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Local Regulation of Immigration

A thesis submitted in partial satisfaction of the  
requirements for the degree Master of Arts

in

Latin American Studies

by

Clare A. Appleby

Committee in charge:

Professor Marisa Abrajano, Chair  
Professor David Fitzgerald  
Professor Denise Ferreira da Silva

2009

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Chair

University of California, San Diego

2009

## **DEDICATION**

To my family and friends who supported me along the way. Most importantly, I dedicate this to Darby who preserved my sanity. I love you, BooBoo!!!

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## ABSTRACT OF THE THESIS

Local Regulation of Immigration

by

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Master of Arts in Latin American Studies

University of California, San Diego, 2009

Professor Marisa Abrajano, Chair

Cities and states across the United States are attempting to formulate immigration policies. What is driving these local ordinances, and what are the consequences of such attempts? To answer these questions, this thesis examines Farmers Branch, Texas and Arizona. Both communities have experienced significant growth in their foreign born population over the last two decades. Mexican immigrants account for the majority of the growth in both locations. This growth and the pervasive stereotype of the “illegal” Mexican has inspired restrictionary policies.

Farmers Branch passed an ordinance that requires a permit to rent which can only be obtained by those with proof of legal status. The District Court of Dallas ruled that the ordinance is an unconstitutional attempt to regulate immigration and that it denies the right of due process. Even though the ordinance has yet to be enacted, it has cost the city millions of dollars and it has created a community marked by fear and division.

Arizona enacted the Legal Arizona Workers Act in 2008, a system of employer sanctions. Despite multiple legal challenges, the District Court of Arizona allowed for its



enactment. Like Farmers Branch, this law is an unconstitutional attempt to regulate immigration. It is federally preempted, and it exposes foreign born and Latinos to racial profiling and discrimination. Until the federal government enacts comprehensive immigration reform, I predict that local governments will continue to attempt to regulate immigration despite the exclusive power of the federal government to do so.

## **Introduction**

Immigration has shaped the United States since its inception. While the country has the founding myth of “a nation of immigrants,” there has also been a long history of nativist, discriminatory policies towards “undesirable” immigrants. While the face of these immigrants has changed over the years, the tendency to scapegoat immigrants and dehumanize them continues. The group of immigrants most likely to be targeted in today’s heated immigration debate, I would argue, is Mexican immigrants. As of 2008, Mexican immigrants comprise 30.7 percent of the U.S. immigrant population, and they account for 59 percent of the unauthorized population (Pew Hispanic Center 2009). They have been labeled as “illegal” security, economic, and cultural threats to the United States (Huntington 2004; Ngai 2004; Newton 2008). These pervasive stereotypes combined with the growth in the Mexican immigrant population have created an inflammatory situation in some communities.

Due to the history of Mexico and its proximity to the United States, there has been a long tradition of Mexican immigration to the United States. In the last twenty years, however, the immigration patterns of Mexican immigrants have changed due to the unintended consequences of faulty immigration policies and changes in the low wage economy that have created employment opportunities in new areas like the southeast of the United States (Cornelius 2005; Durand, Massey, and Capoferro 2005; Gozdziaik and Martin 2005). Mexican immigrants are choosing new destinations across the United States, bringing their wives and families with them, and settling permanently in the United States (Cornelius 1992; Marcelli and Cornelius 2001; Passel 2006, 2007). Furthermore, the incidence of unauthorized immigration has

increased dramatically since the 1980s due to the inefficiency of the U.S. immigration system, the unrealistically low number of visas available each year to Mexican immigrants, and the government's border enforcement policies.

Scholars, activists, and politicians from both sides of the debate acknowledge that the current immigration regulation scheme is unacceptable. In a press conference calling for immigration reform, President Obama referred to it as “a broken immigration system” (CNN 4/29/2009). Despite this consensus, the federal government has been unable to enact comprehensive immigration reform in the last decade. Strong public sentiment against immigrants has been building during this same time period as seen in the 1994 passage of Proposition 187 in California, an unsuccessful attempt to limit immigrants' access to social services, and the proliferation of English-only initiatives in multiple states.

### **Recent Attempts to Regulate Immigration**

In the face of growing populations of unauthorized immigrants and the perceived inability of the federal government to regulate immigration, some cities and states decided to enact immigrant-related policies. In the first legislative quarter of 2008 alone, there were 1,106 immigrant-related ordinances under consideration in 44 states (Hegen 2008). These ordinances ranged from “pro-immigrant” policies such as granting identification cards to unauthorized immigrants to “anti-immigrant” policies such as rental bans for unauthorized immigrants. This flurry of local level immigration regulation challenges traditional legal reasoning that holds immigration control to be an exclusively federal power. In these local and states cases, important legal

precedence is being set that has the potential to change dramatically the future course of U.S. immigration law.

For the purpose of this thesis, I focus on local and state restrictive policies towards immigrants. Communities from Escondido, California to Hazleton, Pennsylvania have attempted to restrict the rights of unauthorized immigrants in an effort to deter these immigrants from settling there. I am interested in examining the following three questions: what constitutional barriers do these ordinances face, what motivates communities to formulate these bills, and what are the repercussions on the communities of such attempts?

To answer these questions, I analyze the laws passed in the state of Arizona and Farmers Branch, Texas. In 2008, Arizona enacted the Legal Arizona Workers Act. This legislation mandated the use of the E-Verify system, a federal database that enables employers to check the work authorization status of employees, and established strict penalties for employers who utilize unauthorized workers. Employer sanctions, such as the ones passed in Arizona, are a popular tactic used to deter unauthorized immigrants. Other states such as Oklahoma and Missouri are following Arizona's example by attempting to enact similar legislation.

Farmers Branch, Texas, on the other hand, is trying to establish residential restrictions to deter unauthorized immigrants from settling in the city. In 2007, the city council passed an ordinance prohibiting apartment complexes and property managers from renting without first verifying a person's legal status. Landlords found in violation of the law face penalties of up to \$500 per day for non-compliance. Currently, the ordinance has not been enacted; three injunctions have been placed

upon it due to challenges about its legality, but the city continues its legal battle. Other cities have tried to pass similar legislation. Despite the failure of cities such as Escondido, California and Hazleton, Pennsylvania to defend these ordinances in court, cities like Farmers Branch continue the most likely doomed attempt to formulate residential restrictions.

I chose these case studies for multiple reasons. First, both have been highly publicized by the media. As a result, there is an abundance of sources and media coverage for both locations. Second, both cases had extensive legal opinions written about them. This allowed me to analyze the legal reasoning behind the acceptance or rejection of these policies. Additionally, I chose these locations because they reflect two important trends in Mexican immigration. The growth of the Mexican immigrant population in Arizona embodies the unintended consequence of the selective border fortification along the southern U.S. border. Farmers Branch, on the other hand, highlights the recent suburbanization of immigration and its effect on small communities. Finally, employer sanctions and residential restrictions are popularly used tactics to discourage unauthorized immigration. By investigating examples of both strategies, a broader argument can be made about the constitutional barriers to local immigration regulation.

To establish the legal barriers to these ordinances, chapter one outlines the development of U.S. immigration law. It explains three important tenets of immigration law: the plenary power principle, the personhood principle, and federal preemption. The plenary power principle, as traditionally articulated by the courts, grants the political branches of the federal government virtually unconstrained power

to set immigration and immigrant policies as a result of the special concerns involved in immigration regulation. This principle has been somewhat tempered by the personhood principle, which recognizes the rights of the individual by virtue of his/her humanity, not by his/her legal status. Finally, federal preemption, the supremacy of federal laws over local laws, is especially critical for this examination of the legality of local level immigrant-related policies. To conclude the chapter, I outline the current federal policies in place aimed at regulating immigration to provide the necessary background to assess whether these local laws complement or hinder federal regulation of immigration.

Chapter two examines the legal challenges facing these laws. First, I compare each ruling to Hazleton, Pennsylvania's similar attempt to regulate unauthorized immigrants' ability to live and work in the community. This is an illuminating comparison because the Hazleton ordinance was the first local ordinance to be ruled unconstitutional by a federal court after a full trial. As a result, there is an extensive court decision outlining the constitutional barriers to the enactment of local immigrant-related ordinances. Then, I compare the disparate reasoning found in the judges' opinions. The radically different interpretations of the federal government's intent in regulating immigration found in the opinions highlights the subjectivity of immigration law. After an evaluation of the legal opinions, one can conclude that these attempts to regulate immigration are federally preempted and thus unconstitutional.

To explore the motivations behind these ordinances, chapter three connects the recent trends in Mexican immigration to the dramatic demographic changes occurring in Arizona and Farmers Branch, Texas. I argue that this growth in the Mexican

population is a direct motivator for these ordinances. To demonstrate this, I trace the development of the creation of the “illegal” Mexican and show how this pervasive imagery influences the public debate surrounding these laws. As a result of the intentional targeting of Mexican, and more broadly Latino, residents in these debates and in the enforcement of the laws, these ordinances have severe negative consequences on the community’s economy, safety, and social cohesion. In conclusion, this thesis finds that these attempts are unconstitutional and have unacceptably high costs for the communities attempting to enact these policies.

## **Chapter 1**

This chapter outlines the basic tenets of U.S. immigration law in order to provide the background needed to assess the legality of recent immigration legislation in Farmers Branch, Texas and the state of Arizona. It begins with a brief overview of important immigration cases with attention to the pertinent legal precedence and the commentary of prominent legal scholars. The chapter then goes into greater detail on three important aspects of immigration law: the plenary power principle, the personhood principle, and federal preemption. Finally, the chapter examines the current federal immigration regulation scheme to explore if local laws impede or facilitate its enactment.

U.S. immigration law is a unique field of law. Owing to its exceptional concerns of national sovereignty and national security, the field largely has been immune from modern trends that have transformed other fields of law since the 1960s (Schuck 1984). Furthermore, immigration law is distinctive in its “capriciousness” (Bosniak 2006, 26). The United States’ immigration policies and its treatment of aliens have changed dramatically throughout history. This fickleness is partly due to the presence of two competing and contradictory principles that have shaped the formation of immigration law: the plenary power principle and the personhood principle.

The plenary power principle, which gives the political branches of the federal government virtually unconstrained power to set immigration and immigrant policies, has enabled the passage of restrictive, discriminatory laws. On the other hand, the application of the personhood principle has allowed aliens in the United States to



enjoy many of the same rights as citizens due to the personhood principle. The personhood principle locates the source of rights in the individual as opposed to the citizen.

The tension between these two principles is particularly apparent in judicial rulings involving unauthorized immigrants. As Peter Schuck writes, “[T]hese two different ideological threads—the one denying that a society owes aliens any obligations to which it does not consent, the other affirming the existence of certain obligations to aliens owed simply by reason of their humanity— are woven throughout the fabric of immigration law” (Schuck 1984, 7). Depending on the economic, social, and political context of the time of the judicial decision and the leanings of the judiciary, one principle often outweighs the other.

Due to these competing principles, immigration law is a dynamic, subjective field. As Christopher Joppke writes, “Neither the plenary power nor the personhood principle as applied to aliens can be found explicitly in the U.S. Constitution; instead, they have been judicially construed by courts and legal scholars. The development of alien rights is thus largely one of case law, which is conditioned by changing views of the Constitution” (Joppke 2001, 39). This changing view of the Constitution is evident in the various court decisions reached throughout the 19<sup>th</sup> and 20<sup>th</sup> centuries.

In early American history, immigration matters were left largely in the hands of the state governments. For example, states with seaports formed their own policies about the standards for admission and what head tax to apply to incoming immigrants. The federal government did not take an active role in regulating immigration until the late 1800s (Aleinikoff, Martin, and Motomura 1995). Federal immigration law

emerged in the late nineteenth century as the United States felt the pressing need to regulate immigration. During this time, a new influx of immigrants was entering the country. Unlike previous waves of immigrants who came from Northern and Western Europe, the new immigrants arrived in increasing numbers from Southern and Eastern Europe and from Asia. These culturally and ethnically diverse immigrants provoked a new wave of nativist sentiment (Tichenor 2002).

While the United States struggled to incorporate new immigrants into society, it was simultaneously asserting itself as an important player in the international arena. As a result, it was concerned with establishing itself as a powerful sovereign nation. It was during this time that federal U.S. immigration law was consolidated (Shuck 1984). The ability to control its borders and the movement of people into its territory was and remains a defining feature of a modern, sovereign nation. To ensure this power, the courts articulated the principle of plenary power in the late 1800s.

### **Development of the Plenary Power Principle**

The influx of Chinese laborers into the United States as a result of the Burlingame Treaty of 1868, a treaty between China and the United States that acknowledged the rights of emigration and immigration, fueled the first major federal regulation of immigration (Tichenor 2002). Chinese laborers immigrated in large numbers to work in mines, agriculture, and railroad construction. An economic recession in California during the mid 1870s, however, spurred popular resistance to Chinese immigration. As pressure mounted, Congress passed the Chinese Exclusion Act in 1882; it suspended the immigration of Chinese laborers for ten years except for merchants and government officials. (It was not officially repealed until 1943, and

large scale Chinese immigration was not allowed until the revision of the Immigration and Nationality Act in 1965.) In addition to restricting Chinese immigration, the Chinese Exclusion Act codified Chinese people as non-white and thus unable to obtain citizenship under the United States' 1790 naturalization law (Chin 2005). For those Chinese immigrants already residing in the United States, a certificate system was established to allow them to leave and return to the United States. Before leaving the United States, Chinese immigrants had to apply for certificates of identity to allow their return.

