

DON'T YOU BE MY NEIGHBOR: RESTRICTIVE HOUSING ORDINANCES AS THE NEW JIM CROW

By Marisa Bono*

"We can, of course, little more than hypothesize how our racial passions first began to overtake us, how humankind's obsession to embrace the similar and despise the different got stuck in our communal psyche...."

- Jerold M. Packard¹

"They're taking our jobs, our homes. There's unemployment partly because of the Hispanics. The lady who took my job is Hispanic, and she's bilingual."

- Anonymous proponent of Ordinance 2903, a law passed in Farmers Branch Texas that prohibits undocumented immigrants from renting housing.²

"[T]he cruelty and humiliation of Jim Crow is a thing of the past."

- President George W. Bush, in a speech delivered at the John F. Kennedy Center for the Performing Arts in Washington, D.C., on January 16, 2006.³

To the extent that the laws meant to perpetuate racial segregation in the post-Civil War South do not exist in America today, President George W. Bush was right when he delivered his Martin Luther King Jr. commemoration speech in 2006: *Jim Crow is dead*.⁴ However, many do not recognize that such laws have since been reincarnated in forms that are much less conspicuous and significantly more savvy and mature than their predecessors.⁵ Facially neutral, they operate without reference to the racial prejudice that stirred their rebirth, and for this reason they are difficult to identify.⁶ But as Supreme Court Justice Potter Stewart once said of another subject matter similarly difficult to define, we know it when we see it.⁷

One pernicious manifestation has taken the form of anti-immigrant ordinances that have swept through predominantly small and/or rural communities across the country since April 2006.⁸ By utilizing such measures as English-only provisions,⁹ fines and criminal penalties for employers, landlords, and others who do business with undocumented immigrants,¹⁰ and barring undocumented immigrants from social services,¹¹ local government officials are attempting to drive undocumented immigrants who are predominantly Latino out of their towns. In the process, these laws create hostile living and working environments for Latino residents, relegating them to second-class citizenship in their own communities, and creating a climate of fear and shame for the undocumented, the documented, and U.S. Citizens alike. To date, approximately 100 localities in twenty-eight states have proposed some form of

anti-immigrant ordinance, all varying in language and scope.¹² Of these, forty ordinances have passed.¹³

This article will examine one face of the modern anti-immigrant campaigns: restrictive housing ordinances that prohibit undocumented immigrants and their families from renting apartment housing within city limits. The public rationale offered by local government officials to justify these ordinances is the health, safety, and welfare of local constituents.¹⁴ Upon closer inspection, however, these ordinances are actually reminiscent of racial zoning laws passed during the Jim Crow era to maintain and reinforce racial stratification.¹⁵ Throughout the early twentieth century, cities all over the country enacted segregation ordinances to prevent the intermingling of the races.¹⁶ City officials labeled African-American neighborhoods undesirable because "the shiftless, the improvident, the ignorant and the criminal carry their moral and economic condition with them wherever they go."¹⁷

The similarities between the racial zoning ordinances of the Jim Crow era and the restrictive housing ordinances of today are disquieting. First, this article provides an overview of racial zoning ordinances passed in the early twentieth century and the restrictive housing ordinances of today, as well as their justifications. Second, after delving into the explanations offered by local government officials in passing restrictive housing ordinances, this article concludes that such laws are a reaction to the growing Latino population in the United States. It also asserts that, like racial zoning ordinances, restrictive housing ordinances are passed to maintain racial segregation and white dominance.¹⁸ Finally, this article suggests possible motives for these policies of segregation and warns against following their treacherous path.

OVERVIEW OF RACIAL ZONING ORDINANCES AND RESTRICTIVE HOUSING ORDINANCES

Before drawing any parallels between these two forms of discriminatory housing regulation, it is important to set the historical and social contexts in which they developed. In large part, the characteristics of each are radically distinct and exist almost a century apart. Immediate differences are evident, not only in the historical context, but in form as well. For example, racial zoning was exclusive; while restrictive housing is expulsive.¹⁹ Racial zoning was an instance of de jure discrimination; whereas, restrictive housing is de facto,²⁰ or so this article will argue. Despite these differences, however, an overarching objective emerges: the segregation of races as a fearful reaction to a growing minority population.

RACIAL ZONING ORDINANCES

In the post-Civil War era, newly freed slaves enjoyed a brief period of time where they benefited from many of the rights enjoyed by the body politic: the right to vote, the right to own property, and the right to travel and associate freely.²¹ However, after Reconstruction ended in the late 1860s, and as the entrenched southern classes regained political power, any rights afforded African Americans were revoked or modified severely so as to render them ineffectual.²² A new system of federal and local laws was ushered in under Jim Crow, one in which “racism [was a] legal right and obligation.”²³

Because the most obvious way to ensure the separation of the races was to force them to live in separate places, Jim Crow laws included severe restrictions on where African Americans could reside and travel.

Racial zoning ordinances were largely a reaction to the mass migration of southern rural blacks fleeing to the North.²⁴ In fact, studies from the time indicated that racial tension in the North was growing as the proportion of blacks in the area increased.²⁵ In 1910, Baltimore, Maryland, passed an ordinance that zoned separate residential districts for blacks and whites. Over the next six years, at least a dozen racial zoning ordinances were enacted to legally restrict members of particular races to certain areas of U.S. cities and towns.²⁶ These local housing regulations took various forms: some segregated block by block, others created distinct racial districts, and “one, New Orleans [regulation] required new residents of a particular race to obtain the consent of the current residents if they were of a different race.”²⁷ The purposes of the ordinances revolved largely around police power, or the right “to preserve social peace, protect racial purity, and safeguard property values.”²⁸

RESTRICTIVE HOUSING ORDINANCES

Almost a hundred years after the first racial zoning ordinance was passed, restrictive housing ordinances have evolved amidst a heated national debate over federal immigration policy. In 2004, an estimated 10.3 million immigrants living in the United States were undocumented, with 81% of those individuals claiming Latin American countries of origin.²⁹ By December of 2005, the United States Congress was considering a major overhaul of federal immigration law.³⁰ From those deliberations came a punitive House bill, known as the Sensenbrenner Bill after its sponsor. The bill made it a felony to have undocumented status and imposed felony criminal sanctions on individuals who provided aid or humanitarian assistance to undocumented immigrants.³¹ The passage of the Sensenbrenner bill immediately incited unprecedented mass demonstrations. Across the country, millions of people, both non-citizens and citizens, protested against what they perceived as anti-immigrant, racially hateful reforms to existing U.S. immigration laws.³² A second wave of

protests followed in March when demonstrators sought an overhaul of enforcement-only measures and demanded comprehensive immigration reform that would give amnesty to undocumented immigrants, in addition to a pathway to legalized status.³³

Opponents of amnesty provisions counter-protested with demonstrations, albeit on a much smaller scale.³⁴ Indeed, in the years leading up to these events, anti-immigrant advocates who favored enforcement-only measures had already been engaged in enforcement-type activities of their own.³⁵ Most notably, but

The similarities between the racial zoning ordinances of the Jim Crow era and the restrictive housing ordinances of today are disquieting.

not exclusively, a group calling itself the Minutemen Project had been organizing armed civilian volunteers and stationing them along the U.S.-Mexico border in order to track and detain undocumented immigrants.³⁶ In June 2006, following the mass pro-immigrant demonstrations in the

spring, the Senate passed a bill that replaced the harsher measures of the Sensenbrenner Bill with relief for undocumented immigrants.³⁷ Not long after, members and supporters of groups like the Minutemen Project began to press harder than ever for local solutions to what they insisted was the federal government’s failure to enforce immigration law.³⁸ Prominent in their efforts to promote enforcement-only laws is a claim that Latinos who support comprehensive immigration reform are plotting a “Reconquista,” or that they “seek to reconquer this territory by taking the land away from the United States and returning it to Mexico. The goal of the Reconquista is to ‘reconquer’ these ‘lost’ or ‘stolen’ territories for ‘La Raza’ - the race indigenous to Mexico.”³⁹ When local government officials first began proposing restrictive housing ordinances in the summer of 2006, the Minutemen and their associates spoke publicly in their favor and also testified at city hearings.⁴⁰

