers are an ostensibly easy way to do so.⁷² For example, in *Plyer v. Doe*, the Court explained that "despite the exclusive federal control of this Nation's borders, we cannot conclude that the states are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns."⁷³ Likewise, the Court's *De Canas* decision gave the states some room to adjust immigration when it noted "the fact that aliens are the subject of a state statute does not render it a regulation of immigration"⁷⁴ Notably, however, *De Canas* involved employment regulations; housing is the new target.⁷⁵

Housing ordinances are particularly desirable for a number of reasons. First, housing has traditionally been within the reach of state control and is at least

⁷⁴ De Canas v. Bica, 424 U.S. 351, 355 (1976).

⁶⁹ Chappell & Taylor, supra note 68.

⁷⁰ Tafflin v. Levitt, 493 U.S. 455, 458 (1990).

⁷¹ Chi., Burlington, & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906).

⁷² See, e.g., Plyer v. Doe, 457 U.S. 202 (1982).

⁷³ Id. at 228 n.23.

⁷⁵ See generally Fair Immigration Reform Movement, Database of Recent Local Ordinances on Immigration, www.ailadownloads.org/advo/FIRM-LocalLegislationDatabase.doc.

conceivably related to public health, public morals, and public safety.⁷⁶ Although the circuits are split on this issue,⁷⁷ immigration-housing regulation may qualify as a valid use of police power, whereas general immigration policy will not. Second, the availability of housing in the United States is a pull factor drawing in documented and undocumented immigrants alike.⁷⁸ Supporters of restrictive housing regulations reason that making life in the United States as difficult as possible will force stateside undocumented immigrants out and will deter those on the other side of the borders.⁷⁹

Part III discusses the constitutional and preemptive legal challenges associated with AIHOs, but understanding how AIHOs operate is a prerequisite. AIHOs in Pennsylvania, Nebraska, and Texas are demonstrative.

A. Hazleton, Pennsylvania: The Illegal Immigration Relief Act Ordinance and the Rental Registration Ordinance

Post 9/11, the City of Hazleton felt the impact of immigrants migrating out of New York and New Jersey. 80 Between 2000 and 2009, the population of Hazleton, Pennsylvania, increased by 10,000 people. 81 This growth was largely due to a flood of Latino families with diverse statuses including citizens, lawful permanent residents, and undocumented persons. 82 Nevertheless, the Mayor of Hazleton broadly declared that undocumented persons were to blame for certain social problems associated with the population increase in Hazleton, although the actual number of undocumented persons in Hazleton is unknown. 83

The Mayor and the Hazleton City Council acknowledged that the federal government had the power to address the immigration problem but complained that

⁷⁶ See Daniel Eduardo Guzmán, "There Be No Shelter Here": Anti-Immigrant Housing Ordinances and Comprehensive Reform, 20 CORNELL J.L. & PUB. POL'Y 399, 404 (2010).

⁷⁷ See infra Part III.

⁷⁸ Huyen Pham, The Private Enforcement of Immigration Laws, 96 GEO. L.J. 777, 791 (2008).

⁷⁹ *Id.* (quoting Avon Park, Florida, Mayor Tom Macklin who urged, "If we address the housing issue—make it as difficult as possible for illegals to find safe haven in Avon Park—then they are going got have to find someplace else to go.").

⁸⁰ Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

⁸¹ Lozano v. City of Hazleton, 620 F.3d 170, 176 (3d Cir. 2010).

⁸² Id

⁸³ Lozano, 496 F. Supp. 2d at 484.

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it was failing to do so.⁸⁴ Accordingly, Hazleton officials took independent action and enacted a series of ordinances targeting immigrants.⁸⁵

The two contested ordinances were the Illegal Immigration Relief Act Ordinance ("IIRAO") and the Rental Registration Ordinance ("RO"), which sought to regulate unauthorized immigrants in the employment and housing arenas, respectively, but work in conjunction with each other.⁸⁶

The IIRAO's stated findings and purpose read,

[t]hat unlawful employment, the harboring of illegal aliens in dwelling units in the City of Hazleton, and crime committed by illegal aliens harm the health, safety and welfare of authorized U.S. workers and legal residents in the City of Hazleton. Illegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributed to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life 87 [The IIRAO seeks to protect the right] to enjoy the public services provided by this city without being burdened by the cost of providing goods, support and services to aliens unlawfully present in the United States, and to be free of the debilitating effects on their economic and social well being imposed by the influx of illegal aliens to the fullest extent that these goals can be achieved consistent with the Constitution and Laws of the United States and the Commonwealth of Pennsylvania. 88

The RO builds off of the anti-harboring provision in the IIRAO and requires that any prospective occupant of rental housing over the age of eighteen apply for and receive an occupancy permit before approval.⁸⁹ The process of obtaining an occupancy permit includes paying a ten-dollar fee and submitting documents concerning identification with proof of legal status.⁹⁰ The RO puts the burden of enforcement on the landlords, and provides that a landlord who rents to someone

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84 Id. at 522 n.44.
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85 Id. at 484.