Chae Chan Ping, a Chinese immigrant, entered the United States in 1875 and returned to China for a brief visit in 1887. Before leaving for China, he obtained the necessary certificate from the U.S. government to ensure his reentry. While he was in China, however, the U.S. Congress passed a statute on October 1, 1888 that prohibited the return of all Chinese laborers regardless of their possession of certificates. Upon his return, Chae Chan Ping was stopped at the border and refused entry. Chae Chan Ping fought the repeal of his certificate of reentry claiming it violated the Constitutional right of due process and the Burlingame and 1880 Treaties. The U.S. Supreme Court ruled against the plaintiff in a unanimous decision (Aleinikoff, Martin, and Motomura 1995, 3-5). The Court's opinion, written by Justice Field, articulated an important tenet of immigration law, namely, the plenary power principle.

The plenary power principle, as stated earlier, holds that the political branches of the federal government have complete authority over the entry, stay, exclusion, and naturalization of immigrants. Traditionally, this power has been unconstrained by judicial review (Joppke 2001, 39). In his article "Immigration Law and the Principle of

Plenary Congressional Power,” Steven Legomsky (1984) outlines seven justifications historically given for the plenary power doctrine. The two most commonly used explanations, the sovereignty theory and the political theory, are reflected in Justice Field’s opinion.

The sovereignty theory holds that the ability to exclude and to deport aliens is an inherent power of sovereign nations; it is a nation’s right to control its border. If the United States did not have the power to decide who can enter its borders, it risks being under the control of a foreign nation. As Justice Field wrote,

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 (*Chae Chan Ping v. United States* 1889).

Unlike other enumerated Congressional powers, the right to exclude aliens did not need to be explicitly linked to the Constitution once the rhetoric of sovereignty was used to justify it (Legomsky 1984, 274). Justice Fields set an important precedent for all future court cases by linking immigration matters to national sovereignty.

While the plenary power to control immigration is not an enumerated power, it has been justified by linking it to three other enumerated powers: the Naturalization Clause, the Commerce Clause, and the Foreign Affairs Clauses (Aleinikoff, Martin, and Motomura 1995). The Naturalization Clause grants the federal government the exclusive power to set naturalization laws. The reasoning is that since the federal government has the sole power to decide who is allowed to become citizens, it should also have the exclusive power to decide who can gain access to the paths to citizenship, which necessarily involves controlling who has the right to enter the

country. The Commerce Clause asserts that the federal government has the authority to regulate commerce with foreign nations, between states, and with the Indian tribes. Migration, the transportation of people, has been linked to commerce; as a result, several state laws that sought to control immigration through the imposition of taxes or other regulations on carriers of immigrants were ruled unconstitutional (Aleinikoff, Martin, and Motomura 1995, 8-9).

Finally, the Foreign Affairs Clauses include the Congressional powers to declare war, the Senate's power to advise and to approve of the appointment of ambassadors, and the Presidential power to make international treaties (Pham 2004, 987-990). International treaties, like the Burlingame Treaty, can include provisions that allow for the immigration of foreign nationals. Since immigration necessarily involves foreign nationals, it is characterized as a foreign affairs issue. These foreign affairs issues form the basis for Legomsky's "political theory" for the justification of plenary power.

As seen in the enumerated powers to which immigration control has been linked, the Supreme Court has been reluctant to review federal immigration policy because it is seen as a political question. The admission and treatment of aliens in the United States has the potential to create international tension. For example, if the United States were summarily to deny admission to all Mexican nationals, it would have serious repercussions on the political and economic relationship between the United States and Mexico. Furthermore, the admission policies set for a specific country can be used as a bargaining tool in foreign affairs.

In addition to foreign relations, the influx of immigrants into a country is seen as a political issue because it can create domestic political problems and security concerns. The “hordes” of immigrants entering the country have been likened to an invading army. As Justice Field wrote,

It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth (*Chae Chan Ping v. United States* 1889).

The federal government should be able to deal with these concerns, the argument goes, without burdensome oversight.

The special interests involved in immigration law and policy have allowed the federal government to be immune from most judicial review in immigration matters. This has given the federal government immense power in setting policies. Accordingly, Peter Shuck describes immigration law as “the realm in which the government authority is at the zenith, and individual entitlement is at the nadir” (Shuck 1984, 1). The federal government not only has the right to exclude people at the borders, it has been given expansive powers in setting domestic policies for the treatment of aliens within the United States. Aliens within the United States are not guaranteed equal access to the political, economic, and social opportunities available to citizens.

The right of the federal government to distinguish between citizens and aliens within the United States was upheld in the 1976 decision of *Mathews v. Diaz*. Diaz, a Cuban refugee, challenged a federal statute that required aliens to be legal permanent

residents for at least five years before accessing Medicare. The District Court of Southern Florida ruled that the first condition of the statute, the necessity of being admitted as a permanent resident, was a violation of due process. Thus, the statute was unconstitutional. The District Court applied strict scrutiny because of the risk of discrimination due to the vulnerable position of aliens (Aleinikoff, Martin, and Motomura 1995, 163). Upon appeal, however, the Supreme Court reversed this decision.

The Court offered three justifications for denying aliens benefits in its decisions; these arguments remain popular today. First, the Court argued that it was legitimate to make distinctions between aliens and citizens. While the Court acknowledged that the Fifth and Fourteenth Amendments protected *everyone* in the United States from the deprivation of life, liberty, or property without due process, it did not guarantee equal access to the rights and benefits available to citizens. Second, the Court upheld the plenary power of the federal government to set immigration policy free from judicial review. This meant that the government could form policies with regards to immigrants that would not be legitimate for citizens. As the Court wrote, “In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens” (*Mathews v. Diaz* 1976).

Finally, the Court characterized aliens as guests in this country. It is the right of the United States to decide with whom and how to “share its bounty” (Aleinikoff, Martin, and Motomura 1995, 163-164). Guests should be grateful, and they should not demand anything. The reasoning found in this court decision remains pervasive today.

The federal government has the right to decide who will benefit from the social services offered in this country; for example, the Welfare Reform Act of 1996 significantly limited legal aliens' access to public welfare benefits. According to some commentators, immigrants, as guests in this country, should not demand benefits, but rather, be grateful for whatever they do receive.

The persistence of the plenary power doctrine in setting policies is criticized by some legal scholars for preventing the growth of immigration law and for shielding immigration law from modern constitutional law (Aleinikoff 1989; Shuck 1984; Motomura 1990). Since federal immigration decisions generally are not open to judicial review, there are not guidelines placed upon them. This makes the formation and implementation of immigration policies wildly unpredictable. As Hiroshima Motomura writes, "Plenary power has prevented the growth of a coherent constitutional framework for immigration law, within which its sub-constitutional levels-statutes, regulations, agency directives, and so forth-can develop and be administered fairly and predictably" (Motomura 1990, 606). Despite the continued deference to Congress and to the executive branch, the federal government does not have *carte blanche* in all immigration matters.

There has been some restraints placed on plenary power; for example, procedural rights are granted to aliens during exclusion and deportation hearings (Bosniak 2006, 51). Furthermore, an important distinction must be made between admittance and exclusion policies and the laws regulating the rights and obligations of aliens within the United States. The mere fact that an alien is involved in a matter does not mean the federal government has unrestrained powers. The federal government, as



seen in the *Mathews v. Diaz* case, can and does distinguish between citizens and aliens, but some rights are guaranteed to all regardless of legal status. Motomura notes, "In contrast to the harshness of classical immigration law, a long line of Supreme Court decisions has afforded a measure of protection to aliens that much more closely resembles the substantive and procedural rights of individuals in mainstream public law" (Motomura 1900, 565). The following section discusses these decisions that have granted aliens substantial rights in the United States.

### **Personhood Principle**

The competing tenets of plenary power and the personhood principle have existed simultaneously. Even during the draconian era of Chinese Exclusion, for example, Chinese immigrants were granted some important Constitutional rights. In an era in which Chinese immigrants had no hopes of attaining citizenship, the Supreme Court affirmed rights based on their personhood and not on their status. The rights gained by Chinese immigrants in the late 1800s set important precedents for contemporary legal battles for immigrant rights. The first major victory for the rights of Chinese immigrants was 1886's *Yick Wo v. Hopkins*.

In an attempt to curb Chinese immigration, San Francisco passed an ordinance in 1880 that required laundries operated in wooden buildings to obtain a permit (Lemay and Barkan 1999, 57). While written as a race-neutral law, Chinese immigrants owned the majority of laundries (most of which were in wooden buildings) and issuing permits was left up to the discretion of the Board of Supervisors. Almost all of the Chinese who applied for the permit were rejected. Yick Wo and Wo Lee, Chinese immigrants who had been charged with violating the

ordinance, challenged the law saying it violated the equal protection clause of the Fourteenth Amendment (Bosniak 2006, 54). The ordinance was upheld in the California Supreme Court, but the U.S. Supreme Court ruled it unconstitutional in 1886.

In addition to ruling on the prejudicial nature of the law, at issue was the right of resident aliens to invoke the equal protection clause. The Supreme Court found that the rights guaranteed in the Fourteenth Amendment were not confined to citizens. As Justice Matthews wrote in the majority opinion,

These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality...The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court (*Yick Wo v. Hopkins* 1886).

While this ruling does not specify between authorized and unauthorized aliens, the petitioners involved were legally present in the United States. It was not until a decade later that unauthorized immigrants were explicitly given the right to claim Constitutional protections and “invoke the jurisdiction” of U.S. courts.

The *Yick Wo* decision struck down a discriminatory local ordinance, but it did not challenge the right of the federal government to have a discriminatory immigration policy. Instead, the Geary Act of 1892, written by California Congressman Thomas Geary, extended the Chinese Exclusion Act. In addition to extending the Act, it added new requirements for Chinese residents in the United States. Now they had to carry a resident permit with them at all times within the United States. Those found without one not only risked deportation, they also faced up to a year of hard labor before being

deported. Once found to be deportable, a migrant had little chance for legal recourse. In an earlier court case, *Fong Yue Ting v. United States* (1893), the Supreme Court ruled that deportation was not a punishment for a crime and therefore did not demand a criminal trial. As a result, deportation hearings did not merit the safeguards found in the Bill of Rights including the right to trial by jury and the prohibition of unreasonable search, seizures, and cruel and unusual punishments (Chin 2005, 17-20).

On July 15, 1892, two months after the passage of the Geary Act, four Chinese immigrants were arrested in Detroit. Wong Wing, Lee Poy, Lee Yon Tong, and Chan Wah Dong were found to be unlawfully residing in the United States, and they were sentenced to sixty days of hard labor before being deported to China. The men contested the constitutionality of the Geary Act claiming it violated the Fifth, Sixth, and Thirteenth Amendments. Their lawyer, Frank Canfield, argued that it violated the Fifth and Sixth Amendment because it “imposed infamous punishment without indictment and criminal punishment without jury trial,” and the sentence to hard labor violated the Thirteenth Amendment, which prohibits involuntary servitude except after conviction of a crime (Neuman 2005, 36). The Assistant Attorney General J.M. Dickinson responded by saying that their status as illegal aliens denied them the right to seek constitutional protections.

The Supreme Court disagreed with Dickinson. On May 18, 1896 the Court released its unanimous decision. It found that the United States had the right to sentence unauthorized immigrants to hard labor and deportation, but such punishments necessitate a judicial trial. Thus, the Supreme Court found that even unauthorized immigrants had the right of due process. Wong Wing was an extremely important

ruling in immigration law history. It was the first ruling to invalidate a federal immigration statute, the first decision to hold that the Bill of Rights protects aliens against the federal government, and the first Supreme Court confirmation of the constitutional rights of unauthorized aliens (Neuman 2005, 41).

Another significant ruling for the rights of unauthorized immigrants was the Supreme Court decision in *Plyler v. Doe* in 1982. The Supreme Court struck down a Texas statute that denied free public education to unauthorized children. In 1975, the Texas Legislature ruled that state funds would be denied to support children who were not “legally admitted,” and it authorized local districts to deny these children the right to enroll in school. Texas argued that the statute was necessary to preserve its limited resources for its lawful residents, that it would prevent more unauthorized immigrants from entering Texas, and that it was fair given that unauthorized children were less likely to remain in the United States, and thus would not be able to use the public education they received to contribute to U.S. society (Olivas 2005, 208-209).

The Supreme Court found that the statute violated the Equal Protection Clause of the Fourteenth Amendment. Of importance, however, is the characterization of children as innocent beings. The decision did not argue that benefits should be extended to all unauthorized immigrants. As Justice Brennan wrote in the majority decision, “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 own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants” (*Plyler v. Doe* 1982). In the decision, children were portrayed as unwilling

lawbreakers- unlike their parents- who made the conscious decision to remain in the United States illegally. The outcome of the case probably would have been different if unauthorized adult immigrants had been the ones demanding adult education classes.

Despite this caveat, the Court's decision refuted three popular assumptions about unauthorized immigrants. First, it rejected the claim that unauthorized immigrants are a significant burden on the state's economy. Rather, they are likely to underutilize services while contributing their labor and tax money to the state. Furthermore, restricting public education would not be a deterrent for future immigrants. As the Court noted, the majority of unauthorized immigrants are drawn to Texas by employment opportunities, not to take advantage of the educational system. Finally, the Court stated that there was no guarantee that unauthorized immigrants will return to their native country. Instead, many will remain in the United States, and some may eventually become lawful residents or citizens. Denying these children access to free public education would only create a "subclass of illiterates" within the United States (Aleinikoff, Martin, and Motomura 1995).