Thus far, at least forty cities have proposed restrictive housing ordinances, of which fifteen have passed.⁴¹ The ordinances made most visible to the public by the legal challenges they inspired are those that were passed in Hazleton, Pennsylvania; Escondido, California; and Farmers Branch, Texas.⁴²

On September 8, 2006, Hazleton, Pennsylvania, a former coal-mining town about forty-five miles northwest of Philadelphia, was the first locality to propose and pass an anti-immigrant ordinance that included housing restrictions.⁴³ Entitled the Illegal Immigration Relief Act (IIRA), Ordinance 2006-18 prohibited undocumented immigrants from renting property in the city, subjecting any property owner or tenant to fines of up to \$250 a day and criminal penalties for a violation of the ordinance.⁴⁴ In addition, each property owner was required to obtain and pay for an occupancy permit for each potential tenant that would be granted only upon a showing of “proof of legal citizenship.”⁴⁵ Landlord property owners also faced suspension of their rental licenses for violating the ordinance.⁴⁶

The restrictive housing ordinance passed by the City of Escondido, California, on October 16, 2006, was modeled

largely after the IIRA.⁴⁷ The Escondido ordinance prohibited landlord property owners from renting an apartment to any “illegal alien” and placed the burden of verifying tenant legal status on landlords.⁴⁸ Those who failed to comply with the ordinance would be subject to fines of up to \$1,000 per day, up to six months in jail, and suspension of their business licenses.⁴⁹

On November 13, 2006, Farmers Branch, Texas passed its own restrictive housing ordinance, months after it was initially proposed by city councilman Tim O’Hare.⁵⁰ Although the Farmers Branch ordinance also threatened stiff financial and criminal penalties for landlords who rented to undocumented immigrants, it differed from those passed by Escondido and Hazleton in that it applied only to “existing leases.”⁵¹ Later versions of the ordinance also attempted to define “illegal alien.”⁵² The Farmers Branch city council repealed the ordinance and replaced it with an amended version that contained many of the same restrictions on immigrants’ access to housing as the first. Farmers Branch voters approved the ballot on May 22, 2007, and it was enjoined the same year by a federal court on June 19.⁵³

JUSTIFICATIONS USED TO SUPPORT RACIAL ZONING AND RESTRICTIVE HOUSING ORDINANCES

Despite the many decades that separate them, racial zoning ordinances and restrictive housing ordinances share two key characteristics. First, both occurred in the wake of sudden influxes of minority populations in a relatively short period of time. In the case of zoning ordinances, the triggering demographic change was a mass migration of southern rural blacks to northern cities during the Jim Crow era.⁵⁴ For restrictive housing ordinances, it was the exponential growth of Latino populations in smaller, predominantly white towns.⁵⁵ In Farmers Branch, for example, the Latino population, including both native and foreign born, virtually doubled – from 20% to 37% – during the 1990s.⁵⁶ Hazleton’s population of approximately 30,000 is about 30% Latino, up from 5% in 2000.⁵⁷ The Latino population of Escondido, a city of approximately 142,000, has nearly tripled since 1990, rising from 16% to 42%.⁵⁸

The second point of comparison is the use of the police power to justify exclusionary policies. As indicated above, in addition to the blatant and public fear of racial amalgamation,⁵⁹ racial zoning ordinances were premised on the notion that they were necessary to protect the public welfare and preserve property values.⁶⁰ Modern day localities have relied on the same rationales to justify restrictive housing ordinances. For example, Mayor Louis Barletta, the main proponent of the Hazleton ordinance, has publicly stated that, though he is unaware how many undocumented immigrants currently reside in the city, he nonetheless blames them for contributing “to overcrowded classrooms and failing schools, subject[ing] our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroy[ing] our neighborhoods and diminish[ing] our overall quality of life.”⁶¹ To date, the city has not provided any figures to support Barletta’s assertions.

The same pattern of baseless justification occurred in Escondido. The Escondido ordinance states that “crime committed by illegal aliens harm[sic] the health, safety, and welfare of legal residents in the city.”⁶² During the debate leading up to the passage of the ordinance, city councilmember Marie Waldron, the driving force behind the Escondido ordinance, warned without evidence that illegal immigrants exposed other town residents to a litany of potential harms ranging in severity: from loud music and graffiti, to child molestation and deadly diseases such as leprosy and tuberculosis.⁶³ Similarly, the Farmers Branch ordinance purports to “promote the public health, safety, and general welfare of the citizens of the City of Farmers Branch.”⁶⁴ More specifically, city councilmember Tim O’Hare, who first proposed the ordinance, argued that it was necessary to prevent increasing crime rates, declining local property values, and school underperformance.⁶⁵ However, he failed to show how all of these “problems” were actually linked to undocumented immigrants, or that they were even occurring in the first place.⁶⁶

Thus, support for the racial zoning ordinances of the past and restrictive ordinances of today relies on the demonization of rapidly increasing minority populations and the aggrandizing of the so-called “police power” supposedly needed to control them. This historical and geographic commonality is crucial to identifying how restrictive housing ordinances perpetuate racial segregation.

USING EFFECT AND INTENT TO RECOGNIZE RACIAL BIAS

One may be inclined to take a strong position against, and perhaps even take a stronger offense to, the argument that restrictive housing ordinances are throwbacks to the racial zoning ordinances of a post-slavery era. The most obvious argument against this comparison is that racial zoning ordinances specifically targeted African Americans; whereas, restrictive housing ordinances target undocumented immigrants, not Latinos as a racially defined class.⁶⁷ This response, however, appears as little more than a smokescreen in light of the intent and effect of restrictive housing ordinances.

THE INTENT OF RESTRICTIVE HOUSING ORDINANCES

A closer examination of the reasons set forth by public officials to justify targeting undocumented immigrants, reveals that they are not only unfounded, but do not distinguish between undocumented immigrants and Latinos in general. Furthermore, localities do not avail themselves of alternative solutions that refrain from targeting subordinated groups of people. Put simply, in light of these considerations, the only conclusion a critical observer can reach is that these justifications are pretexts for racial exclusion.

When Farmers Branch councilmember O’Hare stated publicly that it was necessary to protect property values,⁶⁸ the city failed to offer any connection between immigration status

and problems related to health, safety, welfare, or declining property values. Worse, Farmers Branch did not show that those problems even existed.⁶⁹ Neither O'Hare nor other proponents of the ordinance pointed to any studies, reports, or statistics to support a correlation between immigration status and societal ills. In fact, at the same time as the touted increase in the Farmers Branch Latino population, the total number of criminal offenses in Farmers Branch declined – from 1,413 in 2003 to 1,306 in 2005.⁷⁰ The Texas Educational Agency recently recognized schools in the Carrollton Farmers Branch School District for academic excellence in the 2004-2005 school year, an achievement those schools had not obtained in recently preceding years.⁷¹ Furthermore, O'Hare's public comments did not distinguish between undocumented immigrants and Latinos. To explain fluctuations in property values, O'Hare reasoned that "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...."⁷² He claimed that retail operations cater to low-income and Spanish-speaking customers, leaving "no place for people with a good income to shop."⁷³ Yet, his statements again fail to discern between undocumented immigrants and Latinos in general.⁷⁴

Similarly, the City of Escondido based its ordinance on findings that "the harboring of illegal aliens in dwelling units in the City, and crime committed by illegal aliens, harm the health, safety and welfare of legal residents in the City."⁷⁵ Unlike the City of Farmers Branch, Escondido relied on a June 2006 study by the National Latino Research Center at California State University San Marcos (hereafter "NLRC study") addressing housing conditions in the Mission Park area of Escondido.⁷⁶ The NLRC study, however, found that the causes for substandard housing in Escondido were the high costs of housing and the unavailability of affordable subsidized housing in Escondido – not the presence of "illegal aliens."⁷⁷