87 Lozano v. City of Hazleton, 620 F.3d 170, 177 (3d Cir. 2010) (quoting IIRAO § 2C).

⁸⁶ *Id*.

⁸⁸ Id. (quoting IIRAO § 2F).

⁸⁹ Id. at 180 (quoting RO).

⁹⁰ Id. (quoting RO § 7b).

without an occupancy permit must pay a one thousand dollar initial fine, with an additional fine of one hundred dollars "per day per unauthorized occupant until the violation is corrected." Additionally, any approved tenant with an occupancy permit who allows someone without an occupancy permit to live in the rental housing must pay the same fine as a landlord in violation. 92

B. Fremont. Nebraska: Ordinance No. 5165

Like Hazleton, the population in Fremont has tripled in recent years, with many Latino families migrating to the once quiet Nebraska town just outside of Omaha. ⁹³ After at least one failed attempt to pass a similarly restrictive measure, in 2010, voters in Fremont amended the City's municipal code to adopt Ordinance No. 5165 ("No. 5165"). ⁹⁴

No. 5165 makes it unlawful for any landlord or entity to rent to or permit occupancy to "an illegal alien," as defined by the U.S. code, 95 when the landlord knows "or [is] in reckless disregard[] of the fact that an alien has come to, entered, or remains in the United States in violation of law."96

Like Hazleton, No. 5165 requires prospective renters over the age of eighteen to obtain an occupancy license. 97 The process of obtaining the license is also similar and involves a five-dollar fee and disclosure of certain identifying information such as citizenship or immigration status. 98 But unlike Hazleton, No. 5165 provides that the city of Fremont must immediately issue an occupancy license upon receipt of a complete application. 99 This mandate likely derives from recognition that the City cannot conclude illegal status without verification from the federal government. 100

⁹⁸ Id.

99 Id.

⁹¹ Id. (referencing RO § 10b).

⁹² Id.

⁹³ Keller v. City of Fremont, 719 F.3d 931, 937 (8th Cir. 2013).

⁹⁴ Id

^{95 8} U.S.C. §§ 1101–1537 (2018).

⁹⁶ Keller, 719 F.3d at 938.

⁹⁷ Id.

¹⁰⁰ 8 U.S.C. § 1373(c) (2018).

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Instead, after the license is issued, the Fremont police seek verification of immigration status from the federal government. A renter who is subsequently found undocumented "shall be deemed to have breached the lease," and the Fremont police send the renter a deficiency notice triggering a sixty-day grace period for the renter to establish lawful presence. It is the renter fails to establish legal presence within the sixty-days, the Fremont police again seek verification from the federal government. Upon receipt of this second verification, the police send the renter and landlord a notice of revocation of the occupancy license, which is effective forty-five days after notice is received. After this forty-five day period, renters and landlords in violation are fined one hundred dollars per day.

C. Farmers Branch, Texas: Ordinance 2952

Due to its proximity to the Mexican border, Texas has always been an immigrant destination. Therefore, unlike in Hazleton and Fremont, the Texas city of Farmers Branch had different motivations for implementing harsh AIHOs.

In May of 2006, two undocumented immigrants shot and killed eighteen-month-old Eva Maria Gallegos during a drive by shooting in Farmer's Branch.¹⁰⁷ The murder of a child rightfully strikes outcry anywhere, but Farmers Branch Mayor Tim O'Hare turned his wrath to all immigrants rather than focusing on criminal justice for the two involved.¹⁰⁸ This type of broad generalization is not new,¹⁰⁹ but is especially dangerous from lawmakers.

¹⁰³ Id.

¹⁰⁴ *Id*.

¹⁰⁵ Id.

¹⁰⁶ *Id*.

¹⁰¹ Keller, 719 F.3d at 938.

¹⁰² Id.

¹⁰⁷ Elvia Limón, Farmers Branch still trying to move forward from shadow of controversial rental ordinance, DALLAS NEWS (Aug. 2016), https://www.dallasnews.com/news/farmers-branch/2016/08/26/farmers-branch-still-trying-move-forward-shadow-controversial-rentalordinance.