Finally, the Court based its immigrant-friendly decision on the absence of a contradictory federal policy (Joppke 2001, 55). Since the federal government, which has the exclusive authority to set immigration and immigrant policies, did not formulate a policy to deny education to unauthorized immigrants, the Court assumed that the government did not intend to deny education to unauthorized children. As Justice Brennan wrote

Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's

prerogative to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education" (*Plyler v. Doe* 1982).

The deference to the policies and intentions of the federal government is the basis for the third important aspect of immigration law, federal preemption.

### **Federal Preemption**

The issue of federal preemption in regards to immigration policy is critical for this investigation into the legality of local level laws. The preemption principle is based on the Supremacy Clause, Article VII, clause 2, of the U.S. Constitution that states the Constitution and the laws of the United States are the "supreme laws" of the land and should be upheld by the states (Guizar 2007, 1). Congress, therefore, has the right to preempt state laws. As noted above, there has been a long history of asserting Congress's exclusive authority over immigration. As a result, many state and local laws have been challenged on the basis of federal preemption. The 1948 court case, *Torao Takahashi v. Fish and Game Commission*, articulated an important justification for the rejection of restrictive local level immigration laws.

A Japanese resident of California, Torao Takahashi, contested a 1945 state code that prohibited people ineligible for citizenship from obtaining a fishing license. (Like Chinese, Japanese immigrants were labeled as nonwhite and thus ineligible to naturalize.) Despite Takahashi's victory in the Superior Court of Los Angeles, the California State Supreme Court overruled the decision and upheld the code that denied Takahashi a permit. The California State Supreme Court claimed the state was justified in discriminating against aliens because the state had a proprietary interest in

the ocean's fish. The State Supreme Court argued that California had the right to limit the number of fishing licenses to conserve fish. The U.S. Supreme Court, however, rejected the state's argument (Aleinikoff, Martin, and Motomura 1995).

The U.S. Supreme Court denied California's claim of nondiscrimination, and the Court stated that the state law was in direct conflict with the federal regulation of immigration. As Justice Black wrote in the decision,

They [the states] can neither add to nor take from the conditions lawfully imposed by the Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid (*Torao Takahashi v. Fish and Game Commission* 1948).

In short, the rationale behind preemption cases is that oppressive local laws that deny certain social and economic rights to legal immigrants are tantamount to the denial of "entrance and abode" granted by the federal government (Wishnie 2001, 511). If the federal government chooses to admit an immigrant, it is not the prerogative of the state to deny the immigrant the right to live in the community or place undue burdens upon the immigrant. Legislation that seeks to restrict the residential or labor rights of immigrants contradicts the federal government's approval of the immigrant's residence in the United States.

The preemption argument has been more successful in guaranteeing the state's equal treatment of immigrants than the equal protection clause (Levi 1979). The federal government has already made it clear that distinctions based on citizenship are legitimate, so it is federal precedence rather than an undeniable right to equal access that establishes the rights owed to immigrants. This is evident by comparing the

outcomes of *Mathews v. Diaz* (1976) with *Graham v. Richardson* (1971). As discussed previously, *Mathews v. Diaz* ruled that restrictions on aliens' access to Medicare were constitutional. It was a federal statute, and therefore, the *federal* government had a broad power to set policies even policies that "would be unacceptable if applied to citizens." However, a similar Arizonan statute was overturned five years previously in 1971's *Graham v. Richardson*.

Carmen Richardson, a disabled, legal resident alien for thirteen years, challenged an Arizona statute that restricted welfare benefits to those who had lived in the country for fifteen years or were citizens. The Supreme Court ruled the statute violated the equal protection clause of the Fourteenth Amendment. It further argued that classifications based on alienage were suspect and subject to close scrutiny (Aleinikoff, Martin, and Motomura 1995; Levi 1979).

Despite labeling aliens as a discrete minority susceptible to discrimination, the Supreme Court later recognized the right of the federal government to pass immigrant policies free from judicial review as seen in *Mathews v. Diaz*. Furthermore, at the state level, subsequent rulings upheld the right to make distinctions based on citizenship in regards to political rights (since the federal government never specified political rights) and the rights of unauthorized immigrants who were not "invited" by the federal government.

In comparing these two cases of similar claims and different outcomes, it is obvious that the intent of federal government is critical in determining the constitutionality of an immigrant-related policy. If the federal government does not place restrictions on authorized immigrants, it is not the right of the state to do so. The



outcome of *Graham v. Richardson* may have been different if it had followed *Mathews v. Diaz* because it could have been argued that the federal government did place restrictions on the ability of permanent residents to access social welfare benefits. Federal preemption is a double-edged sword for immigrants. As Christopher Joppke writes, “In fair weather, when the government decides to be generous to aliens, preemption is an effective tool to prevent states from discriminating against aliens. Yet in tempestuous times, when the federal government may switch to discrimination, preemption will force the states to do the same” (Joppke 2001, 42).

Unauthorized immigrants have the least amount of legal recourse to protest restrictionist policies under claims of federal preemption. The argument against adding “burdens” upon those who the federal government admits is not a pervasive argument in defending the rights of those not legally admitted. As Peter Spiro writes, “It hardly seems defensible, however, to presume that Congress would not contemplate additional burdens on undocumented aliens, burdens which should seem overshadowed if not trivial against the prospect of deportation” (Spiro 1994, 148). Some argue that since unauthorized aliens are not invited into the country by the federal government, the states are not preempted in denying unauthorized aliens certain social and economic benefits. The leeway given to states in the regulation of unauthorized immigrants is evident in the Supreme Court’s decision in *De Canas v. Bica* (1976).

In *De Canas v. Bica*, the petitioners challenged a California statute that imposed penalties on employers who hired unauthorized immigrants. The petitioners claimed that the statute was unconstitutional and preempted by the Immigration and

Nationality Act (INA). The California courts agreed with the petitioners on both counts, but the Supreme Court reversed the ruling.

The Court argued that the mere fact that immigrants were the subject of the statute did not mean it was an attempt to regulate immigration. (As will be discussed in the following chapter, Judge Wake came to a similar conclusion in his decision on the legality of the Arizona Legal Workers Act.) Furthermore, the Court stated that as long as the statute complied with the provisions in the INA, it was not federally preempted (Jorgensen 1997). Finally, the Court acknowledged the right of the state to have more leeway in dealing with unauthorized immigrants due to the fact that there was not a federal precedent guaranteeing them employment rights (Wishne 2001, 9).

In its decision, the Supreme Court detailed three ways to establish whether a federal law can be proven to preempt a state or local law (Guizar 2007; Booth 2006). First, the federal government can explicitly state in legislation that it preempts state authority. Every court decision has acknowledged the exclusive authority of the federal government to set the admittance and exclusion policies. As a result, any state law that attempts to *directly* regulate legal immigration is seen as explicitly preempted. Second, there is field preemption. If the scheme of federal regulation is found to be pervasive, the Court argues that it is reasonable to assume that Congress has intentionally left no room for the states to supplement it. For example, in the Hazleton, Pennsylvania ruling, which will be explored in greater detail in the next chapter, it was argued that the Immigration Reform and Control Act of 1986 established a pervasive system of immigration control that preempted local measures.

Finally, there is conflict preemption. Any state or local law that conflicts with federal law is automatically preempted (Booth 2006, 1070-1071).

Federal preemption of local level immigration laws is necessary to avoid a “patchwork” system of laws and enforcement. Due to the Congressional powers linked to immigration, scholars like Huyen Pham (2004) argue that there is a Constitutional mandate for uniform enforcement. For example, immigration has been linked to the Foreign Affairs Clause. If a state were to enact strict restrictions for immigrants from a particular nation, it would have foreign relations impact that would inevitably involve the federal government. If Illinois, for example, were to restrict all Filipino immigration it would not only contradict the federal immigration scheme, it would have repercussions on United States-Philippines relations. Since Illinois does not have the ability to enter into treaties with other countries nor does it have the power to defend itself from foreign aggression, it should not have the power to make immigration policies. Such policies could have serious consequences on the entire nation’s foreign relations. Similar arguments hold for the Commerce Clause. The federal government has the right to regulate international trade including the “trade” of workers. Therefore, a state or city cannot make conflicting laws about immigrant labor.

Federal preemption is also necessary to prevent “the thousand border” problem (Pham 2004). If each city and state were able to enact its own immigration policy, it would create multiple borders within the United States. This would create logistical and legal problems. If an immigrant had to obtain separate authorization to enter the country, then a state, and finally a specific city, there would be a need for an immense

bureaucracy and the possibility for a series of contradictory laws. This would allow for locations to decide who should be allowed to enter without regard for the federal government's desire. This would undermine the federal government's power to admit immigrants.

A patchwork system of immigration law also poses economic and moral dilemmas. Neighboring cities and states could have dissimilar policies that would result in an imbalance in immigrant communities. If one city, for example, enforced restrictionary laws towards immigrants, immigrants would move to a more immigrant friendly community in the same region. This would result in one city bearing the brunt of the costs while the other city imports labor without providing social services. Furthermore, in the name of controlling unauthorized immigration, cities would be able to adopt strict measures to prevent "undesirable" immigrant communities from settling in their neighborhoods. This would allow for de facto segregation. It would also expose the immigrants already in the community to racial profiling and discrimination. These disturbing trends are evident in my case studies; the local formation and implementation of immigration laws can create hostile environments for authorized and unauthorized immigrants and Latino citizens.

### **What is on the Books: Current Federal Regulation of Immigration**

To address the constitutionality of local acts, the federal government's current attempts to regulate immigration must be made clear. This section highlights the relevant federal immigration legislation to evaluate whether federal law preempts recent immigrant-related state and local laws. Furthermore, the effects of these laws on the immigration flows into the United States are important in explaining the

diffusion of Mexican immigrants across the country. Of particular importance are the Immigration Reform Act of 1965, the Immigration Reform and Control Act of 1986, and the Illegal Immigration Reform and Individual Responsibility Act of 1996.

Prior to 1965, the United States had a system of national origin quotas to determine who was allowed entrance into the United States. (This policy was formalized in 1924 with the National Origins Act). By basing the quota on the 1890 Census and later on the 1920 Census, it allowed the United States to give preference to immigrants from the traditional source countries, mainly Anglo-Saxons. The quotas limited the number of ethnically and culturally diverse immigrants. As the civil rights movement gained momentum in the United States, however, it became increasingly illegitimate to discriminate based on ethnicity and race. As a result, the federal government abandoned the national origins quota that favored immigrants from Europe with the enactment of 1965's Hart-Cellar Act (Tichenor 2002).

Instead of selecting immigrants based on national origins, the new immigration scheme encouraged family reunification and the immigration of skilled workers. Known as the Immigration Reform Act of 1965, it provided 170,000 visas for immigrants from the Eastern Hemisphere with a cap of 20,000 visas maximum per country. The Western Hemisphere received 120,000 visas, but it did not place a per country limit. (The 20,000 per country limit was imposed later in 1976.) In an effort to enable family reunification, spouses, children, and parents of American citizens were exempt from the numerical caps (Tichenor 2002; Martin 2004). Some politicians hoped the emphasis on family reunification would spur further chains of European immigration, however, the Immigration Reform Act of 1965 greatly increased the

number of immigrants from Asia and Latin America. In the end, the reform of 1965 not only greatly diversified the immigration stream into the United States, its generous family reunifications provisions greatly increased the number of immigrants entering the United States every year.

The passage of the 1986 Immigration and Reform Control Act (IRCA) was the next major revision of U.S. immigration law. In response to the growing population of unauthorized immigrants within the United States, IRCA sought to “close the back door while opening the front door.” To accomplish this, IRCA included employer sanctions provisions, an enhancement of border control efforts, and a legalization program (MPI Staff 2005). Employer sanctions and border control were meant to stop the flow of unauthorized immigrants while the legalization program was an attempt to widen the legal channels.

The employer sanctions provisions of IRCA are especially pertinent to this investigation of the legality of state attempts to control immigration. As will be explored in greater detail, Arizona justified its strict system of employer sanctions by claiming it was merely enforcing the federal law. IRCA made the employment of unauthorized immigrants illegal and penalized employers who continued to hire unauthorized immigrants. Furthermore, it required that all employers verify the legal status of potential employees and maintain paperwork to confirm workers’ legal status (the I-9 Employment Verification Form.) Finally, the employer sanctions section of IRCA provided anti-discrimination provisions to ensure that employers did not refuse to hire foreign-born or foreign-looking applicants. It also established an immigrant anti-discrimination agency in the Justice Department (Tichenor 2002). Despite the

provisions in IRCA, widespread employer sanctions have not been enforced. In short, the personnel and funding necessary to enforce employer sanctions have not been provided (Brownell 2005). The weakness of employer sanctions did not allow for “the back door to be closed.”

To widen the legal channels to citizenship, IRCA allowed for the legalization of 3 million unauthorized immigrants in the United States. IRCA enabled unauthorized immigrants who were in the country before January 1, 1982 and seasonal agricultural workers who were employed for a minimum of 90 days in agriculture prior to May 1, 1986 to adjust their status. Over two million, or about 75 percent, of those who took advantage of the program were Mexican immigrants (Papademetriou 2004). Similar to the Immigration Reform Act of 1965, IRCA spawned new chains of migration. As those who were granted permanent residency became citizens, they were able to sponsor family members. It also increased unauthorized immigration as immigrants entered the United States without authorization to join legalized family members. Finally, others entered in the hope of a future legalization program. The continuance of unauthorized immigration and the apparent ineffectiveness of employer sanctions have resulted in IRCA being remembered as a failed attempt at immigration reform (Cornelius 2005; Massey 2001).