In Hazleton, Mayor Ray Barletta insisted "that illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroys our neighborhoods and diminishes our overall quality of life."⁷⁸ Yet, he has also publicly admitted that he does not know how many "illegal aliens" live, work, or attend school in the city, or how many Hazleton crimes have been committed by "illegal immigrants," legal residents, or citizens.⁷⁹

Furthermore, according to statistics compiled by the Pennsylvania State Police Uniform Crime Reporting System, there has been a reduction of total arrests in Hazleton over the past five years, including a reduction in serious crimes such as rapes, robberies, homicides, and assaults.⁸⁰ Under Hazleton's violent crime index (VCI), undocumented immigrants committed no violent crime until 2006, when three such cases

were reported out of 1,397.⁸¹ Barletta also claimed that Hazleton's budget was "buckling under the strain of illegal immigrants," but admitted that he was unaware how many undocumented workers contributed to the city's budget by paying taxes.⁸² In 2000, Hazleton had a \$1.2 million deficit, in stark contrast to the surplus it enjoys today.⁸³ The town also saw its largest increase in property values last year.⁸⁴ Its net assets are up 18%, and its bond rating is AAA.⁸⁵

Amidst the baseless assertions about immigrants, legal alternatives exist that would more directly address the tribulations claimed by public officials. For example, it is not clear why a city, without evidence showing the cause-and-effect between blight-like overcrowding and a certain class of residents, would not pursue remedies that did not target that group of residents. Where concerns about property values arise, a city could enforce stricter penalties for landlords who were not keeping their buildings up to code. Where the occurrence of crime is shown to be increasing, a city could fund community watch programs in appropriate areas, if not train and hire additional police officers. There are myriad alternative solutions to these alleged societal woes. Yet none are being utilized by cities that turn to restrictive housing ordinances.

Thus, municipalities with restrictive housing ordinances fail to show a connection between the presence of immigrant populations and alleged societal harms. They also ignore less restrictive solutions that would more directly address those harms to the extent that they actually exist. Moreover, municipalities that pass restrictive housing ordinances simultaneously incur overwhelming legal and economic costs that they are often unable to afford. For example, after Riverside, New Jersey, passed a restrictive ordinance in the fall of 2006, thousands of Latinos fled the community, creating a forceful blow to the local economy. Local businesses floundered, and many were forced to close.⁸⁶ By the time Riverside voted to rescind the ordinance a year later, it had already spent \$82,000 in attorney's fees fending off a legal challenge to its law.⁸⁷ It is

likely that Riverside would have spent many times that amount had it seen the challenge through to conclusion.

Thus, the record of these cities reveals the intent behind the legal exclusion of the undocumented. In short, local governments' willingness to engage in certain behavior – ignoring the variety of obvious legal solutions, willingly incurring staggering economic and legal costs, and simultaneously admitting to the nonexistence of evidence that links predominantly Latino undocumented immigrant populations to threatened safety or welfare – speaks for itself. The intent behind exclusionary ordinances is to use immigration status as a pretext for the racial exclusion of Latinos.

The intent behind exclusionary ordinances is to use immigration status as a pretext for the racial exclusion of Latinos.

THE EFFECT OF RESTRICTIVE HOUSING ORDINANCES

While restrictive housing ordinances do not explicitly segregate a distinct racial or ethnic class, as racial zoning ordinances once did, their practical effect demonstrates how immigration status is actually a proxy for the same type of racial targeting. For example, restrictive housing ordinances apply to Latinos who have legal status. Moreover, the proposal and debate of restrictive housing ordinances creates extraordinary racial tension and animus in the communities where they originate. Therefore, restrictive housing ordinances force documented and undocumented Latinos alike to choose between leaving their communities and families and breaking the law by continuing to work and attend school in a place where they have been categorized as outsiders.

More specifically, Latinos suffer what this article will term “constructive exclusion.” By excluding some family members and not others from renting housing, these ordinances constructively force Latinos who have legal status, and even citizenship,⁸⁸ to leave by imposing a choice between relocation and severing the familial unit. For example, under Ordinance 2892, the first ordinance passed by Farmers Branch, each potential tenant was required to show evidence of “eligible immigration status” in order to live in a rented apartment.⁸⁹ This wording created an explicit threat to mixed-status families, or those families in which one or more parents is a non-citizen and one or more child is a U.S. citizen. Thus, hypothetically, where a family is comprised of one undocumented spouse, a spouse with legal permanent residence, and children with U.S. citizenship by birth within the U.S., household heads are forced to choose between splitting apart and relocating their family altogether. Even after the city repealed 2892 and replaced it with 2903, the city ordinance still prohibited certain categories of persons permitted by the federal government to live and work in the United States, such as student-visa holders and temporary workers, from renting housing.⁹⁰

Ordinance language also excludes Latinos from renting housing by sanctioning racial stereotyping by potential landlords. The Hazleton ordinance, which was closely modeled after the Escondido ordinance, approved the use of an individual’s “race, ethnicity, or national origin” as at least a partial basis for a complaint that they are undocumented.⁹¹ While the ordinance states that those factors may not be the sole basis for a complaint, it virtually sanctions race- and national origin-based targeting. It also makes Latinos more vulnerable to false complaints that result in automatic criminal and financial penalties. As the plaintiffs challenging the Hazleton Ordinance stated in their Memorandum of Law in Support of Preliminary Injunction, the use of race, ethnicity, and national origin as relevant considerations in enforcing the ordinance “threatens to

stigmatize individuals by reason of their membership in a racial [or ethnic] group and to incite racial [and ethnic] hostility... [and] to enforce racial and ethnic division.”⁹²

In this way, restrictive housing ordinances, like that passed in Hazleton, relieve landlords of a sense of responsibility for racist practices. Restrictive housing ordinances encourage, or at the very least allow, landlords to use racial profiling while “screening” potential tenants.⁹³ As Latinos make up significant portions of the immigrant communities in cities that have passed restrictive housing ordinances, landlords are virtually forced to consider race, national origin, and English-speaking ability when entering into a lease agreement. By making the “degradations of racism a legal duty rather than an act of individual free will,”⁹⁴ these ordinances essentially clear the consciences of racially prejudiced Americans by relieving them of responsibility for racist practices.

Furthermore, restrictive housing ordinances target Latinos, and not merely undocumented immigrants, in another more circuitous method: by creating animus-filled environments within the communities where they are proposed. In each case

“There’s unemployment partly because of the Hispanics. The lady that took my job is Hispanic, and she’s bilingual.”

where restrictive ordinances were proposed and debated, the local communities were immediately embroiled in heated, and often hateful, controversy.⁹⁵ By painting undocumented immigrants as the cause of all their communal

woes, without evidence to support the connection, and without any distinctions between immigrants and Latinos in general,⁹⁶ city officials embolden local residents to act on misinformation, prejudice, and, worse, racial animus. As a result, Latinos are forced to refrain from living, working, and attending school comfortably in their own environments. For example, in Farmers Branch, Latino parents are apprehensive that their children will be removed from school, and students refrain from speaking Spanish with each other for fear of arrest.⁹⁷ Relatives refrain from visiting for fear of harassment.⁹⁸ As Jose Gomez of Farmers Branch, Texas, puts it: “If we’re of a certain color, they’re going to point their finger at us.”⁹⁹

The public rhetoric surrounding the ordinances, which emphasizes protecting Americans from undesirable outsiders who speak a different language, is evidence of this effect. For example, in Farmers Branch, one ordinance proponent outright blamed Latinos, not immigrants, for perceived public woes: “They’re taking our jobs, our homes.... There’s unemployment partly because of the Hispanics. The lady that took my job is Hispanic, and she’s bilingual.”¹⁰⁰ Another complaint tied the prevalence of the Spanish language to community ruination: “[F]or every two [retail shops] that went vacant, one would be filled by a Spanish-speaking business, then, you... saw what was once a really, really, really nice neighborhood start to decline.”¹⁰¹ In these ways, local residents are sending Latinos a clear message: you are welcome to work in our city and pay sales taxes here, but you can’t sleep here at night. This

sentiment not so vaguely echoes those from the thousands of all-white “sundown” towns and suburbs across the West and North during the Jim Crow era.¹⁰² At that time, not only African Americans, but Mexican Americans, and Asian Americans were warned not to let the sun set on them while within town limits.¹⁰³

Accordingly, many Latinos who have legal status are prohibited from housing under restrictive housing ordinances, and many of those who are not will be driven out by racial targeting and animus. These Latinos, in addition to undocumented immigrants who are employed and whose children are acclimated to local schools, are most likely to move to nearby towns and suburbs.¹⁰⁴ In this way, restrictive ordinances will have the palpable effect of removing a racial community from one city to a neighboring one. In some cases, such as Farmers Branch, actual racial districts could potentially be created within the same city.¹⁰⁵ Thus, restrictive housing ordinances initiate the first step towards the segregation sought by yesteryear's proponents of racial zoning laws.