¹⁰⁸ *Id*.

¹⁰⁹ See Gina Martinez, 'She Wouldn't Want That.' Mollie Tibbetts' Family and Friends Push Back on the Politicization of Her Death, TIME (Aug. 23, 2018), http://time.com/5376596/mollie-tibbetts-family-friends-pushing-back-on-politicization/; Jeremy W. Peters, How Politics Took Over the Killing of Mollie Tibbetts, N.Y. TIMES (Aug. 23, 2018), https://www.nytimes.com/2018/08/23/us/politics/mollie-tibbetts-republicans-immigration-trump.html; see also 'Drug Dealers, Criminals, Rapists': What Trump Thinks

Two months following the murder, Mayor O'Hare proposed Ordinance 2952 ("2952"), which included housing licensing provisions and criminal sanctions. 110 Similar to the Hazleton ordinance and Fremont's No. 5165, Farmers Branch's 2952 required all individuals to obtain an occupancy license to rent an apartment or single-family residence. 111 Applicants who declare they are not citizens of the United States trigger a backup checking system where the Farmers Branch building inspector seeks verification "with the federal government whether the occupant is an alien lawfully present." 112 If the building inspector finds that the federal government has twice reported that the occupant is not lawfully present, then the building inspector must revoke the occupant's license with notice to the occupant and the landlord. 113

Moreover, the criminal sanctions of 2952 make it a crime for persons to occupy a rented apartment or single-family residence without an occupancy license, ¹¹⁴ or to make a false statement on the license application. ¹¹⁵ It likewise makes it a crime for a landlord to rent to anyone who fails to provide an occupancy license, ¹¹⁶ to allow an unlicensed occupant to continue renting, ¹¹⁷ to fail to keep copies of occupants' licenses, ¹¹⁸ or to fail to include a provision in the lease indicating that the lack of a valid occupancy license constitutes default. ¹¹⁹ Certain landlord violations lead to a suspension of the landlord's rental license until a sworn affidavit is submitted stating that the violation has ended. ¹²⁰ Further, 2952 criminalizes creating, possessing, selling, or distributing fraudulent licenses. ¹²¹

of Mexicans, BBC NEWS (Aug. 31, 2016), http://www.bbc.com/news/av/world-us-canada-37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans.

¹¹⁰ Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 526–27 (5th Cir. 2013).

¹¹¹ FARMERS BRANCH, TEX., ORDINANCE 2952, §§ 1(B)(1), 3(B)(1) (2008).

¹¹² Id. §§ 1(D)(1), 3(D)(1).

¹¹³ *Id.* §§ 1(D)(1)–(4), 3(D)(1)–(4).

¹¹⁴ *Id.* §§ 1(C)(1), 3(C)(1), 5.

¹¹⁵ *Id.* §§ 1(C)(2), 3(C)(2), 5.

¹¹⁶ *Id.* §§ 1(C)(4), 3(C)(4), 5.

¹¹⁷ Id. §§ 1(C)(7), 3(C)(7), 5.

¹¹⁸ *Id.* §§ 1(C)(5), 3(C)(5), 5.

¹¹⁹ *Id.* §§ 1(C)(6), 3(C)(6), 5.

¹²⁰ Id. §§ 1(D)(5)–(7), 3(D)(5)–(7).

¹²¹ Id. §§ 1(C)(3), 3(C)(3), 5.

III. AIHOS ARE LIKELY PREEMPTED BY FEDERAL LAW, FACE AN UPHILL BATTLE AGAINST CONSTITUTIONAL CONCERNS, FICTIONALIZE THE FAIR HOUSING ACT, AND FOSTER LANDLORD FHA AND INA VIOLATIONS

A. The Preemption Problem

Predicting conflicts between federal and sub-federal law, the framers of the Constitution penned the Supremacy Clause to ensure that federal law carried the day. Article IV provides that,

[t]his Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. 122

When courts void a state law due to a Supremacy Clause conflict, the state law is said to be preempted by a federal law regulating in the same area. This process of preemption occurs when Congress has legislated in the field the state law seeks to regulate, even if it is a field that the states have traditionally occupied. ¹²³ Courts carry the "assumption that the historic police powers of the States . . . [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ¹²⁴

To determine if preemption exists in the context of immigration policies, the sub-federal law is compared to the current federal immigration laws under the INA. 125 Upon preemption review, courts ask whether the state or local law is a "regulation of immigration" defined as "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 126 This is yet another way the Court boasts Congress' plenary power over

¹²² U.S. CONST. art. VI.