The next relevant revisions of U.S. immigration law were three acts in 1996 that limited immigrants' access to social benefits and legal protections: the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA), and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). PRWORA, a welfare reform

act, dramatically limited immigrants' eligibility for welfare. Legal permanent residents cannot receive food stamps or Supplemental Security Income (SSI) benefits.

Unauthorized immigrants are barred from receiving any benefits. It was left to the discretion of the states to provide immigrants with Medicaid and Temporary Assistance for Needy Families (TANF.) As a result, immigrant use of welfare benefits declined rapidly (Levinson 2002). PRWORA reaffirmed the right to distinguish between aliens and citizens, and for some, it reaffirmed the stereotype of immigrants as drains on public resources.

In an attempt to control unauthorized immigration and to exclude undesirable immigrants, the federal government passed IIRIRA and AEDPA. IIRIRA called for the doubling of border enforcement efforts, tightened asylum procedures, limited immigrants' access to public benefits, required U.S. financial sponsors for new immigrants, and established strict provisions for criminal and unauthorized immigrants (Tichenor 2002, 284). Of importance for this study, IIRIRA created the Basic Pilot Program, an electronic employment verification system. The use of this system is voluntary, but some states and cities are attempting to make its use mandatory. Along with IIRIRA, AEDPA made it easier for the government to arrest, detain, and deport non-citizens. Additionally AEDPA allowed for the expedited removal of non-citizens who arrive at U.S. airports without the proper documentation (Martin 2004).

As seen in the 1996 acts, the federal government has taken an increasingly strict stance towards authorized and unauthorized immigrants. In the next chapter, this trend will be even more evident as the recent buildup of the southern border is



discussed in reference to the new destinations of Mexican immigrants. In the last two decades, I argue that the plenary power principle now outweighs the personhood principle. Recent legislation reaffirms the right of the federal government to set exclusionary immigration laws and to distinguish between citizens and non-citizens in regards to services and rights.

Certain states and cities are following this trend by attempting to regulate the rights of immigrants within their communities. This, however, does not give state and local governments the unconstrained right to set immigration policies. As the case studies show, arguments against these local laws based on federal preemption have been relatively successful in blocking legislation. However, immigration law is a dynamic, subjective field. Depending on the judge, radically different conclusions can be reached about the intent of the federal government in regulating immigration. As a result, some places, like Arizona, have been successful in enacting immigration related legislation while the courts have blocked other attempts. Recent attempts to formulate immigrant-related ordinances have gained momentum, and important precedence is being set that will shape the future of immigration law.

## Chapter 2

Despite the reforms of the 1980s and the 1990s, unauthorized immigration to the United States has not abated. To the contrary, the population of unauthorized immigrants has grown substantially over the last twenty years. From 1990 to 2000 the population of unauthorized immigrants grew from 3.5 million to 8.5 million. As of 2008, there are an estimated 11.9 million unauthorized immigrants residing in the United States (Passel and Cohn 2009).<sup>1</sup> This rapid growth is incongruous considering the numerous policies enacted and the billions of dollars spent to deter unauthorized immigration.

Beginning in 1993, the federal government has emphasized border enforcement along the U.S.-Mexico border as its primary strategy to control unwanted immigration (Cornelius 2004). As examined in further detail in the following chapter, this strategy has not been successful. Rather, it only redirected the flow of unauthorized immigrants and increased the likelihood that they will settle in the United States.

Due to the growth of the unauthorized population and new migration patterns that have directed immigrants to new locations, some states and cities are struggling to incorporate these new communities of immigrants. Frustrated by the perceived inability of the federal government to enact comprehensive immigration reform, these

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<sup>1</sup> There is recent evidence, however, that due to the current economic crisis in the United States, unauthorized immigration has slowed for the first time in decades, and some immigrants are choosing to return to their home country due to the lack of employment.

states and cities have decided to regulate, on their own authority, the presence and rights of immigrants within their communities. Across the United States, local and state governments are attempting to formulate legislation and to pass ordinances regarding the rights of immigrants. In the first legislative quarter of 2008 alone, there were 1,106 immigrant-related ordinances under consideration in 44 states (Hegen 2008). The majority of these laws are aimed at expanding the rights of immigrants, however, a significant number of the proposed laws restrict the rights of immigrants (Laglagaron, Rodrigues, Silver and Thanasombat 2008). These restrictive ordinances encompass a variety of tactics from residential restrictions and employer sanctions to English-only policies and the denial of public services to unauthorized immigrants.

Farmers Branch, Texas and the state of Arizona have both attempted to enact anti-immigrant legislation; the outcomes of their efforts, however, have been radically different. This chapter describes the respective legislation, outlines the legal obstacles to enacting them, and compares the efforts of Farmers Branch and Arizona with the failed attempt of Hazleton, Pennsylvania to enact similar policies. This is an illuminating comparison because Hazleton's ordinance was the first of this type to be ruled unconstitutional by a federal court after a full trial. As a result, there is an extensive court decision outlining the constitutional barriers to the enactment of local immigrant-related ordinances. I argue that these ordinances are federally pre-empted and therefore, unconstitutional.

### **Residential Restrictions**

Farmers Branch, Texas, a suburb of Dallas, is currently in the process of trying to enact an anti-immigrant ordinance. The city council passed an ordinance in 2007

that prohibited apartment complexes and property managers from renting without first verifying a person's legal status. Landlords would be fined up to \$500 each day for violating the measure. The ordinance was endorsed 2-to-1 in a public vote (Garay 6/19/2007). It has faced legal challenges in court, and despite revising the ordinance multiple times, three injunctions have been ordered against it. Thus far, Farmers Branch has attempted to pass four versions of the ordinance to overcome the legal objections to its enforcement without success.

Since the original drafting of the ordinance in 2007, the city of Farmers Branch has been taken to court by a variety of plaintiffs including apartment owners and authorized and unauthorized residents of Farmers Branch aided by the American Civil Liberties Union (ACLU) and the Mexican American Legal Defense and Education Fund (MALDEF). The state court initially issued a temporary restraining order against the original ordinance because there was sufficient evidence to suggest that the approval and the adoption of the ordinance was done in violation of the Texas Open Meetings Act. In short, the plaintiffs argued that the ordinance was adopted behind closed doors without public input. To circumvent the restraining order, the city council put the ordinance up to public vote. It passed 4,058 to 1,941 (Garay 6/19/2007). The restraining order was extended, however, as the ordinance faced further challenges in court.

Two groups of plaintiffs -- the Villas Plaintiffs, apartment owners, and the Vazquez Plaintiffs, apartment residents-- remain embroiled in a legal battle with the city. The plaintiffs contend that federal law preempts the ordinance and that it violates the Contracts Clause of the U.S. Constitution, the right to due process, the Equal

Protection Clause of the U.S. Constitution, and the Texas Local Government Code (*Villas at Parkside Partners v. the City of Farmers Branch*). While attempting to enact its ordinance, the city of Hazleton, Pennsylvania faced challenges similar to those in Farmers Branch. The case of Hazleton thus serves as a lens through which to explore constitutional concerns surrounding the enactment of local immigration policies.

Hazleton is a small mining town in northeastern Pennsylvania. Between 2000 and 2006, the city grew in size from 23,000 to 33,000; the increase was largely due to an influx of Latino immigrants (*Lozano v. City of Hazleton*). In addition to this dramatic increase in Latino residents, anti-immigrant sentiment was inflamed by the alleged murder of Derek Kichline, a twenty-nine year old resident, by two unauthorized Dominican immigrants (McKanders 2007). (The charges against the two men have been dropped due to a lack of evidence. They have been sentenced to deportation, however, due to their unauthorized status.) In 2006, in the wake of this murder, the city council approved the Illegal Immigration Relief Act Ordinance (IIRA). The ordinance prohibited the employment and harboring of unauthorized immigrants. In addition, the city passed the Tenant Registration Ordinance (RO). Like Farmers Branch, it required apartment renters to obtain an occupancy permit. To receive the permit, renters had to prove that they were citizens or lawful residents (*Lozano v. City of Hazleton*). A landlord who allowed a tenant to rent without a permit received a \$1000 fine for each occupant without a permit and \$100 fine per occupant per day that the landlord allowed the tenant to remain without a permit. For

comparison with Farmers Branch, I focus on the arguments against the harboring provision of the IIRA and the arguments against the RO.

The plaintiffs in *Lozano v. Hazleton* argued that the harboring portion of the IIRA and the RO are conflict preempted because they are at odds with the federal immigration system. Conflict preemption exists when a state law is an obstacle to accomplishing an objective of Congress or when it is impossible to comply with both a state and federal law (*Lozano v. City of Hazleton*). The plaintiffs argued that the ordinances assumed that the federal government seeks the removal of all unauthorized immigrants and that a determination that a person cannot remain in the United States cannot be obtained outside of a formal hearing. If Hazleton were to enforce its law, therefore, it would run counter to federal immigration policy. This would violate the Supremacy Clause that states federal laws are the supreme laws of the country. Judge Munley agreed with the plaintiffs that the ordinances were conflict preempted.

In his decision, Judge Munley held that the federal government grants residence to many people who may not be technically lawfully present in the United States including asylum applicants, those who applied for an adjustment of status, those who filed for a suspension of deportation, and those paroled into the United States for emergency reasons. Judge Munley also held that changing status from unauthorized to authorized is a lengthy, complex process. Those who are taking part in the process often do not have the proper documents to claim the right to reside in the country. (Federal immigration officials have discretion to remove individuals with applications pending.) In Hazleton, these immigrants would be unable to rent, a

condition that effectively denies them the right to abode granted, however temporarily, by the federal government.

Finally, Judge Munley agreed that it is incorrect to assume that the federal government wants all unauthorized immigrants to be removed is false. The federal government may grant unauthorized immigrants permission to remain in the country at any time, and the decision to remove an immigrant can only be reached through the formal procedures set forth in the Immigration and Nationality Act. Furthermore, the provisions that relied on the Hazleton Code Enforcement Office to examine the paperwork for permits was in conflict with federal law because only an immigration judge can determine someone's immigration status (*Lozano v. City of Hazleton*).

The proposed ordinance of Farmers Branch, Texas faces the same preemption challenges. Like the Hazleton case, the ordinance was found to be an unconstitutional attempt to regulate immigration, owing to the fact that federal law preempted it. The city tried to assert that they were merely enforcing federal immigration law, but the standards used to determine an immigrant's legal status were not in line with the federal government's immigration system. Legal, temporary immigrants like students, for example, would not meet the requirements of the Farmers Branch's ordinance to prove legal residence. As a result, the ordinance is preempted because it is in direct conflict with the federal government's acceptance of legal, temporary immigrants (*Villas at Parkside Partners v. the City of Farmers Branch*). U.S. District Court Judge Sam Lindsay of the Northern District of Texas placed a permanent injunction on this version of the ordinance.

The claim to be enforcing federal immigration law is a common defense in cases like these (i.e. *Lozano v. City of Hazleton* and *Garrett v. Escondido*.) There is potential for legal enforcement of federal immigration laws by local entities. The Immigration and Naturalization Act allows for this:

[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States..., may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law (Immigration and Naturalization Act 1952, Section 287(g)).

Furthermore, in 2002, Attorney General John Ashcroft invited state and local police to enforce civil and criminal immigration laws. He remarked that state authorities have the “inherent authority” to enforce the laws (Pham 2004). Farmers Branch, however, had not at this point entered into any agreement with the Attorney General to enforce immigration laws.

Even if a city or state were to enter into an agreement with the federal government, there are serious logistical and constitutional problems with the local enforcement of federal immigration laws. First, it requires intensive training of local forces to ensure that they are in line with federal policy, and there have to be sufficient funds and personnel to carry out the orders. Even if local forces could be trained comprehensively in the federal enforcement of immigration law, such a policy results in a patchwork of enforcement. Neighboring cities and states could have completely different policies. As discussed previously, this would have serious legal, economic, and moral repercussions. Immigration law with its special concerns of national



security and foreign relations mandates uniform enforcement (Pham 2004). In addition to concerns about federal preemption and uneven enforcement, these ordinances frequently deny the right to due process.

The Fourteenth Amendment protects every *person*, not just every citizen, in the United States from the deprivation of life, liberty, or property without due process. Ordinances like the ones in Hazleton and Farmers Branch deny both residents and apartment owners the proper recourse to contest alleged violations. Judge Munley ruled that the Hazleton ordinance was unconstitutional because it did not give proper notice to tenants who face eviction, and it provided unclear instructions to landlords who want to contest a violation (*Lozano v. Hazleton*). This vagueness is also present in the Farmers Branch ordinance. Judge Lindsay ruled that the term “eligible immigration status” was unconstitutionally vague and that the ordinance did not sufficiently detail the documentation requirements for landlords (*Villas at Parkside Partners v. the City of Farmers Branch*).

Despite future revisions of the ordinance, it will likely face more legal obstacles.

As Judge Lindsay wrote,

Because Farmers Branch has attempted to regulate immigration differently from the federal government, the ordinance is preempted by the Supremacy Clause. The city’s attempts to save the ordinance fail because the proposed revisions would require the court to engage in the legislative function of redrafting the ordinance. Even if sections or phrases of the ordinance could be severed, the ordinance would suffer from the same- if not worse- vagueness problems (*Villas at Parkside Partners v. the City of Farmers Branch*).