IDENTIFYING A MOTIVE TO SEGREGATE

Now that we have addressed the question of how restrictive housing ordinances operate to segregate Latinos, it is important to contemplate the motive behind these laws. The “knee-jerk” explanation points to fear of racial amalgamation, the widely recognized driving force behind racial social control in the early 1900s.¹⁰⁶ Additionally, there are two more probing, possibly interlocking, explanations: race nuisance and fear of “the waking giant.”

The theory of race nuisance was raised by white plaintiffs during the Jim Crow era to support racial segregation.¹⁰⁷ Typically, white landowners or municipal government officials articulated this concept to challenge the presence of black people in white neighborhoods. “Race nuisance” encapsulated the notion that by virtue of race alone, the African-American presence created a nuisance that disrupted the quiet enjoyment of land for white property owners.¹⁰⁸ This theory was also used to protest the presence of Mexicans in Texas. In *Worm v. Wood*¹⁰⁹ and *Lancaster v. Harwood*,¹¹⁰ for example, Texas appellate courts rejected the plaintiffs’ requests for injunctions prohibiting Mexicans and African Americans from residing nearby.¹¹¹ The plaintiffs based their arguments on the premise that the presence of these racial minorities would “greatly injure and practically destroy the social conditions of [the] neighborhood.”¹¹²

The notion of race nuisance has returned in the failure by proponents of restrictive housing ordinances to delineate between undocumented immigrants and Latinos when citing immigrants as the cause of public ailments. By failing to link the presence of undocumented immigrants to nuisances such as declining property values, underperforming schools, and

increasing crime rates, proponents of restrictive housing ordinances insinuate that Latinos are a “per se nuisance.” They claim, in essence, that Latinos, as a class of people, create a nuisance by their very presence. This implication arises from the reality that restrictive housing ordinances are often coupled with the passage of English-only laws, without justification as to how Spanish is harmful or detrimental to the community.¹¹³ Although no appellate courts between the end of Reconstruction and *Brown v. Board of Education* ever enshrined the concept of Mexican residents as a race nuisance,¹¹⁴ today’s proponents of restrictive housing ordinances are now reversing that judicial outcome by turning to legislation. Indeed, some localities have already moved towards classifying immigrants as public nuisances outright.¹¹⁵

In addition to the race nuisance theory, proponents of restrictive housing ordinances may be motivated by the fear of a “waking giant.” The proverbial “giant” being a growing minority population that is culturally different from the majority, less complacent about the subordination they encounter, and increasingly resistant to assimilation than in previous years. The combination of these factors creates fear and resentment in older residents as they witness the change in their community. While some older residents may leave, others stay behind, fighting to preserve their community as they once knew it.¹¹⁶

Already alarmed by the sheer growth of Latino populations, the white majority in small communities like Farmers Branch, Hazleton, and Escondido may be especially intimidated by the changing attitude within the Latino “majority-minority.”¹¹⁷ This

The plaintiffs based their arguments on the premise that the presence of these racial minorities would “greatly injure and practically destroy the social conditions of [the] neighborhood.”

attitude contrasts that of the late nineteenth-century, when many Mexican Americans began insisting that they were white in order to avoid “legal” forms of discrimination and classification.¹¹⁸ *Mendez v. Westminster*, a landmark school desegregation case involving Mexican-American students, concretized the Latino embrace of assimilation as the plaintiffs argued explicitly that race

was not at issue in the case and that the “whiteness” of Mexican Americans carried great social value.¹¹⁹

This attitude prevailed well into the late 1960s, until the advent of the Chicano movement.¹²⁰ The emergence of a non-white identity has since been a key component in the Latino civil rights movement,¹²¹ and in fact, the assertion of a singular non-white identity may have culminated in the mass immigrants’ rights marches of 2006.¹²² With the emergence of this “non-assimilationist” attitude, the Latino population is also projected to comprise a majority of the U.S. population within the next fifty years.¹²³ These changes together have inspired allegations of increased competition for resources, jobs, housing, and education.¹²⁴ Thus, the fear of the “waking giant” alludes, more than anything else, to the threatened financial and social superiority of the white majority. The perceived peril hearkens

back to the post-Reconstruction mass migration of African Americans to the North, and their ensuing call for equal rights.

CONCLUSION

In 1917, in *Buchanan v. Warley*, the Supreme Court addressed the constitutionality of a Louisville, Kentucky, racial zoning ordinance.¹²⁵ Although the Court invalidated the ordinance, it did so in a limited holding that trumpeted the priority of white property rights more than it rejected racial housing segregation.¹²⁶ Similarly, those courts that have enjoined restrictive housing ordinances, thus far, have done so on the basis of federal preemption, and not because of any discrimination based on suspect classification.¹²⁷

However, notwithstanding other constitutional problems posed by restrictive housing ordinances – namely the threat of piecemeal immigration policy thrown together by localities in a field already preempted by the federal government¹²⁸ – local governments should be vigilant of the racial impact of these ordinances. Across the country, the slow tide of restrictive housing ordinances threatens to create segregated towns, where

Latinos are welcomed community members in one, while uninvited guests in the next.¹²⁹ During the Jim Crow era, de facto inequality followed separateness.¹³⁰ In other words, “if Jim Crow placed a badge of inferiority on the black race, it provided license to devalue black interests as well.”¹³¹ As shown above, the controversy surrounding the proposal and passage of restrictive housing ordinances has already shown shades of a reemergence of one of the most shameful chapters of this country’s history.

In large part, it was the moral outrage over segregation and the second-class citizenship of African Americans that rang the death knell for de jure apartheid. Lest they repeat an ugly past, local governments should utilize means other than restrictive housing ordinances to alleviate social tribulations, to the extent that they actually exist. In the meantime, grounded in a social consciousness gleaned from the history of our country’s race relations before the Civil Rights Movement, we should speak out and act swiftly to prevent the actions of those who refuse to heed that unfortunate legacy.

ENDNOTES

* Marisa Bono received her J.D. from the University of Michigan Law School, 2005 and her M.P.P. from the Gerald R. Ford School of Public Policy, University of Michigan, 2005. Ms. Bono is a civil rights attorney and Skadden Fellow with the Mexican American Legal Defense and Educational Fund (MALDEF) in San Antonio, Texas. She sends her love and thanks to Andrés Pérez for his invaluable research and insightful contributions to this article. Special thanks also to Professor Alberto M. Benítez of the George Washington University Law School for his substantive comments, and to Zafar Shah and Tanisha James for their guidance and hard work. Any opinions expressed in this article are solely those of the author and do not necessarily represent the position or policy of MALDEF or the Skadden Fellowship Foundation.

¹ JEROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 1* (St. Martin’s Press 2002).

² Stephanie Sandoval, *FB studies tough provisions aimed at illegal immigrants: Proposals would affect landlords, employers; some say rules would draw lawsuits*, DALLAS MORNING NEWS, Aug. 21, 2006 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas) available at http://www.dallasnews.com/sharedcontent/dws/news/city/carrllton/stories/DN-fbimmigration_21met.ART.North.Edition1.3e0478e.html (last visited Oct. 7, 2007).