¹²³ Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

¹²⁴ *Id*.

¹²⁵ See supra Part I (A)(2).

¹²⁶ De Canas v. Bica, 424 U.S. 351, 355 (1976).

immigration.¹²⁷ But even if the Court determines that the state law is not a "regulation of immigration," it may still be preempted if Congress intended to occupy the field, known as field preemption, ¹²⁸ or if the state law is in conflict with a federal law to such a degree that it makes compliance with both laws impossible, known as conflict preemption. ¹²⁹

While this Note examines federal preemption as a vehicle to sorting out the tension between federal and sub-federal immigration power, it is important to note that just as a state law can be preempted by a federal law, a local law too can be preempted by a state law. state Constitutions likewise establish the supremacy of state law over inconsistent municipal ordinances, and because state property law historically governs landlord-tenant relations, municipal AIHOs frustrate also state power. ¹³⁰

Although the courts carry a presumption against preemption, the case studies out of Pennsylvania, Nebraska, and Texas illustrate that the Circuits are split as to whether AIHOs must fail under the analysis.

 The Third Circuit Found that Hazleton's RO and Housing Provisions in the IIRAO Were Preempted by Federal Law

The Third Circuit affirmed the decision of the District Court for the Middle District of Pennsylvania finding that Hazleton's RO and housing provisions in the IIRAO were preempted by federal law as an impermissible regulation of immigration because it "[d]ecid[ed] which aliens may live in the United States . . . [which] has always been the prerogative of the federal government."¹³¹ Specially, the RO was conflict preempted because it "attempt[ed] to . . . 'remove' persons . . . based on a

¹²⁸ See Murphy v. Nat'l Collegiate Athletic Ass'n, 200 L. Ed. 2d 854 (2018) ("Field preemption occurs when federal law occupies a field of regulation 'so comprehensively that it has left no room for supplementary state legislation."") (citation omitted).

¹²⁷ See supra Part I (A)(3).

¹²⁹ See id. (describing conflict preemption as occurring where a state law imposes a duty that is inconsistent with federal law)

¹³⁰ See Todd Donnelly Batson, No Vacancy: Why Immigrant Housing Ordinances Violate FHA and Section 1981, 74 Brook. L. Rev. 131, 136 (2008).

¹³¹ Lozano v. City of Hazleton, 620 F.3d 170, 220 (3d Cir. 2010).

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snapshot of their current immigration status, rather than . . . [by] federal order of removal... [which is] fundamentally inconsistent with the INA."132

Notably, the Third Circuit distinguished the ordinance's housing provisions from the employment regulations. They reasoned that state regulation of employment falls within state police powers, but because housing involves private contract for shelter, police powers were not applicable. 133

Rejecting Hazleton's argument that the ordinance was simply enforcing federal anti-harboring laws, the Third Circuit reasoned that the federal laws had never been interpreted so broadly as to regulate the landlord-tenant relationship. 134 It reasoned that it

define[s] "harboring" as conduct "tending to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence." Thus, we have held that 'harboring' requires some act of obstruction that reduces the likelihood the government will discover the alien's presence. It is highly unlikely that a landlord's renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy this definition of harboring. Renting an apartment in the normal course of business is not in and of itself conduct that prevents the government from detecting an alien's presence. 135

Similarly, while acknowledging that the RO did not expressly proscribe removal of undocumented immigrants, the Third Circuit noted that it cannot ignore the reality that the RO sought to condition presence on immigration status. 136 The Third Circuit also had the larger tension between federal and state control over immigration in mind when it rejected the Hazleton AIHO:¹³⁷ the court acknowledged its discomfort with the idea of every state and municipality enacting similar ordinances. ¹³⁸ Quoting the District Court for the Northern District of Texas, the Third

133 Id. at 220.

¹³² Id. at 221.

¹³⁴ Id. at 223.

¹³⁵ Id. at 223 (citations omitted).

¹³⁶ Id. at 220.

¹³⁷ Id. at 221.

¹³⁸ Id.