In 2008, Farmers Branch tried another tactic to get the ordinance approved. It approached the court for a declaratory judgment. In other words, the city wanted the court to rule that the latest draft of the ordinance was legal and enforceable before it was challenged in court. This was the fifth draft of the ordinance presented in court, and Judge Lindsay dismissed the motion. He ruled that it was not the court's role to anticipate the challenges that might be made, and that this new version of the ordinance was "yet another attempt to circumvent the court's prior rulings and further an agenda that runs afoul of the United States Constitution" (*Villas at Parkside Partners v. the City of Farmers Branch*).

Despite these warnings from the judiciary, Farmers Branch continues its fight for the ordinance. In September 2008, the ACLU and MALDEF filed a lawsuit to prevent the latest version of the ordinance from being enacted. An injunction has been placed on the most recent version of the ordinance while it is being contested. A decision is still pending, but based on past rulings it is highly unlikely that the ordinance will be allowed to be enacted.

### **Employer Sanctions**

While Hazleton's IIRA was ruled unconstitutional, other localities have been successful in enacting restrictive legislation. Arizona is one such place. On January 1, 2008, the Legal Arizona Workers Act took effect. The law established strict penalties for employers who hire unauthorized workers. Upon the first violation, businesses face suspension of their business license for ten days and probation. A second violation could result in the revocation of the business's license. Furthermore, the law mandated the use of the E-Verify system, an online federal database that notifies employers of a

potential hire's authorization to work. The law is not to be applied retroactively; only people hired after January 1, 2008 must be screened using the E-Verify system. Prior to the passage of the law, only 9,000 of 150,000 employers in Arizona were registered for the E-Verify System (Chishti and Bergeron 2008).

Hazleton, Pennsylvania had a similar law included in its 2006 Illegal Immigration Relief Act Ordinance (IIRA). According to the ordinance, every business has to sign an affidavit affirming that it did not employ unauthorized workers in order to receive a business permit. If found to be employing unauthorized workers, the business had three days to correct the violation before its business permit was suspended. After a second violation, the license is suspended for twenty days while the business corrects the situation. Like Arizona, the ordinance mandated the use of the Basic Pilot Program (the trial version of the E-Verify system) (Ordinance 2006-18). The plaintiffs in *Lozano v. City of Hazleton* claimed that IRCA preempted the employment provisions of the IIRA. The plaintiffs were successful in their argument, and the employment provisions were declared unconstitutional.

Like Hazleton, the Arizona law faced strong opposition from multiple groups. Labor groups, such as the Arizona Employers for Immigration Reform (AZEIR), oppose the mandatory use of the E-Verify system. They claim it is a flawed system that does not work and adds undue burdens to employers. Some larger companies, for example, report having to hire additional personnel to oversee the company's compliance with the new system (Hanson 11/28/2007). Furthermore, businesses fear that they will be unable to meet their labor demands if the legislation forces immigrants to seek employment in other states. Governor Janet Napolitano reluctantly

signed the bill and called it a “business death penalty” (Chishti and Bergeron 2008). Immigrant-rights groups protested the law on grounds that the law does not provide due process rights and that it will lead to discrimination against foreign-born workers.

The ALCU and MALDEF filed a lawsuit seeking an injunction of the law, as did a consortium of Arizona business associations. The plaintiffs claimed that the act was federally preempted and that it denied procedural due process. On February 7, 2008, Judge Neil V. Wake of the United States District Court for the District of Arizona dismissed the case. In his opinion, he wrote that the case lacked for subject matter jurisdiction and that there was no justifiable case or controversy before the Court (*Arizona Contractors Association, INC., et al. v. Criss Candelaria and Valle Del Sol, INC. v. Terry Goodard et al.*) How did a similar act get overturned in Hazleton, Pennsylvania, but pass in Arizona? An examination of the judges’ opinions reveals the subjectivity of immigration law.

At issue in both cases was whether IRCA preempted any state or local attempt at employer sanctions. IRCA prohibits the employment of unauthorized immigrants and immigrants without work authorization. Under IRCA, an employer must fire an unauthorized worker upon discovery of his or her status; failure to do so can result in civil fines and criminal prosecution. Within IRCA, the federal government clearly states its intent to fully occupy the field of employer sanctions. It states, “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens” (8 U.S.C. §

1324a(h)(2)). A crucial determinate in these cases was the judges' interpretation of the statement of preemption.

The city of Hazleton and the state of Arizona both argued in court that they were merely enforcing the employer sanctions found in IRCA. The city of Hazleton claimed that it was following the preemption claim found in IRCA by avoiding civil and criminal sanctions and merely suspending a business's permit which is permissible under the "licensing and similar laws" provision. Judge Munley rejected Hazleton's interpretation of the clause; he equated the revocation of a business license with the "ultimate sanction." As a result, he reasoned IRCA expressly preempted Hazleton's employer ordinance. As Munley held, "It would not make sense for Congress in limiting the state's authority to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty" (*Lozano v. Hazleton*).

One House subcommittee clarified what sanctions are permitted under IRCA in House Report No. 99-682(1). The report stated that the federal government does not preempt the ability of local governments to suspend, revoke, or refuse a business license to a company that has violated the provisions of IRCA. This report, however, was not based on a larger consensus. Even if this interpretation is valid, Judge Munley found that Hazleton's act was still preempted because the city's ordinance was significantly different than IRCA. One main difference is that the IIRA created a system in which a "lawful" worker who was terminated by an employer who used "unlawful" workers could seek damages against the employer. This clearly falls outside the scope of IRCA.

Judge Munley found that, in addition to express preemption, implied preemption occurred with regards to Hazelton's IIRA. As discussed in the previous chapter, preemption can be implied even if it is not explicitly stated if there is evidence of field preemption and/or conflict preemption. Field preemption means that federal regulation is found to be so pervasive that it is reasonable to assume that Congress has intentionally left no room for the states to supplement it. Conflict preemption exists when it is impossible to comply with both the local and federal law. Judge Munley found that both existed in regards to Hazelton's IIRA.

In establishing field preemption, Munley supported previous court decisions (i.e. *Hoffman Plastic Compounds Inc. v. N.L.R.B.*) that found IRCA to be a "comprehensive scheme," and he affirmed the long tradition of classifying immigration regulation as a federal matter. He wrote, "Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions. Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives" (*Lozano v. Hazleton*).

Finally, Judge Munley found it to be conflict preempted. Though both IIRA and IRCA had the similar goal of discouraging the employment of unauthorized immigrants, the ways of accomplishing this goal were different. IIRA required all categories of workers to have their status verified; IRCA did not require this of some employees such as casual domestic workers and independent contractors. Furthermore, IIRA mandated the use of the Basic Pilot Program, a voluntary and experimental

program created by Congress. IRCA only required the completion of the I-9 form. Finally, IIRA did not have the procedural due process rights and anti-discrimination framework that IRCA did. In conclusion, Judge Munley wrote, “Specifically, in this case, the federal government in exercising its superior authority in the field of immigration has enacted a complete scheme of regulation on the subject on the employment of unauthorized aliens. Hazleton cannot conflict, interfere, curtail or complement this law” (*Lozano v. Hazleton*). Hazleton’s IIRA was preempted because it did conflict and interfere with IRCA.

Judge Munley’s decision displayed sound legal reasoning, and it properly outlined the constitutional challenge to local employer sanction laws. In the Arizona case, however, Judge Neil Wake reached radically different conclusions about the intent and purpose of IRCA. Wake found that IRCA purposely provides significant space for state governments to combat the employment of unauthorized workers through licensing and similar laws. As he wrote, “The Act...is a conscious attempt to address this problem at the State level by imposing sanctions by ‘licensing and similar laws’ upon those who employ unauthorized aliens, as expressly permitted by IRCA” (*Arizona Contractors Association, INC., et al. v. Criss Candelaria and Valle Del Sol, INC. v. Terry Goodard et al.*) As a result, Judge Wake concluded that the Act is not federally preempted. In his decision, he systematically discounted the plaintiff’s claim of federal preemption.

First, he established that immigration control and employer sanctions are separate actions. While Judge Wake did not contest the plenary power of the federal government to regulate immigration, he did not view the regulation of the employment

of immigrants as the exclusive purview of the federal government. “Unlike interstate transportation, foreign affairs, and even immigration, employment of unauthorized aliens in neither intrinsically nor historically an exclusive concern of the federal such ‘that the federal system will be assumed to preclude enforcement of state laws on the same subject’” (*Arizona Contractors Association, INC., et al. v. Criss Candelaria and Valle Del Sol, INC. v. Terry Goodard et al.*).

I find this argument problematic. With the passage of IRCA and IIRIRA, the federal government made it clear that it is utilizing a two-pronged approach to immigration control: border enforcement and employer sanctions. Thus, it does not follow that employer sanctions are not a direct attempt to control immigration. This kind of regulation can only be enacted and enforced by the federal government. Therefore, only the federal government can mandate the use of the E-Verify system and only the federal government can establish the proper due process procedures to ensure that the prosecutions of IRCA violations are done fairly and properly.

Judge Wake, however, argued that certain states, like Arizona, have a vested interest in deterring unauthorized immigration and that the federal government recognized this interest and empowered states to pursue this goal. Unlike Judge Munley, Wake did not see a problem with leaving the “ultimate” sanction to the state. He argued that this was purposeful on the part of the federal government. “If the authorized state and federal sanctions are disproportional in severity, that is because Congress recognized the disproportional harm to core state and federal responsibilities from unauthorized alien labor” (*Arizona Contractors Association, INC., et al. v. Criss Candelaria and Valle Del Sol, INC. v. Terry Goodard et al.*). According to Judge



Wake, since some states bear the “costs” of unauthorized immigration in disproportional amounts, these states should be allowed to establish “strong deterrence” legislation.

It is true that the federal government has directed its efforts and spending in certain regions of the country. For example, it has funneled billions of dollars into border fortification along select areas of the southern border while largely neglecting interior enforcement measures (Brownell 2005; Cornelius 2004). It is the federal government’s prerogative to take such measures, however, and not the prerogative of state and local governments. As mentioned previously, if state and local governments were able to select which policies to enforce and in what manner, there would be a patchwork system of enforcement. This is unconstitutional and would have serious impact on the ability of the federal government to effectively regulate immigration.

Despite claims of merely enforcing IRCA, the Arizona Legal Workers Act goes above and beyond this claim, adding new burdens onto to employers by mandating the use of the E-Verify system. Judge Wake, however, argued that even though the use of the system is not mandatory at the federal level, it did not follow that it could not be made mandatory at the state level. “Federal policy encourages the utmost use of E-Verify. The Act effectively increase employer use of the system with no evidence of surpassing logistical limits, and it does so in the context of a licensing sanction law that is within the police power of the state as expressly recognized by IRCA” (*Arizona Contractors Association, INC., et al. v. Criss Candelaria and Valle Del Sol, INC. v. Terry Goodard et al.*).

This, however, is not a convincing argument. In 1996, Congress declared “that the Attorney General may not require any person or other entity to participate in [E-Verify]” (IIRIRA 1996). If the federal government, which has the plenary power to regulate immigration, does not have the right to mandate the use of the system, why would a state be able to do so? The mandatory use of the E-Verify system is clearly overstepping the regulatory scheme put into use by the federal government. By attempting to regulate immigration through its own system of employer sanctions and by mandating the use of the E-Verify system, the Legal Arizona Workers Act is attempting to usurp the exclusive power of the federal government to regulate immigration. Furthermore, as will be discussed in the following chapter, the flaws of the E-Verify system make it likely that the Legal Arizona Workers Act will unduly affect immigrants and Latinos. The complexity of the system and the repeal process erode employee’s right of due process. For the reasons, the Legal Arizona Workers Act is unconstitutional.

### **Conclusion**

These local ordinances, which seek to restrict unauthorized immigrants’ right to reside and to work in these communities, are unconstitutional. They would result in patchwork enforcement, they abrogate the right of due process, and they are in conflict with the federal immigration scheme. Unfortunately, there is significant popular support for these measures, and politicians vow to pursue these policies despite significant legal obstacles to their enactment. While court rulings may not dissuade communities from pursuing these policies and while there has been some success in enacting these measures as seen in the case of Arizona, the severe repercussions of

these ordinances on the local economy and the community's cohesion provide compelling rationale to avoid similar policies.

### **Chapter 3**

What is motivating these communities to enact immigrant-related legislation? Is it just a reaction to the increased number of foreign-born? While demographic changes play a motivating role in the recent trend of local level immigration laws, it is specifically the growth in the Mexican population that is causing such extreme reactions to the recent influx of unauthorized immigrants. To support this claim, I trace the growth of the Mexican immigrant population, explain how Mexican immigrants have become synonymous with “illegal” immigration, and show how this popular stereotype has influenced and shaped the public debate surrounding these ordinances. I argue that these ordinances aim to exclude Latino, in most cases Mexican, immigrants. As a result, these ordinances have severe negative impacts on the community’s economy and social cohesion.