³ The White House, *President Honors Dr. Martin Luther King, Jr. at “Let Freedom Ring” Celebration*, available at <http://www.whitehouse.gov/news/releases/2006/01/20060116-3.html> (last visited Oct. 7, 2007).

⁴ See generally LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY 111, 293* (R.R. Donnelly & Sons 2002) (noting that most segregation laws were slowly banned after *Brown v. Board of Education* and the passage of the Civil Rights Act).

⁵ See, e.g., Hazelton, Pa., Ordinance No. 2006-18; Hazelton, Pa., Ordinance No. 2006-40, 2007-6; Escondido, Cal., Ordinance No. 2006-36 R; Farmers Branch, Tex., Ordinance No. 2892; Valley Park, Mo., Ordinance No. 1715.

⁶ See generally Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593 (Fall 2006) (describing the absence of instances of de facto discrimination in the anti-discrimination discourse).

⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart, concurring) (trying to explain “hard-core” pornography, or what is obscene, by saying, “I shall not today attempt further to define the kinds of material I understand to be embraced... [b]ut I know it when I see it....”).

⁸ Today, approximately 100 localities have proposed anti-immigrant ordinances, and at least 40 of those have passed. For a list of local ordinances introduced, passed and defeated, see Database of Local Immigration Ordinances, Fair

Immigration Reform Movement, available at <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/>; see also, e.g., Annette Fuentes, *Immigration backlash goes local*, USA TODAY, July 28, 2006, available at <http://www.mywire.com/pubs/USATODAY/2006/07/28/1719459?extID=10051> (last visited Oct. 7, 2007); Annabelle Garay, *Texas Town Okays Anti-Immigration Measure*, WASHINGTON POST, Nov. 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/13/AR2006111300155.html> (last visited Oct. 7, 2007) [hereinafter *Texas Town*]; James Sterngold, *San Bernardino seeking ‘relief,’* SAN FRANCISCO CHRON., June 11, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/11/MNGM5JCE0B1.DTL&hw=san+bernardino&sn=001&sc=1000> (last visited Oct. 7, 2007).

⁹ See, e.g., Ellen Barry, *Pennsylvania town is sued over immigrant ordinance*, SAN FRANCISCO CHRON., Aug. 16, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/16/MNGVJKJ7R31.DTL> (last visited Oct. 7, 2007).

¹⁰ See, e.g., *Texas Town*, *supra* note 8.

¹¹ See, e.g., Associated Press, *Nevada town enacts English-Only law, bans immigrant benefits*, Las Vegas Sun, Nov. 15, 2006, available at <http://www.lasvegassun.com/sunbin/stories/nevada/2006/nov/15/111510272.html> (last visited Oct. 7, 2007).

¹² For an overview of anti-immigrant ordinances that have been proposed and passed, see American Civil Liberties Union, *Local Anti-Immigrant Ordinance Cases*, available at <http://www.aclu.org/immigrants/discrim/27848res20070105.html> (last visited Oct. 7, 2007) [hereinafter ACLU]; and Fair Immigration Reform Movement, *Database of Recent Local Ordinances on Immigration*, available at http://64.243.188.204/CCCFTP/local/7.23_updated_firm_ordinance.doc (last visited Oct. 7, 2007).

¹³ See ACLU, *supra* note 12.

¹⁴ See, e.g., Escondido, Cal., Ordinance No. 2006-38 Sec. 1 ¶ 3; City of Escondido, California, City Council Meeting, October 18, 2006, video recorded speech available at <http://www.youtube.com/watch?v=JK-pDsdT9pE> (last visited Oct. 7, 2007); Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).

¹⁵ See, e.g., Rachel G. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 539 (2006) (describing different methods introduced by local officials to impose racial housing segregation); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM & MARY L. REV. 69, 87-97 (1995).