Circuit echoed warnings of the slippery slope to evisceration of the federal government's control over immigration. ¹³⁹

 The Eighth Circuit Found that Fremont's Ordinance No. 5165 Was Not Preempted by Federal Law

Taking a different approach, the Eight Circuit affirmed the District Court's rejection of both conflict and field preemption challenges. ¹⁴⁰ Unlike the Third Circuit in *Lozano II* which looked at the "reality" of the Hazleton ordinance to determine its impermissible removal purpose, the Eighth Circuit was convinced that No. 5165 did not seek to remove undocumented persons. ¹⁴¹

Challengers argued that No. 5165 had the effect of impermissible regulation of immigration because it expelled those whose legal status prevented them from obtaining an occupancy license from the city. 142 Rejecting this argument, the Eighth Circuit acknowledged that removal procedures are exclusively prescribed by Congress, 143 but found that no provision in No. 5165 expressly sought to impermissibly "remove" an undocumented immigrant from the City of Fremont or from the country. 144 The Eighth Circuit highlighted that there was "no record evidence that aliens denied occupancy licenses in [Fremont] will likely leave the country, as opposed to obtaining other housing in the City, renting outside the City, or relocating to other parts of the country." 145

Instead, the Eighth Circuit held that the Fremont ordinance only "marginally affect[ed] 'the conditions under which a legal entrant may remain," which the Supreme Court has held as permissible state action in *De Canas*. ¹⁴⁶

143 See 8 U.S.C. § 1229a (2018).

¹⁴⁶ Id. (quoting De Canas v. Bica, 424 U.S. 351, 355 (1976)) (citations omitted).

 $^{^{139}}$ *Id.* (quoting Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch I"), No. 3:08–ev–1551–B, Hrg. Tr. at 136 (N.D. Tex. Sept. 12, 2008)).

¹⁴⁰ Keller v. City of Fremont, 719 F.3d 931, 939–41 (8th Cir. 2013).

¹⁴¹ *Id.* at 941.

¹⁴² *Id*.

¹⁴⁴ Keller, 719 F.3d at 941.

¹⁴⁵ *Id*.

3. The Fifth Circuit Found Farmers Branch Ordinance 2952 Preempted by Federal Law

The Fifth Circuit rejected the argument that 2952 was a simply a regulation of housing. 147 Similar to the Third Circuit's "reality" reasoning and unlike the Eighth Circuit's strict formalism, the Fifth Circuit looked to the text of the ordinance and "the circumstances surrounding its adoption" to conclude that the true purpose was to regulate immigration, not housing. 148

The Circuit Court noted that most of the introductory provisions refer to federal immigration law, and that the preamble expressly declares that the intended purpose of 2952 is to aid the enforcement of federal immigration law, not Texas housing law. 149 The Court also found that the regulatory scheme has nothing to do with housing, 150 the license application inquiries only concern identity and immigration status, 151 and the licenses could only be revoked based on immigration status. 152

Overall, the Fifth Circuit was unconvinced that 2952 was intended as a housing regulation and, instead, read it as an impermissible regulation of immigration. Therefore, the Court was not persuaded that 2952 was an appropriate use of state police power, additionally reasoning that there was no evidence offered for how it intended to promote public health, safety, or general welfare, or that undocumented immigrants adversely affected the City in any way. ¹⁵³ Accordingly, the Fifth Circuit held:

[a]lthough the Ordinance provides no express removal mechanism, removal is the practical result of the Ordinance because it regulates who may be an occupant based solely on immigration status. This functional denial to aliens of access to rental housing based on their immigration status is 'tantamount to the assertion of

¹⁴⁷ See Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d 802 (5th Cir. 2012).

¹⁴⁸ Villas at Parkside Partners v. City of Farmers Branch, 675 F.3d 802, 809 (5th Cir. 2012).

¹⁴⁹ Id.

¹⁵⁰ *Id.* (noting that the Ordinance includes nothing about location, design, construction, maintenance, ownership, or alternation of rental properties that one would expect in a housing regulation).

¹⁵¹ Id. at 810 (reasoning that housing licenses would normally be concerned with employment or credit history).

¹⁵² Id.

¹⁵³ Id.

the right to deny them entrance and abode,' an area that is historically one of federal, not state, concern. 154

While there is a circuit split as to whether state and municipal AIHOs are preempted by Federal law, larger constitutional and statutory concerns are also at play.