#### **New Trends in Mexican Immigration and the Increased Visibility of Mexicans**

As of 2008, 12.7 million Mexican immigrants reside in the United States. They are the largest immigrant group in the United States, accounting for 30.7 percent of all U.S. immigrants. Mexican immigrants also make up 59 percent of the unauthorized population (Pew Hispanic Center 2009). There has been a long history of Mexican immigration to the United States, but since 1970 there has been a 17-fold increase in the number of Mexican immigrants. This latest wave of Mexican immigrants is selecting new locations across the United States as a result of U.S. immigration policies and economic conditions (Light 2007). As a result, Mexican immigrants are now present in states, cities, and towns that were previously unaffected by Mexican

immigration. Even in areas familiar with Mexican immigration, like Arizona, the recent, dramatic increase in the number of Mexican immigrants has alarmed some politicians and residents.

There are three likely explanations for the dispersion of Mexican immigrants. First, as the result of the federal government's selective militarization of the southwest border during the last ten years, unauthorized Mexican immigrants have chosen new entrance points along the border (Durand, Massey, and Capoferro 2005). The Border Patrol has concentrated its efforts along the four traditional corridors: El Paso, San Diego, the Rio Grande Valley, and central Arizona. The government has spent billions of dollars on initiatives such as Operation Gatekeeper in San Diego that have increased the number of border patrol agents and built both physical and virtual fences along the border. Instead of halting clandestine entry, this strategy only redirects the migrant flows (Durand, Massey, and Capoferro 2005). Immigrants cross through the "gaps" in the fence. The government assumed that the dangerous terrains between the fences, mainly deserts and treacherous mountains, would act as natural fences. Instead, unauthorized immigrants rely on *coyotes*, people smugglers, and risk their lives to enter the United States (Cornelius 2005).

An increasingly popular route is through the deserts of Arizona and New Mexico. As a result, the Tucson sector became the most popular entrance point for unauthorized immigrants crossing the United States-Mexico border in 2004 (Cornelius 2005). This led to an increase in the number of Mexican immigrants living in Arizona. Traditionally, as a result of its history and proximity to Mexico, Arizona has been a gateway state. The number of Mexican immigrants living there, however,

dropped steadily from the 1920s onwards as California became the primary destination for immigrants due to its booming economy and the deepening of migrant networks there. In 1920, 14.1 percent of all Mexican immigrants lived in Arizona compared to 3.3 percent in 1980 (Durand, Massey, and Capoferro 2005). In the last two decades, however, Arizona's immigrant population has grown mirroring the nationwide trend. The growth of the foreign-born population in Arizona, however, is unique because the foreign-born are much more likely to be Mexican. They account for 65.9 percent of the foreign-born in Arizona in comparison to the national average of 30.4 percent. Since Mexican immigrants constitute the majority of the unauthorized population, Arizona has a much higher percentage of unauthorized immigrants in its foreign-born population; 45 to 48 percent are unauthorized (the national average is 30.6 percent according to the Pew Hispanic Center) (2008). The growth of the Mexican unauthorized population in Arizona is a central motivating factor in its adaptation of the Legal Arizona Workers Act.

In addition to the militarization of the border, the unintended consequences of IRCA led to new populations of Mexican immigrants. The legalization of 2.3 million immigrants gave them the freedom to move throughout the United States in search of better jobs (Papademetriou 2004). Furthermore, IRCA spawned new chains of migration in three ways: naturalized citizens were able to sponsor family members, some new immigrants came in the hope of another legalization program, and others came without authorization to join their relatives, many of whom were residing in new communities across the United States.

Finally, California suffered a recession in the late 1980s, which fueled an anti-immigrant movement in the 1990s. For example, Californians voted for Proposition 187, a later abandoned attempt to block unauthorized immigrants' access to social services, health care, and public education. The lack of employment opportunities and the anti-immigrant sentiment made California a less attractive destination (Durand, Massey, and Capoferro 2005). Mexican immigrants began to move to other states with better economic opportunities.

In addition to new migration routes and chains, the suburbanization of immigration helps explain the recent surge in local level attempts to control immigration. Communities that had largely been isolated from the immigration debate are now struggling to incorporate large numbers of immigrants. In 2000, of the 94 percent of the United States' immigrants that lived in metropolitan areas, 52 percent lived in suburbs (Singer 2008, 10). This is the first time in the history of the United States that immigrants are more likely to live in the suburbs than in urban areas. Traditionally, immigrants centered in large cities. The move to the suburbs, where there were generally better schooling and housing options, was a sign of success and assimilation. Recent waves of immigrants, however, are likely to move directly into the suburbs.

The decentralization of cities helps explain this trend. As people moved out of urban centers in large numbers after World War II, the surrounding smaller cities and towns grew. To meet the needs of the growing population in these areas, commercial development occurred rapidly in the suburbs starting in the 1970s. Mega stores, strip malls, and shopping centers were built in land that was previously farmland. Major

corporations followed this trend and established headquarters outside of urban centers in the 1980s (Hardwick 2008). As metropolitan areas grew, immigrants arrived to fill the labor demands of the growing economies. Demographer Audrey Singer calls these areas that have attracted large numbers of immigrant in the last twenty-five years “emerging gateways” (Singer 2008).

The Dallas metropolitan area, which contains Dallas and Forth Worth, medium-sized cities like Plano and Irving, and small cities like Farmers Branch is an emerging gateway. From 1980 to 2005, the total number of foreign-born in the area increased eight-fold. As of 2005, immigrants constituent 17.7 percent of the total population; this is up from 4.1 percent in 1980 (Singer 2008, 27). The dynamic growth of the economy of the Dallas metropolitan area in the last two decades has attracted immigrants into the area. Major companies like ExxonMobil, JC Penney, and Nokia moved into the Dallas metropolitan area beginning in the 1990s. According to Richard Jones, this growth “has created a demand for ‘high-touch’ jobs to serve the ‘high-tech’ professionals and businesses who demand them” (Jones 2008, 7). Immigrants often fill these “high-touch” service jobs. Farmers Branch, Texas is a perfect example of the suburbanization of immigration. As home to more than 80 corporate headquarters, Farmers Branch attracts large numbers of immigrants to fill the service jobs accompanying the suburb’s economic growth (Garay 11/14/2006).

The demographic changes of Farmers Branch, Texas correspond to the growth of the Dallas metropolitan area and to the changing pattern of Mexican immigration. Farmers Branch is a small city with an estimated population of 28,750 in 2008 (City of Farmers Branch Website). It has experienced a steady growth over the last twenty



years. The most significant change is the growth in the number of Latino residents. For the first time in its history, Latinos are now the majority in Farmers Branch (Sandoval 08/27/2006).

Immigration is a major source of the growth in the Latino population. From 1980 to 2000, the percentage of foreign-born grew from 5 percent to 25 percent (Brettel 2008, 59). As of 2007, foreign-born residents make up 28.4% of the population (U.S. Census Bureau 2008). Three out of four of the foreign-born are from Latin American countries; 58 percent are from Mexico and 17 percent are from El Salvador (Brettel 2008, 60). As will be discussed in further detail, Farmers Branch's residential ordinance is aimed at these Latino immigrants.

In addition to the dispersion of immigrants across the country, the increased numbers of Mexican immigrants in the United States increases the visibility of the Mexican immigrant community. As mention earlier, the population of Mexican immigrants grew exponentially in the last three decades. Between 1980 and 2000, the Mexican immigrant population in the United States increased from about 2.1 million to 9.2 million (Light 2007). This is a result of economic conditions in Mexico and the United States, U.S. immigration policies, and the deepening of migrant networks within the United States.

The likelihood of permanent settlement has increased along with the population size of Mexican immigrants. Increased border enforcement, superior economic opportunities in the United States, and the growing incidence of female and child immigration have encouraged long-term settlement in the United States. The propensity to settle in the United States is a significant change from past migration

patterns, in which the majority of Mexican migrants were unaccompanied males who engaged in circular migration. They would work in the United States for part of the year and then return to their hometowns in Mexico for extended stays (Appleby, Moreno, and Smith 2009). Today, Mexican immigrants are staying longer in the United States, bringing their families with them, and establishing roots in American communities (Cornelius 1992; Marcelli and Cornelius 2001; Passel 2006, 2007).

The presence of Mexican immigrant families increases their visibility in the community as mothers and fathers enter the workforce, engage in the community, and send their children to local schools. These families, however, are not always welcomed. Instead Mexican immigrants are framed largely as “undesirables” in the current debate on immigration. I argue that the increased visibility of Mexican immigrants combined with the pervasive stereotypes of Mexican immigrants has inspired the recent rash of anti-immigrant legislation. In particular, Mexican immigrants are portrayed as threat to the United States’ security, social unity, and economy.

### **“The Mexican Problem”**

Mexican immigration to the United States has become synonymous with “illegal” immigration. Historian Mae M. Ngai traces the development of the origin of the “illegal alien” in her book, *Impossible Subjects: Illegal Aliens and The Making of Modern America* (2004). Before World War I, the southern border of the United States was not patrolled, and Mexican immigrants, mainly agricultural, railroad, and mine workers, were able to move freely across the border. This changed, however, with the enactment of the Immigration Act of 1924, which established national origins quotas

and a racial-ethnic hierarchy for potential immigrants. Originally, Mexicans were not assigned numerical limits, but the visa-entry and border inspection policies incorporated in the act made most Mexican immigrants “illegal” immigrants. In addition to the new entry requirements, the creation of the Border Patrol in 1924 “raised” the border; it established a clear division between the two countries and their residents. As a result of these developments, Ngai writes, “[d]uring the 1920s, immigration policy rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration” (Ngai 2004, 67).

Even while Mexican immigrants were beginning to be viewed as “illegal,” they simultaneously occupied an essential role in the U.S. economy by serving as *disposable* labor (Johnson 2004). In the early 1900s they filled vital roles in the southwest economy. However, as a result of the Great Depression, over 400,000 Mexicans and Mexican-Americans were repatriated during the early 1930s. Once the economy rebounded, however, Mexican labor was sought out once again. The Bracero Program, which lasted from 1942 to 1964, imported, on average, 200,000 *braceros*, temporary workers, a year (Ngai 2004). The program did not provide enough visas, so unauthorized immigration to the United States continued. Additionally, growers preferred unauthorized immigrants to *braceros* because they could pay them lower wages.

In the 1950s, the federal government tried to stop unauthorized immigration. In June 1954, Operation Wetback began; the INS apprehended over 800,000 Mexican immigrants and returned them to Mexico. Thousands of others returned on their own initiative out of fear (Ngai 2004). The program was a temporary “success;” however,

unauthorized immigration to the United States continued. The actions of the United States' government, however, cemented the imagery of Mexicans as permanent foreigners- disposable people with no right to remain in the United States.

As a result of this history, Mexican immigrants have not been lionized as the founders and builders of this country as other immigrant groups have. Instead they continue to be portrayed as permanent foreigners who pose a threat to the United States. As Lina Newton writes, "Currently, the word 'Mexican' in the United States is pejorative; it automatically conjures a vision of something un-American, even menacing" (Newton 2008, 26). This imagery has only been reinforced since September 11, 2001. Following the terrorist attacks on the United States, immigration was definitively linked to national security. The Immigration and Naturalization Service was abolished, and today citizenship, naturalization, and border security are placed under the auspices of the Department of Homeland Security, which was founded in 2003.

In addition to the bureaucratic changes, border fortification has increased since September 11, 2001. A porous border is now viewed as an entry way for would be criminals and terrorists. Despite the fact that none of the terrorists involved in September 11<sup>th</sup> attacks crossed over the southern border and that the vast majority of unauthorized immigrants come for economic reasons, the southern border is now the center of the national security debate. The emphasis on border control as a way of protecting the United States has reinvigorated the efforts of and increased the appeal of civilian border patrol groups like the Minuteman Civil Defense Corps, which will be discussed in greater detail in this chapter. Restrictionist groups can now couch their

anti-immigrant sentiment in terms of national security and respect for the United States' law instead of openly discriminatory language. This, however, has not decreased the use of the stereotype of Mexican immigrants as permanent foreigners.

Mexican immigrants are viewed not only as a security threat, but also a cultural threat to the homogeneity of the United States. In addition to their skin color and their continued use of Spanish, Mexicans are viewed as permanent foreigners because they are seen as unwilling to integrate. The continual flow of immigrants from Mexico sustains ties with its homeland as seen in the retention of Mexican cultural practices within the United States and the participation of immigrants in transnational organizations. Rather than adapt to the United States, people fear Mexicans are changing the United States. Some view the retention of cultural practices as a threat to the United States' social cohesion. According to the influential Harvard University political scientist Samuel Huntington, Mexican immigration is "blurring the border between Mexico and America, introducing a very different culture, while also promoting the emergence, in some areas, of a blended society and culture, half-American and half-Mexican" (Huntington 2004, 221). Not only do Mexican immigrants refuse to assimilate into the "mainstream," they are also depicted as an economic threat to the country.

There is much debate about the economic costs and benefits of immigration for the United States, but Mexican immigrants frequently are viewed as a drain on the economy. According to this argument, they take away jobs from and depress the wages of the working class by their willingness to work for less. Furthermore, Mexican immigrants are viewed as opportunistic. They come here specifically to take

advantage of U.S. health and educational systems. This is seen in the public debate in Farmers Branch where immigrants are blamed for the alleged deterioration of the public schools. Unauthorized immigrants, in particular, are viewed as a drain on public resources because some work informally and do not pay taxes. They are seen as undeserving of benefits since they allegedly contribute nothing to society.