- ¹⁶ See Charles S. Magnum, Jr., *The Legal Status of the Negro* 140 (1940), available at [http://links.jstor.org/sici?sici=0002-7162\(194011\)212%3C269%3ATLSOTN%3E2.0.CO%3B2-K](http://links.jstor.org/sici?sici=0002-7162(194011)212%3C269%3ATLSOTN%3E2.0.CO%3B2-K) (last visited Oct. 7, 2007).
- ¹⁷ A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit of Racial Justice*, 1990 U. ILL. L. REV. 763, 854 (citing Brief for Defendant in Error at 7, 12, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33)).
- ¹⁸ This would not be the first time that facially neutral property laws have sought to and had the de facto effect of excluding residents of color. For example, although the Supreme Court has held that race-based zoning violates the Equal Protection Clause, non-exclusionary zoning restrictions, based on economic considerations of property devaluation, still create residential segregation. See generally, Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101 (Charles M. Haar & Jerold S. Kayden eds., 1989); Jania S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 U.C.L.A. L. Rev. 1689, 1695 (1996). These "neutral" zoning ordinances undeniably exclude poor minorities. Nelson. at 1704.
- ¹⁹ The term "expulsive zoning" was coined by Professor Yale Rabin in reference to the practice of superimposing incompatible zoning on communities of color in order to force residents of color out. See Rabin, *supra* note 18; Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 Minn. L. Rev. 739, 744 (1993) (using the term "expulsive" in reference to the ordinance at issue in *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890), which required all persons of Chinese descent to move out of a San Francisco neighborhood in 1890).
- ²⁰ For the purposes of this article, "de jure" and "de facto" discrimination take on definitions as they apply to how others perceive these discriminated groups - African Americans and Latinos. "De jure" discrimination is that which is "affected by overt, explicit, and systematic laws and regulations." "De facto" discrimination "results from actions that are covert and that are less or not formalized...." See Bitton, *supra* note 6.
- ²¹ See Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under America Law From 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B. C. THIRD WORLD L. J. 207 (2006).
- ²² *Id.*
- ²³ *Id.* Between 1890 and 1907, virtually all the southern and border states amended their constitutions to disenfranchise African Americans, or adopted poll taxes to achieve the same ends. See also Godsil, *supra* note 15, at 530. Local laws were also passed to segregate education, transportation, public accommodation, prisons, and even cemeteries. Waterhouse, *supra* note 21.
- ²⁴ See Dubin, *supra* note 19, at 744-45.
- ²⁵ Supplemental and Reply Brief for Defendant in Error on Rehearing at 142-254. *Buchanan v. Warley*, 245 U.S. 60 (1917) (quoting FRANK URIAH QUILLIN, *THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE* 1-2 (Negro Universities Press 1969)).
- ²⁶ See A. Bickel & B. Schmidt, *The Judiciary And Responsible Government*, 1910-1921, 791 (Macmillan 1984); Godsil, *supra* note 15, at 539 (explaining that racial zoning ordinances were passed in Baltimore, Maryland; several Virginia cities; Winston-Salem and Greenville, North Carolina; Atlanta, Georgia; Louisville, Kentucky; St. Louis, Missouri; Oklahoma City, Oklahoma; and New Orleans, Louisiana).
- ²⁷ Godsil, *supra* note 15 (citing C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 100-01 (Oxford University Press 3d ed. 1974)).
- ²⁸ Godsil, *supra* note 15.
- ²⁹ Jeffrey S. Passel, Pew Hispanic Center, Background Briefing Prepared for Task Force on Immigration and America's Future, June 14, 2005, available at <http://pewhispanic.org/files/reports/46.pdf> (citing 2000 Current Population Survey, Census Bureau and the Bureau of Labor Statistics) (last visited Oct. 7, 2007).
- ³⁰ For a summary of immigration reform proposals in Congress over the last few years, see BILL ONG HING, *DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY* 17-38 (Cambridge University Press 2006).
- ³¹ See generally Border Protection, Antiterrorism, and Immigrations Control Act of 2005, H.R. 4437, 109th Cong. (2005).
- ³² See Oscar Avila & Antonio Olivo, *A Show of Strength; Thousands March to Loop for Immigrants' Rights/Workers, students unite in opposition to toughening of law*, Illinois Coalition for Immigrant and Refugee Rights, Mar. 11, 2006, available at <http://www.icirr.org/stories/march10tribune.htm> (last visited Oct. 7, 2007); Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, Illinois Coalition for Immigrant and Refugee Rights, Mar. 26, 2006, available at <http://www.icirr.org/stories/lahalfmil.htm> (last visited Oct. 7, 2007).
- ³³ See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 Harv. C.R.-C.L. L. Rev. 99, 102-05 (2007).
- ³⁴ See, e.g., Jeffrey Zahka, *Minutemen Project Rallies Against Illegal Immigration*, May 25, 2006, available at <http://www.worldpress.org/Americas/2362.cfm> (last visited Oct. 7, 2007).
- ³⁵ *Id.*
- ³⁶ See, e.g., Amy Argetsinger, *In Ariz., 'Minutemen' Start Border Patrols*, WASH. POST, April 5, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A26339-2005Apr4.html> (last visited Oct. 7, 2007).
- ³⁷ See Comprehensive Immigration Reform Act of 2006, S.B. 2611, 109th Cong. (2006) available at <http://thomas.loc.gov/cgi-bin/query/D?c109:2:/temp/~c109Tsk6XQ::> (last visited Oct. 7, 2007); See also Johnson & Hing, *supra* note 33, at 104.
- ³⁸ See, e.g., Miriam Jordan, *Grassroots groups boost clout in immigration fight*, THE POST-GAZETTE, Sept. 28, 2006, available at <http://www.post-gazette.com/pg/06271/725845-84.stm> (last visited Oct. 7, 2007).
- ³⁹ Jerome R Corsi & Jim Gilchrist, "Reconquista - the plan of Mexicans to regain the American Southwest," available at <http://www.usbc.org/opinion/2006/summer/reconquista.htm> (last visited Oct. 7, 2007). Jim Gilchrist is the founder of the Minuteman movement. The sentiment of racial preservation and white dominance has also been touted in the anti-immigration discourse by racial hate groups, such as the Nazi National Socialist Movement. See Action 3 News, *Nazi Group To Protest Illegal Immigration In Omaha*, available at <http://www.action3news.com/Global/story.asp?S=6991064> (last visited Oct. 7, 2007).
- ⁴⁰ See, e.g., *Minutemen press immigration ordinance*, SPOKANE SPOKESMAN REV., Dec. 6, 2006, available at <http://www.spokesmanreview.com/local/story.asp?ID=163060> (last visited Oct. 7, 2007); *Escondido gives final approval to illegal immigrant rental ban*, NORTH COUNTY TIMES, Oct. 19, 2006, available at <http://www.immigrationwatchdog.com/?p=2024> (last visited Oct. 7, 2007); CNN Open House, *Right to Housing*, aired Nov. 18, 2006, transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/061118/oh.01.html> (last visited Oct. 7, 2007).
- ⁴¹ Cities that have passed restrictive housing ordinances to date are: Escondido, California; Cherokee County, Georgia; Topeka, Kansas; Valley Park, Missouri; Riverside, New Jersey; Inola, Oklahoma; Altoona, Gilberton, Mahanoy, Hazelton and Bridgepoint, Pennsylvania; Gaston, South Carolina; and Farmers Branch, Texas. See Latino Justice Project, *Database of local anti-immigrant ordinances*, available at <http://prldef.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Oct. 7, 2007).
- ⁴² In the interest of space and efficiency, this article limits details provided on specific ordinances to Hazleton, Pennsylvania, Escondido, California, and Farmers Branch, Texas, which are generally representative of restrictive housing ordinances passed throughout the country.
- ⁴³ *Texas Town*, *supra* note 8.
- ⁴⁴ Hazleton, Pa., Ordinance No. 2006-18.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ Escondido, Cal., Ordinance No. 2006-36 R.
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ Farmers Branch, Tex., Ordinance No. 2892; *Texas Town*, *supra* note 8.
- ⁵¹ Farmers Branch, Tex., Ordinance No. 2892.
- ⁵² *Id.*
- ⁵³ *Villas at Parkside Partner, et al. v. City of Farmers Branch*, 496 F.Supp.2d 757 (2007). To date, all of the legal attempts to enjoin restrictive housing ordinances in court have been successful. See *Lozano v. City of Hazleton*, 459 F.Supp.2d 332 (2006); *Garret v. City of Escondido*, 465 F.Supp.2d 1043 (2006); *Reynolds v. City of Valley Park*, No. 06-CC-3802, Div. No. 3 (County of St. Louis, Sept. 27, 2006). More recently, a federal judge ruled the Hazleton ordinance unconstitutional after a full hearing on the merits. See *Lozano v. City of Hazleton*, 496 F. Supp.2d 477 (2007).
- ⁵⁴ See Godsil, *supra* note 15, at 539 (citing Michael J. Klarman, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 81 (2004)).
- ⁵⁵ See Immigration Policy Center, The American Immigration Law Foundation, prepared by Jill Esbenshade, Ph.D., *Division and Dislocation: Regulating Immigration through Local Housing Ordinances*, Sept. 13, 2007, available at http://www.aifl.org/ipc/special_report/sr_sept07.shtml (last visited Oct. 7, 2007) [hereinafter Esbenshade].
- ⁵⁶ American Fact Finder, United States Census Bureau, available at <http://factfinder.census.gov> (search "Farmers Branch" and "Texas" under "Fast Access to Information") (last visited Oct. 7, 2007).