B. AIHOs Are Constitutionally Problematic, Frustrate the Spirit of the FHA, and Foster Landlord Statutory Violations

The Constitution provides due process protections against both the federal government and state governments.¹⁵⁵ Moreover, housing is property which triggers procedural due process safeguards requiring that governmental deprivation of life, liberty, or property be fair.¹⁵⁶ Notice is essential to that fairness, and AIHOs fail to fulfill the due process promise because of inadequate notice to both landlords and tenants.¹⁵⁷ Burdened landlords untrained in the law lack notice of their legal responsibilities under AIHOs, and notice of review or challenge to their eligibility is not required to those who pass the initial threshold and become tenants.¹⁵⁸

Additionally, AIHO's face an uphill battle with applicable statutory law. The FHA explains that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The FHA bolsters its protections to certain suspect classes by making it unlawful "[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" on the basis of race, color, religion, sex, familial status, or national origin. 161

¹⁵⁵ U.S. CONST. amends. V, XIV, § 1; see also Wong Wing v. United States, 163 U.S. 228 (1896) (holding that due process applies to all persons regardless of legal status).

¹⁵⁴ Id.

¹⁵⁶ Batson, *supra* note 130, at 141 n.69.

¹⁵⁷ *Id.* at 142 n.70 ("As a matter of due process, parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. Consequently, notice is an essential element of due process") (citations omitted).

¹⁵⁸ Id. at 142-43.

^{159 42} U.S.C. § 3601 (2018).

¹⁶⁰ Id. § 3604(a).

¹⁶¹ See id. §§ 3604, 3605, 3606, 3617.

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Although legal status is closely correlated to national origin, it is not a protected class. As a result, under the FHA, landlords are permitted to discriminate on the basis of legal status, meaning that citizen-only or legal-residents-only policies are legal. Thus, there is a gap in protection for national origin minorities, who cannot be discriminated against because of their national origin *per se*, but who can be discriminated against based on characteristics associated with national origin. Thus, facially, AIHOs seem to just barely comport with the FHA, but pragmatically, and from an implementation perspective, AIHOs frustrate the spirit of the FHA and foster landlord violations.

Because of the bureaucratic burdens and punitive threats placed on landlords, the potential cumulative effect is that landlords may refuse to rent to any person who appears or sounds foreign. ¹⁶⁴ Additionally, because of the time commitment and need to fill vacancies, landlords may only request occupancy permits from those that look or sound foreign. Either way, these scenarios illustrate back-door national origin discrimination that may be necessary for landlords to get tenants in their front doors but would nevertheless clearly violate the FHA. ¹⁶⁵

In attempting to circumvent the process, a landlord may also attempt to interpret immigration documents for himself. Or if the landlord does rent to a person who appears foreign, he may watch the tenant more carefully, monitor his guests, or frequently request status updates. ¹⁶⁶ Under these circumstances, the landlord is treading an indiscernible line between complying with the AIHO and violating both the FHA, by treating tenants differently based on perceived national origin, and the INA, by impermissibly stepping into the shoes of the federal government in determining who is and is not legally present. ¹⁶⁷

¹⁶² See Rigel C. Oliveri, Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination, 62 VAND. L. REV. 55, 83–84 (2009).

¹⁶³ Id. at 86.

¹⁶⁴ *Id.* at 87 (discussing the corresponding phenomenon in the employment context with employers "playing it safe" in the face of statutory penalties by refusing to hire people who look or sound like immigrants and describing discriminatory practices by employers trying to avoid sanctions under IRCA).

¹⁶⁵ See 42 U.S.C. § 3604 (2018).

¹⁶⁶ See Oliveri, supra note 162, at 88–90.

¹⁶⁷ *Id*.

IV. CONGRESS SHOULD CONTROL IMMIGRATION REGULATION AND ADD LEGAL STATUS AS A PROTECTED CLASS UNDER THE FHA

A. The Federal Government Should Have Nearly Exclusive Immigration Control Because Immigration Is a National Problem that Requires a National Solution

Although immigration disproportionately affects different regions of the county, the immigration problem is a national problem that requires a national solution. Allowing states immigration power, including letting AIHOs survive, would worsen the regional disparities and create competitive immigration regionalism¹⁶⁸ while doing nothing to comprehensively address the national problem.¹⁶⁹ Indeed, there is evidence that state and local exclusionist regulations may shift immigration patterns, but fail to reduce the total number of immigrants.¹⁷⁰

The symbolic effect of giving states enough room to regulate with exclusionist policies such as AIHOs is also troubling. Opponents of such laws claim that they create hostile environments for all minorities, not just immigrants. ¹⁷¹ And although federalists deny AIHOs are racially or ethically insensitive, their comments tell a different tale. For instance, "[i]n explaining his rationale for pushing for Valley Park, Missouri's housing law, Mayor Jeffrey Whitteaker explained, 'You got one guy and his wife that settle down here, have a couple of kids, and before long you have Cousin Puerto Rico and Taco Whatever moving in.'"¹⁷² This Note recognizes that federal regulation of immigration has racial implications as well, but argues that compared to "a patchwork of laws from fifty different states" the federal government is less likely to be "commandeered by nativist and racist elements than state and local governments."¹⁷³

¹⁶⁸ See generally Aoki & Shuford, supra note 2, at 62.