In addition to the stereotypes of Mexican immigrants used in the media and public discourse, the use of the term "illegal alien" and the pervasive assumption that all unauthorized immigrants are Mexican immigrants- and vice versa- enables the further dehumanization of Mexican immigrants. While Mexican immigrants account for 59 percent of the total unauthorized population, over 40 percent of Mexican immigrants are authorized (Batalova 2008). The composition of the Mexican immigrant population is complex; Mexicans range in status from unauthorized immigrants to naturalized citizens. In the media, however, Mexican immigrants now represent unauthorized immigration. As Lina Newton writes, "This complexity of statuses as become subsumed as the United States has grown consumed with the specter of illicit Mexican immigration" (Newton 2008, 28). The debate over immigration in both Arizona and Farmers Branch, Texas illustrates how persuasive the imagery of the Mexican immigrant as the "threatening, foreign, and illegal" is.

### **Anti-Immigrant or Anti-Mexican?**

Is there something besides the increased number of foreign-born that is motivating these laws? Does it matter from where these foreign-born are coming? In this section I explore the groups and personalities involved in the debate over unauthorized immigration and the justifications for these laws. While these

communities have serious concerns due the recent influx of immigrants, I argue that it is impossible to deny the role that ethnic discrimination and xenophobia play in advancing the legislation (Brettel 2008; Newton 2008). The language and tactics used to support these attempts underlines the vulnerability of the Mexican immigrant community to racial profiling and discrimination.

The debate in Arizona over unauthorized immigration is a particularly heated one. As the entry state for more than 40 percent of unauthorized immigrants, Arizona has struggled to control its border and to incorporate recent immigrants (Cornelius 2005). Journalist Malia Politzer claims, "in no state, perhaps, is the debate more polarized than in Arizona" (Politzer 2007). There are strong interest groups on both sides, and influential (and notorious) mouthpieces that garner national attention. As Robin Hoover, the president of Humane Borders, a non-profit group aimed at stopping immigrant deaths along the border, says, "We've got people who all say they want to save America -- and they're fighting like cats and dogs" (Pomfret 6/25/2006). This intense debate has left many Mexicans, and Latinos in general, from unauthorized immigrants to U.S. born citizens feeling unfairly targeted and unwelcomed in certain counties of Arizona.

Arizona is headquarters to multiple groups on both sides of the debate. The Sanctuary Movement of the 1980s, which provided shelter to refugees from Central America who were unable to obtain political asylum, originated with religious groups in Tucson. This tradition of pro-immigrant groups continues today. Humane Borders, for example, was founded in Tucson in 2000. To prevent deaths due to clandestine entry over treacherous terrain, Humane Borders places water in the desert for

immigrants and educates about the dangers of the border. There is also an umbrella organization, No More Deaths, which encompasses multiple smaller immigrant rights groups. Together these groups form “search and rescue” patrols to look for immigrants who need food, water, and medical assistance (Politzer 2007).

There are, however, other groups that patrol the border for radically different reasons. Groups like the Cochise County Concerned Citizens (CCCC) and Ranch Rescue patrol the private lands of ranchers and participate in citizen arrests of trespassers who are mainly unauthorized immigrants. The most notorious group is the Minuteman Civil Defense Corps (MCDC), a splinter group of the Minuteman Project. It is based in Peoria, Arizona (Politzer 2007). The stated mission of the MCDC is to “to see the borders and coastal boundaries of the United States secured against the unlawful and unauthorized entry of all individuals, contraband, and foreign military” (MCDC Official Website). The MCDC patrols the border, reports on the movement of unauthorized immigrants and their *coyotes*, and uses headlights and megaphones to intimidate would be immigrants.

The group claims it is not racist; Chris Simcox, the founder of MCDC, has been particularly proactive in reforming the group’s image. Using the rhetoric of national security, MCDC is attempting to establish itself as a legitimate enforcer of the country’s laws. Simcox denies any racial profiling or hostility towards particular ethnic groups. This, however, contradicts earlier statements made by Simcox before his “image makeover.” He was quoted in the media saying inflammatory statements about Mexican and Central American such as, “They have no problem slitting your throat and taking your money or selling drugs to your kids or raping your daughter and



they are evil people" (Holthouse 2005). The criminal, subhuman image of Mexican immigrants continues to be prevalent in the group's popular discourse. In Arizona, it is not only interest groups involved in patrolling the border. Elected officials, such as Sheriff Joe Arpaio of Maricopa County, encourage the participation of citizens in patrolling the border and their communities for unauthorized immigrants.

Sheriff Joe Arpaio of Maricopa County is famous (some would say infamous) for his unorthodox tactics to combat crime. He is known for making prisoners wear pink underwear, eat green baloney sandwiches, and work in chain gangs (Billeaud 04/26/08). Arpaio is equally zealous in pursuing unauthorized immigrants. He interprets laws to the broadest application to allow for extra measures to stop unauthorized immigration. For example, Arizona passed a law meant to penalize smugglers in 2006. Arpaio took it a step further. In addition to penalizing smugglers, he has begun incarcerating smuggler's clients for "conspiring with smugglers." He uses a "posse," a force of volunteers, to patrol the desert and to report on the movements of *coyotes* and unauthorized immigrants. While the posse cannot make arrests, Arpaio has instructed his deputies to arrest and detain *coyotes* and their clients (Archibold 5/10/06). In a separate attempt to "crack down" on unauthorized immigrants, Arpaio founded a hotline for people to call in and report suspected unauthorized immigrants.

Arpaio's tactics pose serious legal problems. First, the use of civilians to monitor the border is problematic. While they are not authorized to arrest people, having them be the eyes and ears of the police force is unacceptable. They are not trained in the complexity of immigration law, and measures like this and the hotline

inherently encourage racial profiling. What does an unauthorized immigrant look like? Does anyone with a dark complexion, an accent, or a “foreign” look necessarily deserve close scrutiny?

Sheriff Arpaio is adamant in his denial of racial profiling. He says his deputies must find other cause, such as minor traffic violations, to investigate someone’s status. He claims his tactics are not targeted at Mexicans but rather “illegals.” "I have compassion for the Mexican people, but if you come here illegally you are going to jail"(Archibold 5/10/06). While he may be sincere in his comments, the automatic, pervasive assumption that all Mexicans are unauthorized immigrants and vice-versa necessarily means that Mexican people, and generally people of Latino descent, are targeted in these policies and in public debate.

Furthermore, there is sufficient evidence of racial profiling for the court to consider a lawsuit against him. In February 2009, a federal court ruled that a class action lawsuit accusing Joe Arpaio of illegally profiling Latinos could proceed. The federal district court of Arizona found in preliminary proceedings that Latino appearance is not justifiable cause for suspicion and that stops for minor traffic violations do not give police the right to question a person’s immigration status (ACLU Press Release 2/11/2009). These claims of racial profiling, however, have not diminished Arpaio’s popularity in Maricopa County.

Both Simcox and Arpaio have benefited from their fight against unauthorized immigration. Chris Simcox has used the rhetoric of national security and highly publicized “education” campaigns to catapult his group into the national spotlight. This former kindergartener teacher can now be seen on national media talking about

“illegal immigration.” This strategy has granted him legitimacy in some circles. Recently, Simcox announced plans to challenge Senator John McCain in the 2010 Republican primary (Associated Press 04/22/09). Arpaio’s tough stance on immigration has also gained him national prominence and electoral success. He has an inordinate amount of press coverage; Arpaio is mentioned in the *Arizona Republic*, Phoenix’s main newspaper, at a rate of 2.5 times per day (Hensley 09/29/08). He enjoys strong approval ratings, and he has been re-elected an unprecedented four times.

Like Arizona, charismatic leaders and strong emotions mark the debate surrounding the Farmers Branch ordinance. The main proponent of the law is former council member Tim O’Hare, a native of Farmers Branch, a local football star, and a young, attractive lawyer in the city. His campaign against unauthorized immigration as a councilman garnered him immense popularity, and he was elected mayor of Farmers Branch in May 2008 (Formby and McCann 5/11/2008). While it is outside the scope of this thesis, an investigation into the personal motives of these charismatic leaders and their appeal would add another layer of analysis in describing how these local laws gain momentum.

According to Tim O’Hare, the proposed law is race neutral and designed to protect the quality of life in Farmers Branch. It does not single out any one group according to O’Hare, but rather, it is meant to discourage all unauthorized immigrants. In particular, he claims that “illegal” immigrants are responsible for the rising crime rates, lowered property values, and lowered school performances. There is not evidence, however, to support his claims. Crime is down 8.5 percent, and schools have

improved in ratings from acceptable to recognized. Home values have increased by 0.9 percent; this is the lowest increase in recent history, but it must be viewed in the larger context of the nationwide mortgage crisis and economic downturn (Sandoval 8/27/2006). Despite claims of non-discrimination, it is clear that the target of the ordinance is Latino, particularly Mexican, immigrants.

Both politicians and residents expressed nativist and racist sentiment in the public debate and media coverage surrounding the Farmers Branch ordinance. Politicians, however, generally attempt to veil their anti-Mexican sentiments in their comments. The *Dallas Morning News* reported, for example,

‘The reason I got on the City Council was because I saw our property values declining or increasing at a level that was below the rate of inflation,’ Mr. O’Hare said. ‘When that happens, people move out of our neighborhoods, and what I would call less desirable people move into the neighborhoods, people who don’t value education, people who don’t value taking care of their properties’ (Sandoval 8/21/2006).

Three out of four of these “less desirable people” are Latinos, and almost 60 percent of them are Mexican. It is clear whom O’Hare is targeting in his comments. Fellow councilman, Ben Robinson, called for an end to the “invasion of illegal immigrants” (Korosec 1/23/2007). While he did not specify the Mexican “invasion,” the imagery of an invasion is widely used in discussing the influx of Mexican immigrants over the southern border. Additionally, the ordinance by regulating the renting of apartments is clearly targeted towards Latino families. In Farmers Branch, 42 percent of Latino headed households live in apartments versus 14 percent of white households (*Reyes et al. v. City of Farmers Branch*).

The residents of Farmers Branch who support the ordinance are more blatant in their comments. In letters to the editor, residents complain that society is changing with the prevalence of Spanish and that the school system is being forced to lower its educational standards to accommodate non-English speakers. Also people complain that immigrants are cramming into small spaces and bringing down the appeal of the area (Brettell 2008, 79). As seen in the following resident's statement, the immigrants of concern are Latino immigrants. "'They're taking our jobs, our homes,' said Debbie Rawlins, 48, of Farmers Branch. 'There's unemployment partly because of the Hispanics. The lady that took my job is Hispanic, and she's bilingual'" (Associated Press 8/26/2006). The sentiments expressed in the local discourse of Farmers Branch mirror the stereotypes and language used in the national media when discussing Mexican immigration.

Clearly, Councilman O'Hare's specific complaints about unauthorized immigrants are unfounded. There may be, however, legitimate economic concerns motivating local immigrant-related ordinances across the country. As the Congressional Budget Office reports, local governments bear the costs of unauthorized immigration. The federal government restricts unauthorized immigrants' access to certain federal programs, such as Social Security, but it requires that local governments provide certain services to residents regardless of their legal status. They must provide education, emergency health care, and law enforcement for all (Congressional Budget Office 2007). The federal and state levels often benefit from the taxes collected from unauthorized immigrants, but this is not the case for counties and cities.

In 2006, the Texas Office of the Comptroller released “Undocumented Immigrants in Texas: A Financial Analysis of the Impact of to the State Budget and Economy.” The report found that the economic benefits of unauthorized immigration exceeded the costs for the state by \$424.7 million in 2005. Local governments, however, experienced the opposite; the costs exceeded the economic benefits by \$929.8 million (Strayhorn 2006, 20). In justifying the ordinance, the city council of Farmers Branch did not point to this specific data; instead, it relied on discriminatory rhetoric to raise popular support for the measure. Using alarmist tactics like those seen in Farmers Branch and Arizona have been widely successful in garnering support for anti-immigrant policies. These policies and the debates surrounding them, however, have harmful repercussions on the communities’ economy and cohesion.

### **The High Costs of Local Immigration Ordinances**

The controversial nature of these ordinances results in serious, negative consequences for the community. These consequences include concrete financial losses and an environment marked by hostility and unrest. Furthermore, in an atmosphere in which “Spanish speakers” are characterized as criminals who are destroying the community and draining its resources, Latinos feel under attack regardless of their legal status. This leads to the isolation of a significant portion of the population and the creation of a sharp divide in the community. Both Arizona and Farmers Branch experienced these repercussions in their attempts to enact their laws.

As reported by the Congressional Budget Office, states’ economies benefit from unauthorized immigrants (Congressional Budget Office 2007). Arizona is no exception. In 2007, the University of Arizona released a report on the economic effect

of unauthorized workers on the economy. It found that if all unauthorized immigrants were removed from the workforce, economic output would drop by 8.2 percent or \$29 billion. Particularly hard hit would be the construction, service, and agricultural industries (Randazzo 7/11/2007). Immigrants fill vital positions in these industries. However, due to the shortage of appropriate work visas, unauthorized immigrants fill many of these jobs.

How will Arizona fill these positions? The answer is still unknown. The Legal Arizona Workers Act went into effect on January 1, 2008. A preliminary analysis of the economic impact of the law by Judith Gans, the program manager for Immigration Policy at the Udall Center for Studies in Public Policy at the University of Arizona, is inconclusive. In it, she states that due to the economic downturn experienced since the passage of the law and the short time it has been in effect, it is not possible to formulate a cost analysis of the law yet (Ruiz-McGill 01/13/2009). There are, however, reports of businesses laying off workers, not expanding, and locating to neighboring states (even Mexico) as a result of the employer sanctions. Governor Janet Napolitano feared this would happen; she reluctantly signed the bill and called it a “business death penalty” (Chishti and Bergeron 2008). While it may take more time to know the concrete economic effect of the law in Arizona, Farmers Branch’s attempt to regulate unauthorized immigration has had immediate, negative impacts on its economy.