ENDNOTES CONTINUED

- ⁵⁷ American Fact Finder, United States Census Bureau, *available at* <http://factfinder.census.gov/> (search “Hazleton city” and “Pennsylvania” under “Fast Access to Information”) (last visited Oct. 7, 2007).
- ⁵⁸ American Fact Finder, United States Census Bureau, *available at* <http://factfinder.census.gov/> (search “Escondido city” and “California” under “Fast Access to Information”) (last visited Oct. 7, 2007). Ironically, in most localities where restrictive housing ordinances have passed, a significant amount of the increase in the Latino population appears to consist not of immigrants, but of native-born citizens moving from one part of the country to another, as well as children born to Latinos already living in the locale. *See* Esbenshade, *supra* note 55.
- ⁵⁹ *See* Dubin, *supra* note 19, at ll.
- ⁶⁰ *See, e.g.,* Higginbotham et al., *supra* note 17, at 854 (citing Brief for Defendant in Error at 7, 12, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33)); Godsfil, *supra* note 15, at 539.
- ⁶¹ *See* Hazleton, Pa., Ordinance No. 2006-18, preamble *Comprehensive Immigration Reform: Field Hearing in Philadelphia Before the United States Senate Judiciary Committee*, (testimony of Barletta).
- ⁶² Escondido, Cal., Ordinance No. 2006-38 Sec. 1 ¶ 3 (establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido).
- ⁶³ City of Escondido, *supra* note 14.
- ⁶⁴ Farmers Branch, Tex., Ordinance No. 2892.
- ⁶⁵ *See* Farmers Branch, Tex., Ordinance No. 2892; Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).
- ⁶⁶ Farmers Branch, Tex., Ordinance No. 2892; Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).
- ⁶⁷ Ironically, the fact that Latinos have not suffered historic de jure discrimination has often been used as a reason for excluding them from antidiscrimination discourse. *See generally* Bitton, *supra* note 6, at 596. Mexican-Americans did not explicitly fall under any of America’s de jure discriminatory regulations during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time. However, although they almost did not suffer from prominent or legally visible de jure discrimination, Mexican-Americans did suffer from chronic abuse and segregation. This discrimination was quite similar in its outcome to that suffered by de jure discriminated against groups, except that the discrimination against Mexican-Americans did not primarily occur through the use of the formal legal system. To date, despite being the largest minority group in America, Mexican-Americans remain largely invisible in the antidiscrimination discourse.
- See also* Ariel Gross, “*The Caucasian Cloak: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*,” 95 GEO. L.J. 337, 354-60 (2007) (describing discrimination endured by Mexican Americans under Jim Crow in Texas and throughout the Southeastern United States); Delbert Roman, *The Citizenship Dialectic*, 20 GEO. IMMIX. L. J. 557, 600-02 (2006) (describing various forms of de jure and de facto discrimination suffered by Mexican-American in the mid-twentieth century); *The Subcommittee on Constitutional Rights: United States Senate Judiciary Committee* (testimony of Leonel Castillo describing de jure and de facto instances of discrimination faces by Mexican Americans in Texas in the mid-twentieth century and in favor of the 1975 Extension of the Voting Rights Act).
- ⁶⁸ Sandoval, *supra* note 2.
- ⁶⁹ *See* Farmers Branch, Tex., Ordinance No. 2892, preamble at p. 2; Farmers Branch, Tex., Ordinance No. 2903, preamble.
- ⁷⁰ Texas Department of Public Safety, Crime Records Service State Record Reports, *available at* http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm#2001 (last visited Oct. 7, 2007). Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men*, *available at* <http://www.ilw.com/articles/2007/0725-rumbaut.pdf> (last visited Oct. 7, 2007) [hereinafter Rumbaut & Ewing].
- ⁷¹ *See* Texas Educational Agency, Academic Excellence Indicator System (AEIS) for Carrollton-Farmers Branch Independent School District, *available at* <http://www.tea.state.tx.us/cgi/sas/broker>. This is consistent with a nationwide trend – as the undocumented population has doubled since 1994, the violent crime rate in the United States has decreased 34.2 percent, and the property crime rate has fallen 26.4 percent. In fact, among men ages 18 – 39, the incarceration rate for the native born in 2000 was five times higher than the incarceration of the foreign born. *See* Rumbaut & Ewing, *supra* note 70. The Farmers Branch superintendent Annette Griffen also denies O’Hare’s assertions. *See* Katherine Leal Munmuth, *FB Schools Have Different View Of Immigrants*, DALLAS MORNING NEWS, Jan. 21, 2007, *available at* <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012107dnmetfbisd.15a36fb.html> (last visited Oct. 7, 2007).
- ⁷² Sandoval, *supra* note 2.
- ⁷³ *Id.*
- ⁷⁴ O’Hare’s accusations about the negative externalities of a strong immigration population on the local economy also contradict recent findings by the State of Texas. *See* Darryl Fears, *Texas Official’s Report Ignites a New Border Conflict*, Washington Post, Dec. 15, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/14/AR2006121401552.html> (discussing a report by Texas State Comptroller Carol Keeton Strayhorn which found that undocumented immigrants “put about \$420 million more into state coffers than they take out”) (last visited Oct. 7, 2007).
- ⁷⁵ Escondido, Cal., Ordinance No. 2006-38 (establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido).
- ⁷⁶ *See generally* Mission Park Community Survey, National Latino Research Center at California State University San Marcos (June 2006), *available at* http://www.csusm.edu/nlrc/publications/Reports/MissionPark_Community_Survey_2006.pdf (last visited Oct. 7, 2007).
- ⁷⁷ *Id.*
- ⁷⁸ Dan Geringer, PHILADELPHIA DAILY NEWS, *Bloomberg: U.S. Can’t Stem Immigration Tide: NYC, Hazleton Mayors Disagree At Hearing Here*, July 6, 2006, *available at* <http://hecubus.wordpress.com/2006/07/07/illegal-immigration-hearings-hurt-my-ears/> (last visited Oct. 7, 2007)[hereinafter Geringer].
- ⁷⁹ *Id.*
- ⁸⁰ *See* Pennsylvania State Police Uniform Crime Reporting System, *available at* <http://ucr.psp.state.pa.us/UCR/Reporting/Annual/AnnualSumArrestUI.asp> (last visited Oct. 7, 2007).
- ⁸¹ *Id.*; *see also* Rubén G. Rumbaut, Ph.D., *Fed.R.Civ.P. 26(a)(2) Report on the City of Hazleton’s Premise, in the Illegal Immigration Relief Act Ordinance, that Illegal Immigrants Contribute to Higher Crime Rates*, *available at* <http://www.aclupa.org/downloads/Rumbautreportonordinance.pdf> (last visited Oct. 7, 2007). Mayor Barletta’s accusations are also contradicted by recent studies showing that immigrants do not raise the crime rate in the United States. *See, e.g.,* Eunice Moscog, *Study: Immigrants don’t raise U.S. crime rate*, ARIZONA DAILY STAR, Feb. 27, 2007, *available at* <http://www.azstarnet.com/news/171109> (last visited Oct. 7, 2007); Rumbaut & Ewing, *supra* note 70; Richard D. Alba, et al, *Open Letter on Immigration and Crime*, The American Immigration Law Foundation, July 2, 2007, *available at* http://www.aifl.org/ipc/ipc_openletter0507.shtml (last visited Oct. 7, 2007).
- ⁸² Geringer, *supra* note 78.
- ⁸³ Sara M. Philly, “*It’s not easy Fighting City Hall*”, American Civil Liberties Union of Pennsylvania, ACLU Blog: Speaking Freely, March 23, 2007, *available at* <http://aclupa.blogspot.com/2007/03/its-not-easy-fighting-city-hall.html> (last visited Oct. 7, 2007).
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ *See* Ken Belson & Jill P. Caruzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007.
- ⁸⁷ *Id.*
- ⁸⁸ Approximately 30% of the households targeted by restrictive housing ordinances include U.S. citizen children. Roughly 3.1 million U.S.-born citizen children in the United States live in households headed by undocumented immigrants. *See* Esbenshade, *supra* note 55.
- ⁸⁹ Farmers Branch, Tex., Ordinance No. 2892.
- ⁹⁰ Farmers Branch, Tex., Ordinance No. 2903; *Villas*, 496 F.Supp.757. Ordinance 2903 defined “eligible immigrants” as those defined by 24 C.F.R. § 5.504, a federal housing regulation concerning eligibility for federal housing assistance. But 24 C.F.R. § 5.504 merely identifies which classes of immigrants are eligible for public housing programs. It does not identify which classes of immigrants are lawfully present in the country. The regulation also excludes certain classes of immigrants with legal status.
- ⁹¹ Hazleton, Pa., Ordinance No. 2006-18, Sec. 4.B.2 and Sec. 5.B.2.
- ⁹² *Villas*, 497 F.Supp.2d 757.
- ⁹³ *See* Herbert Hovenkamp, *Social Science and Segregation before Brown*, 1985 DUKE L.J. 624, 624-25.
- ⁹⁴ *Id.*
- ⁹⁵ “The city’s immigration debate has pitted ‘neighbor against neighbor.’” *See* Munmuth, *supra* note 71.
- ⁹⁶ *See* Section I, *supra*.
- ⁹⁷ *See* Munmuth, *supra* note 71.
- ⁹⁸ *See* Munmuth, *supra* note 71.
- ⁹⁹ Annabelle Garay, *Protesters take on immigrant proposal: Farmers Branch: Over 300 denounce plan as racist and anti-Hispanic*, DALLAS MORNING NEWS,

Aug. 26, 2006, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/082706dnmetbranch.1b79f1e.html> (last visited Oct. 7, 2007) [hereinafter *Protesters*]; see also *Judge blocks Pennsylvania rental law from taking effect*, NORTH COUNTY TIMES, Oct. 31, 2006, available at http://www.nctimes.com/articles/2006/11/01/news/top_stories/0_03_0010_31_06.txt (“‘Before, it was a nice place,’ said Elvis Soto, 27, a variety store owner who came to the United States from the Dominican Republic a decade ago. ‘Now, we have a war against us. I am legal, but I feel the pressure also.’”) (last visited Oct. 7, 2007) [hereinafter *Judge*].

¹⁰⁰ *Protesters*, *supra* note 99. It is interesting to note that restrictive housing ordinances are actually not correlated with high local unemployment rates. Around two-thirds of ordinance locales had unemployment rates at or below the national average in 2000, as did 64 percent of the 25 largest localities in 2005. See Esbenshade, *supra* note 55; see also Tyche Hendricks, *Study Says Immigrants Vie With Earlier Arrivals, Newcomers Not Taking Jobs From U.S.-Born Workers*, S.F. CHRON., Feb. 28, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/BJ9C10F1.DTL&hw=study+says+Immigrants+vie+with+earlier+arrivals&sn=001&sc=1000> (last visited Oct. 7, 2007).