¹⁶⁹ Pham, *supra* note 78, at 814 ("The relevant borders to consider for immigration law purposes are, of course, national borders, and the enforcement of local laws within local jurisdictions does not significantly influence national patterns of immigration.).

¹⁷⁰ Id. at 815.

¹⁷¹ See generally Marisa Bono, Don't You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow, 3 THE MODERN AM. 29 (2007).

¹⁷² Pham, *supra* note 78, at 819 (citation omitted).

¹⁷³ Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 637 (2012).

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There are scholars who endorse the idea of competitive immigration regionalism as constructive interjurisdictional competition that could benefit the nation by determining what policies work best.¹⁷⁴ But decentralizing power by transforming states into test subjects undermines national cohesion and fuels racial and ethnic divisions.¹⁷⁵ And more practically, immigrants would inevitably flood the borders of those states with inclusive policies thereby economically burdening states with immigrant-friendly laws and frustrating public policy.

Just as immigration is a national problem, it also transcends time; the shuffling of Presidents with drastically different immigration positions makes Congress the political body best equipped to control immigration.¹⁷⁶

B. Because the Immigration Problem is Neither New nor a Quick-fix, Congressional Stability Should Steer Immigration Regulation

Advocates for Presidential control over immigration contend that agency expertise paired with the President's role as "Administrator-in-Chief," which is itself a distinctive form of administrative expertise, boosts the credibility and efficiency of Presidential immigration policies.¹⁷⁷ They also advance the idea that Congress has *de facto* delegated immigration policymaking to the President.¹⁷⁸

But each administration carries different immigration views that inevitably lead to hyperpolitical polarization, ¹⁷⁹ chaos, and inefficiency. While not new, media attention to immigration during the 2016 presidential race and throughout the Trump administration has dramatically increased and illustrates how the swing of an administration can uproot the entire immigration system based on politically-charged campaign jargon. Moreover, the current disastrous execution of such campaign

¹⁷⁶ See generally Jacob Pramuk, *Immigration Reform: More than a Decade of Failure from Bush to Obama and now Trump*, CNBC (June 29, 2018), https://www.cnbc.com/2018/06/29/congress-unlikely-to-pass-immigration-reform-border-separation-bill.html.

¹⁷⁴ See Keith Cunningham-Parmeter, Forced Federalism: States as Laboratories of Immigration Reform, 62 HASTINGS L.J. 1673, 1719–20 (2011).

¹⁷⁵ Id.

¹⁷⁷ Chen, *supra* note 20, at 359.

¹⁷⁸ See Cox & Rodríguez, supra note 26, at 530–32.

¹⁷⁹ See Rubenstein & Gulasekaram, supra note 38, at 633.

brags¹⁸⁰ are an extreme but undeniable example that immigration law will never stand strongly from the seat of the President. Instead, Congress should lead the regulation of immigration.

Certainly, Congressional seats change, and partisan lines ride the wave of administration shifts just like the President. That Senators serve six-year terms is, however, significant and makes them more immune to political ebbs and flows. That is, at any given election, two-thirds of the Senate is not up for reelection; this provides a great deal of flexibility for bipartisan immigration reform efforts. ¹⁸¹ Moreover, state representatives are also more connected to their constituents, particularly during reelection years. This tangible accountability is further reason that Congress is the appropriate political branch to control immigration regulation. Likewise, this accountability appeases federalist concerns; states and localities would remain significant players within this power struggle "as... critical mediators... between the President and Congress, or as political partisans [] in immigration policy." ¹⁸² The immigration concerns of the states are better represented through their representatives than the President.

C. Congress Should Add Legal Status as an FHA Protected Class to Assert its Immigration Dominance and to Acknowledge Modern Social Policy

Adding legal status as a protected class under the FHA will almost certainly not fix the immigration problem, but would breathe life into the FHA, represent affirmative Congressional control of immigration, and would signal Congressional acknowledgment of evolving ideas of equality.