The most obvious cost of the Farmers Branch ordinance is the millions spent on defending the controversial ordinance. According to Charles Cox, the city’s finance director, Farmers Branch has already spent \$1.6 million on defending the ordinance;

this represents 1.5 percent to 2 percent of the city's budget. He says, "We can certainly find other uses for the money. By the same token, the residents have made their voices heard that this is a priority" (Bazar 2/10/2009). Tax money is spent not only on the city's attorneys, but also the plaintiffs' attorneys when the city loses its case. The city has been unsuccessful thus far in formulating a legitimate version of the law. As a result, Farmers Branch has already paid \$900,000 in plaintiff's fees. The ordinance is currently being contested, and if the city loses again, it will most likely have to pay more legal fees for the plaintiffs.

Farmers Branch may soon lose both its ability to pay for this defense and its popular support for the ordinance as the economy continues to falter and the legal battle seems endless. Other cities have abandoned similar ordinances in the face of rising legal costs. Escondido, California, for example, decided to abandon its ordinance that made it illegal for landlords to rent to unauthorized immigrants once the city realized its legal bills could exceed \$1 million (Garay 5/6/2007). I predict that Farmers Branch eventually will reach the conclusion that fighting for its ordinance is too costly as the legal challenges and the accompanying bills continue to mount.

In addition to the massive legal costs, these local ordinances creates a hostile environment towards immigrants. They feel unwelcomed and targeted in communities with anti-immigrant policies. As a result, many leave the community and take their money with them. As Iván Vázquez, an immigrant living in Farmers Branch, says, "You're afraid of being Hispanic in this city. Who wants to stay here if they don't like you? I'll move. The money you pay in rent is worth the same somewhere else" (Sandoval 11/15/2006). Apartment complexes in Farmers Branch have already lost



multiple renters as a result of the ordinance (*Reyes et al. v. City of Farmers Branch.*) In Arizona there is anecdotal evidence that immigrants have begun to leave Arizona, but it is unknown whether it is a result of the law or the economic downturn in the state (Ruiz-McGill 01/13/2009).

The exodus of immigrants harms the local economy in multiple ways. First, local niche markets are harmed when a city attempts to enact anti-immigrant policies. Businesses that cater to immigrants, such as money wiring services and ethnic food markets, find it difficult to survive when immigrants move out of the community or when immigrants feel unsafe in the community. Secondly, immigrants bolster the general local economy with their purchasing power. They spend money in the community's stores, restaurants, and businesses. If they feel unwelcomed in the community, they can and often do choose to spend their money elsewhere. Finally, local property taxes are a main source of funding for public education and local public works projects. If landowners are unable to rent out their buildings or if immigrants feel unable to purchase property in the community, the collection of property taxes will decline which harms the local economy and diminishes the ability of the local government to provide services to its residents. Local anti-immigrant ordinances can cost the community millions in legal fees and in lost tax dollars. I find, however, that it is the non-financial costs that are more troubling for a community.

As seen in Farmers Branch, local anti-immigration ordinances can divide a community. In August 2006 when the city began discussing the ordinance, there was an immediate, intense debate. Letters to the editor displayed a range of sentiments from blatantly racist remarks to general dismay over the ordinance (Brettel 2008).

Shortly after announcing the ordinance, there was a rally of 300 people against the ordinance outside of City Hall; approximately two dozen counter-protestors were also present (Sandoval 08/27/2006). The ordinance became a wedge issue between the city's politicians. Former Mayor Phelps was vocal in his opposition to the ordinance despite strong city council support for it. He was attacked professionally and personally for his views; his house was vandalized twice. Unknown vandals spray-painted "Viva Mexico" on the side of his house, and in a separate incident, someone threw a rock through his window (Sandoval 05/10/2007) Tensions continued to grow in Farmers Branch, and federal observers were sent to monitor the May 2008 elections. Tim O'Hare, the main proponent of the ordinance, won the election easily; Phelps did not run for reelection but fellow opponent of the ordinance, Gene Bledsoe, did.

In addition to the highly visible discord in the community, the ordinance created a more insidious divide between Latinos and non-Latinos in Farmers Branch. Spanish speakers and people of Latino descent are trapped in the middle of a highly contentious debate. They are blamed for the decline of Farmers Branch by some of their fellow residents. As a result, Latinos of all statuses- from U.S. born citizens to unauthorized immigrants- began to feel isolated in the community. If the ordinance is enacted, they may face further discrimination. For example, if a landlord thinks renting to Latinos poses the possibility of fines and complex paperwork, she may choose to not even begin the process of leasing to people with brown skin, accents, or Latino names.

This sense of isolation is compounded by intense fear for the Latino immigrants in Farmers Branch. Rumors of deportation spread in the community, and many began to view the city as an enemy rather than a welcoming community. Maria, a Mexican resident of Farmers Branch, says, "It is just so difficult to think that they don't want us" (Solis 5/14/2007). She reports fear of moving about the community, and she is thinking of leaving permanently. If this trend continues, it will have serious consequences not only on the city's unity, but also on its safety. If immigrants feel afraid to approach the police, crimes will go underreported and immigrants will be hesitant to assist in any investigations.

Some counties in Arizona, like Maricopa, are experiencing similar problems. A sense of fear pervades the Latino community due to the tactics used by Arpaio and his deputies. Media reports of immigration raids and checkpoints make some immigrants afraid to go out in public. Mexican immigrant, Ramon Arajon Contreras, who has lived in Guadalupe, a city in Maricopa county, for eight years reported hiding in his house and fearing officials: "If I see immigration officers," he said, "it's like I see the devil" (Associated Press 4/25/2008). This fear is spreading among all Latinos regardless of legal status.

Despite Arpaio's claim that racial profiling does not occur, Latinos report being unfairly targeted by police and pulled over for fictitious reasons in order to have their legal status checked (Associated Press 4/25/2008). Allowing the lawsuit against Joe Arpaio to proceed confirms that there is sufficient evidence to support these claims. If Latinos fear harassment from the police they will not be willing to cooperate with them or other government officials. Some officials, like the mayor of

Phoenix, claim that these tactics harm undercover investigations and interfere with federal investigations (ACLU Press Release 2/11/2009).

The enactment of the Arizona Legal Workers Act also exposes Latino workers to discrimination in the work place. Those who are bilingual or have Latino last names report having accusations and slurs thrown at them. Even business owners note an increase in racial profiling. Customers have begun accusing businesses of hiring “illegal” workers. Jason LaVecke, the owner of fifty-six Carl’s Jr. and eight Pizza Patron restaurants in Arizona says, "Just because you don't speak English doesn't mean you are illegal. We've had people say things as ugly as, 'We are going to deport you Mexicans' and stuff like that" (Associated Press 10/01/2007). In addition to racism on the jobsite, the Arizona Legal Workers Act makes immigrants and Latinos vulnerable to discriminatory hiring practices.

The flawed E-Verify system, which the use of is required by the law, combined with the pervasive assumption that all Latinos are unauthorized immigrants creates a troublesome scenario for immigrants and Latinos seeking employment. According to the Social Security Administration, the database contains incorrect information for 13 million U.S. born citizens and almost 10% of naturalized citizens (Hansen 11/28/2007). While employers are not allowed to fire an employee immediately after the system notices a faulty social security number, workers only have eight business days to challenge it. It is the responsibility of the employer to provide the potential employee with information regarding how to protest a declaration of ineligibility.

People with Latino surnames, dark skin, or accents may face suspicion from their potential employer upon an initial mismatch, and as a result, the employer might

not provide the person in question with the proper documents explaining their options to contest the mismatch. Furthermore, some employers may decide that it is easier not to hire the person than deal with the repeal process. The repeal process is even more complex for non-native English speakers who feel intimidated to challenge the government and unsure of how to approach the necessary bureaucracy to correct the mistake. All these factors make it highly likely that the Legal Arizona Workers Act will disproportionately affect immigrants and Latinos.

### **The Future of Local Regulation of Immigration**

The local ordinances clearly have a detrimental effect on a community's economy and unity. Not only do they cost millions of dollars to defend and drive money out of the community, they discriminate against immigrants and Latinos. The long-term effects of such legislation are still unknown, but the initial findings are troubling. Unfortunately the amount of lag time necessary to truly evaluate the detrimental effects of these laws and the success of Arizona in enacting its legislation may embolden other communities to pursue similar measures. Despite the serious legal obstacles and the high costs to the community, I predict that cities and states will continue to attempt to enact legislation regulating immigration as long as the federal government remains unsuccessful in passing comprehensive immigration reform.

## **Conclusion**

This thesis's analysis of the legislation in Arizona and Farmers Branch demonstrates that local laws that attempt to regulate immigration are unconstitutional. The laws are federally preempted, deny the right of due process, and would create an illegitimate, patchwork system of enforcement. For these reasons, these laws should not be enacted. Some judges, however, like Judge Wake in Arizona, disagree with this interpretation. Decisions like his are challenging traditional understandings of immigration law, particularly the long-held conviction that the federal government has the sole power to regulate immigration. Yet the problems with the local regulations extend beyond mere constitutional arguments. Even if additional court decisions validate the right of local and state governments to regulate immigration, these laws should be prevented due to their harmful effects on the community.

The proposal of anti-immigrant policies, the debate that ensues, and their enactment create a hostile environment for Latinos and foreign-born people, damage the community's economy, and lead to the isolation of a significant portion of the population. In the popular discourse surrounding these laws, immigrants- specifically Latino immigrants- become scapegoats for society's problems. They are portrayed as security, economic, and cultural threats. Furthermore, policies like residential restrictions and English-only initiatives specifically target the immigrant population. This creates a hostile environment for immigrants.

If immigrants feel unwelcomed, they are likely to leave the community and take their skills and money with them to the detriment of the local economy. Immigrants, both authorized and unauthorized, fill crucial positions in the labor force,

bolster the local economy through their spending power, and pay taxes. Finally, these policies create a sense of distrust and fear among the larger population of Latinos in these communities. They feel unfairly targeted by the police and government officials. As a result, they are less likely to cooperate with police investigations, and they are less likely to approach government institutions. This undermines a community's safety and cohesion. The local regulation of immigration has unacceptably high economic and social costs.

### **Future Research**

What else could help explain the recent flurry of immigrant-related legislation at the local level? Demographic changes and the increase in the unauthorized population are not the only explanatory factors for the increasing popularity of these laws. Political scientist S. Karthick Ramakrishnan, for example, found that one of the strongest factors in explaining restrictionist versus "pro-immigrant" proposals is the proportion of Republicans and Democrats present in the county. Areas with a Republican majority are more likely to propose and pass restrictionist policies (Ramakrishnan and Wong 2008). This may help explain this thesis's case studies; both Farmers Branch and the state of Arizona have a Republican majority.

Another possible venue from which to understand the motivations behind these ordinances would be an in-depth study of the characters leading the charge. How important of a role do the leaders play? How are they able to motivate people to participate in collective action? These are pertinent questions whose answers could help explain the phenomenon. Popular, charismatic leaders whose careers have benefitted from their involvement in anti-immigrant initiatives mark the debate in

Farmers Branch and Arizona. How has this influenced the popular support for the laws? Other possible factors included the socio-economic status of the communities, trends in the crime rates, and the presence of immigrant right mobilizations. This is by no means an exhaustive list; a variety of factors could be examined.

Finally, more research is needed on the long-term effects of these laws. The Arizona Legal Workers Act, for example, has been in effect for only eighteen months. In the current economic recession, it is difficult to distinguish whether it is the law or the lack of jobs that has influenced the movement of immigrants to locations outside of the state. Furthermore, it is unknown how a future economic recovery or a continued recession will affect the enforcement of employer sanctions. Additionally, more time is needed to evaluate the non-economic effects of these laws on the community. Will the heated debate cool, or will the sense of hostility towards immigrants prevail? Will Latinos be able to combat racial profiling effectively and regain confidence in the police and governmental institutions? The answers to these questions remain to be seen, and the ability or inability of the Obama administration to enact comprehensive immigration reform undoubtedly will shape the enforcement and outcome of these local attempts to regulate immigration.

### **The Need for Federal Intervention**

As noted throughout the work, immigration law is a subjective field. Due to the contradictory nature of the federal government's stance on immigration and the vagueness of the laws, a variety of interpretations are possible. I do find Judge Munley's reasoning, which found the Hazleton ordinance unconstitutional, more convincing than Judge Wake's, which found the Legal Arizona Workers Act



legitimate. However, another researcher could build the opposite case by interpreting the provisions of IRCA and the intent of the federal government differently than I do. This fact highlights the necessity of the federal government to not only enact immigration reform, but also clarify its intentions behind immigration legislation and the role it sees local and state government having in the attempt to regulate immigration.

Until the federal government takes the necessary steps, I predict that local and state governments will continue to formulate immigrant-related legislation. Due to the dispersion of immigrant communities throughout the country and the increasing visibility of immigrants, cities and states will be unable to isolate themselves from the immigration debate. Locations that struggle to incorporate these new residents may attempt to restrict the rights of immigrants within their community as Farmers Branch and Arizona have. If this trend gains momentum, it will result in a “land of one thousand borders” and the hardening of racial-ethnic lines in the United States.

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