¹⁰¹ Annabelle Garay, *O’Hare Stirs Up Texas Immigrant Debate*, DENVER POST, July 22, 2007, available at http://www.denverpost.com/nationworld/ci_6438454 (last visited Oct. 7, 2007). The effect of local ordinances on the Latino psyche is also evident – according to a recent study by the Pew Hispanic Center, over half of Latinos believe that discrimination against them has increased since Congress began debating immigration reform. See Darryll Fears, *Hispanics Cite Rise In Discrimination: Immigration Debate Is Called a Factor*, WASH. POST, July 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/13/AR2006071301552.html> (last visited Oct. 7, 2007). Still others believe that restrictive housing ordinances are racist. See PRLDEF: Press, Julie Bykowicz, *Hazleton, Pa., All-American Town Considers Strict Rules Against Illegal Immigrants*, BALTIMORE SUN, July 9, 2006, available at <http://www.prldef.org/Press/News%20Stories/Hazleton%20-%20Hazleton,%20Pa.,%20all-American%20town%20considers%20strict%20rules%20against%20illegal%20immigrants.htm> (last visited Oct. 7, 2007).

¹⁰² For a history chronicling these practices, see JAMES W. LOEWE, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (W. W. Norton 2005).

¹⁰³ *Id.*
¹⁰⁴ Indeed, this effect is already being observed in some communities. See, e.g., CBS 11-News, *Top Stories*, Dec. 28, 2006, *Farmers Branch Tenants Leaving Their Apartments* (on file with the author) (Farmers Branch); Bykowicz, *supra* note 101; See also *Judge*, *supra* note 99 (“‘Everyone was running scared and left town,’ said Lopez, 39. ‘We had customers who came in who were legal citizens and they didn’t want the harassment and hassle and told us they were leaving.’”); Press Archives – Riverside, Geoff Mulvihill, *Since strict immigration law was passed, this town has been quiet*, BURLINGTON COUNTY TIMES, Sept. 27, 2006, available at <http://njmda.org/press-archive/sincestrict.php> (Valley Park, New Jersey) (last visited Oct. 7, 2007).

¹⁰⁵ Farmers Branch is not a city, but rather a suburban municipality of north Dallas. City of Farmers Branch Annual Report, available at <http://www.ci.farmers-branch.tx.us/>.

¹⁰⁶ See, e.g., Hovenkamp, *supra* note 93, at 657; Dubin, *supra* 19, at 749. While this article proposes alternative motives for support of restrictive housing ordinances besides racial hate, it does not mean to exclude this motive altogether. In fact, some studies have documented the increase in hate groups and correlate this rise to some degree with the anti-immigrant movement. See, e.g., Brad Knickerbocker, *Anti-Immigrant Sentiments Fuel Ku Klux Klan Resurgence*, Christian Science Monitor, Feb. 9, 2007, available at <http://www.csmonitor.com/2007/0209/p02s02-ussc.html> (last visited Oct. 7, 2007); Southern Poverty Law Center Intelligence Report, *The Year In Hate: Race-based nationalism, black as well as white, is on the rise as the number of American hate groups swells*, Spring 2001, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=233> (last visited Oct. 7, 2007).

¹⁰⁷ See *Godsil*, *supra* note 15, at 515.

¹⁰⁸ See, e.g., *Giles v. Rawlings*, 97 S.E. 521 (Ga. 1918); *Green v. State ex rel. Chatham*, 56 So. 2d 12 (Miss. 1952); *Thoenbe v. Mosby*, 101 A. 98 (Pa. 1917); *Morrison v. Rawlinson*, 7 S.E.2d 635 (S.C. 1940); *Fox v. Corbit*, 194 S.W. 88 (Tenn. 1917).

¹⁰⁹ *Worm v. Wood*, 223 S.W. 1016 (Tex. Civ. App. 1920).

¹¹⁰ *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922).

¹¹¹ *Worm* 223 S.W. at 1018; see also *Harty v. Guerra*, 269 S.W. 1064 (Tex. Civ. App. 1925).

¹¹² *Worm*, 223 S.W. at 1018 (quoting Petition for Writ of Injunction, *Worm*)

¹¹³ Sandoval, *supra* note 2.

¹¹⁴ See *Godsil*, *supra* note 15, at 519.

¹¹⁵ See *Rogers Mayor Wants To Classify Illegal Immigrants As Nuisances*, Dec. 15, 2006, available at <http://www.4029tv.com/news/10177338/detail.html> (last visited Oct. 7, 2007).

¹¹⁶ This pattern of attempted preservationism in the face of large waves of immigration is hardly novel. For analyses of similar movements, see, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (Rutgers University Press Atheneum ed.; 2002); DONALD L. KINZER, *AN EPISODE IN ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION* (Seattle, University of Washington Press 1964).

¹¹⁷ Numbering approximately 40 million, Latinos make up close to 15% of the nation’s demographic total and have already overtaken African Americans as the largest minority in the United States. See A.R. Williams, *Latinos Rise Nationwide: America’s New Majority Minority*, NATIONAL GEOGRAPHIC (March 23, 2003) available at http://magma.nationalgeographic.com/ngm/0311/resources_geo.html (last visited Oct. 7, 2007).

¹¹⁸ See Ian F. Haney Lopez, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205 (2001).

¹¹⁹ See Toni Robinson & Greg Robinson, *Mendez v. Westminster: Asian-Latino Coalition Triumphant?*, 10 ASIAN L.J. 161, 173 (2003).

¹²⁰ *Id.*

¹²¹ See generally Lopez, *supra* note 118.

¹²² See Section I, *supra*.

¹²³ Brad Edmondson, *The Minority Majority In 2001 - Census Bureau Figures On Percent Of Population Composed Of Non-Hispanic Whites*, American Demographics (Oct. 1996), available at http://findarticles.com/p/articles/mi_m4021/is_n10_v18/ai_18722955 (last visited Oct. 7, 2007).

¹²⁴ See, e.g., *Blacks, Latinos and the Immigration Debate*, March 31, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5314594> (last visited Oct. 7, 2007).

¹²⁵ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹²⁶ *Id.* at 81-82. In *Buchanan*, a white seller entered into a contract to sell his home in a racially zoned district to Warley, a black buyer. *Id.* at 69-70. The contract stated that unless Warley had the right, under law, to occupy the residence, he would not have to purchase the property. *Id.* When *Buchanan* sued Warley for specific performance, Warley raised the Louisville racial zoning ordinance as a defense. *Id.* *Buchanan* countered by asserting that the ordinance violated the Fourteenth Amendment of the United States Constitution. *Id.* The Supreme Court specifically declined to invalidate racial zoning on equal protection grounds. *Id.* at 81. Rather, “the right which the ordinance annulled was the civil right of a white man to dispose of his property... to a person of color and of a colored person to make such disposition to a white person.” *Id.*

¹²⁷ See *Lozano*, 496 F. Supp. 2d 477; *Garret*, 465 F. Supp. 2d 1043; *Reynolds v. City of Valley Park*, No. 06-CC-3802, Div. No. 3 (County of St. Louis, Sept. 27, 2006); *Villas*, 496 F. Supp. 2d 757.

¹²⁸ See *Lozano*, 496 F. Supp. 2d 477.

¹²⁹ In addition to local municipalities, 41 state legislatures have passed 170 housing and other laws targeting illegal immigrants. Deborah Barfield Barry, *Civil Rights Groups: Housing Ordinances Targeting Hispanics*, Daily Record, Sept. 28, 2007, available at <http://dailyrecord.com/apps/pbcs.dll/article?AID=20070928/communities/709280369/1203/NEWS01>. (last visited Oct. 7, 2007).

¹³⁰ See *Dubin*, *supra* note 15, at 758.

¹³¹ *Id.*