It is not fantastical to imagine Congress adding legal status as an FHA protected class. The media has transfixed the U.S. population on immigration, but only because recent policy changes and related implications are so outrageous and mesmerizing. Bipartisan heartstrings are yanked by pleas of young "Dreamers," literal cries of

¹⁸⁰ See, e.g., Shoshanna Malett, *The Real-Life Consequences of the (Now Lawful) Travel Ban*, JUST SECURITY (July 11, 2018), https://www.justsecurity.org/59224/real-life-consequences-now-lawful-travel-ban/.

¹⁸¹ See, e.g., Seung Min Kim & Burgess Everett, *Immigration Reformers Eye Gang of 8 Revival*, POLITICO (July 5, 2016), https://www.politico.com/story/2016/07/immigration-reform-gang-eight-225028.

¹⁸² Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 174 (2016).

¹⁸³ See, e.g., Jim Wm. Moyer & Maria Sacchetti, Disappointed Advocates Rally, Vent While 'Dreamers' Hang in the Balance, WASH. POST (Jan. 23, 2018), https://www.washingtonpost.com/local/immigration/

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children separated from their parents at the border, ¹⁸⁴ and suicides of detainees. ¹⁸⁵ These events, coupled with the midterm elections, mean that both incumbent and hopeful Congressmen and women must be strong on immigration. ¹⁸⁶ Adding legal status as a protected class within the FHA is a means of attaining such strength, and the time to act is now as related issues concerning sanctuary cities are beginning to populate the Courts. ¹⁸⁷

It is equally not fantastical to imagine that Congressional inaction will invite more extreme restrictionist ordinances reminiscent of Jim Crow laws. ¹⁸⁸ Of course, the expansion of civil rights to formerly oppressed minorities is the living American political system at its very best, and U.S. history reveals that immigration law is often tied up with civil rights issues. ¹⁸⁹ But modern immigration laws face race in new and challenging ways, ¹⁹⁰ and this Note only attempts to level the housing playing field. ¹⁹¹

disappointed-advocates-rally-vent-while-dreamers-hang-in-the-balance/2018/01/23/35c5ba1c-0049-11e8-bb03-722769454f82 story.html?utm term=.ad9dd88df189.

¹⁸⁴ Salvador Rizzo, *The Facts About Trump's Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/19/the-facts-about-trumps-policy-of-separating-families-at-the-border/?utm term=.92ee02bf9d86.

¹⁸⁵ See, e.g., Deanna Hackney & Eric Levenson, Detained Immigrant Takes his own Life in Texas Jail Cell, CNN (June 10, 2018), https://www.cnn.com/2018/06/10/us/immigrant-suicide-border/index.html.

¹⁸⁶ See generally Steve Holland, Trump Injects Immigration Issue into 2018 Elections Debate, REUTERS (July 24, 2018), https://www.reuters.com/article/us-usa-trump/trump-injects-immigration-issue-into-2018-elections-debate-idUSKBN1KE2OZ; Ariel Edwards-Levy, Immigration Gains Steam as a Midterm Issue, HUFFINGTON POST (June 26, 2018), https://www.huffingtonpost.com/entry/immigration-midterm-election-issue_us_5b328a40e4b0cb56051cc87f.

¹⁸⁷ See Steve Vladeck, Sanctuary Cities as the Next Nationwide Injunctive Case, SCOTUSBLOG (June 19, 2018), http://www.scotusblog.com/2018/06/sanctuary-cities-as-the-next-nationwide-injunction-test-case/#more-271485.

¹⁸⁸ See Bono, supra note 171.

¹⁸⁹ See generally Lucas Guttentag, The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2013) (discussing the interplay between civil rights and immigration reform specifically as to preemption principles).

¹⁹⁰ Johnson, *supra* note 173, at 636.

¹⁹¹ See also Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL'Y 393, 414–15 (2012) (arguing that housing should be a fundamental right under the Constitution).

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Considering the practical effects of AIHO implementation, ¹⁹² adding legal status is necessary to effectuate the promise of the FHA. The plenary power doctrine and immigration exceptionalism render judicial relief unavailable. ¹⁹³ Therefore, absent Congressional action, landlords will continue to commit back-door discrimination based on place of national origin thereby violating the FHA and creating hostile environments for all minorities.

CONCLUSION

We are currently in a state of immigration limbo—not knowing who has the power to do what. Through the narrow lens of housing regulation, this Note attempted to migrate out of that limbo and suggests that Congress should command immigration regulation. As an exercise in its dominance and means of refuge out of limbo, this Note urges Congress to fulfil the promise of the FHA by adding legal status as a protected class.

¹⁹² See supra Part III (B).

¹⁹³ See supra Part I (A)(3).