

# CODED CODES: DISCRIMINATORY INTENT, MODERN POLITICAL MOBILIZATION, AND LOCAL IMMIGRATION ORDINANCES

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*The extent to which some local immigration ordinances are motivated by national-origin or racial discrimination is difficult to discern because our current application of the Equal Protection Clause involves a narrow understanding of the evidence of discriminatory intent. In the last decade, cities and towns have become immigration policy laboratories as a result of sharp increases in local immigrant populations, fiscal constraints, lack of comprehensive federal immigration reform, and, in some instances, a new wave of discrimination against recent immigrants. Many local governments have pursued quality of life ordinances—such as maximum-occupancy, parking, and nuisance regulations—as a means to regulate immigration. Quality of life ordinances are “coded codes”—ordinances that are facially neutral but that may target particular communities. They also evade judicial review because modern courts tend to examine discriminatory intent only through official documents such as city council minutes and give short shrift to extracameral evidence that reveals the motivations of decisionmakers. Quality of life ordinances therefore expose the failure of our current equal protection doctrine to recognize the evidentiary significance of political statements and mobilization outside official city chambers. This Note argues that a more rigorous application of the Arlington Heights six-factor discriminatory intent test, as well as the inclusion of extracameral evidence illuminating political mobilization and statutory diffusion, would revive the equal protection doctrine’s ability to identify discriminatory intent.*

## INTRODUCTION

Like many cities across the country, Escondido, California has become an immigration-law battleground and a policy laboratory. In recent years, the city council supported a ballot initiative that would

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have created a state-operated border police force,<sup>1</sup> passed an ordinance that banned landlords from renting to undocumented immigrants,<sup>2</sup> reviewed a proposal that would make it illegal for day laborers to solicit employment on sidewalks and street corners,<sup>3</sup> and embraced county efforts to team up with federal immigration enforcement.<sup>4</sup> After many of these efforts failed,<sup>5</sup> city leaders turned to quality of life ordinances, such as maximum-occupancy or parking ordinances, to deal with immigration.<sup>6</sup>

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<sup>1</sup> David Fried, *Escondido Council Votes To Support Border Initiative*, N. COUNTY TIMES (San Diego), Oct. 13, 2005, [http://www.nctimes.com/news/local/article\\_c4f73fc5-a6d3-54c4-ae1f-0b13ba54d207.html](http://www.nctimes.com/news/local/article_c4f73fc5-a6d3-54c4-ae1f-0b13ba54d207.html).

<sup>2</sup> This ordinance was a variation of an ordinance passed in Hazleton, Pennsylvania. See *infra* note 31 and accompanying text. The Escondido ordinance was later rescinded due to mounting legal fees incurred defending it against civil rights and proimmigrant groups. J. Harry Jones, *Escondido Councilman Learns Hard Political Truths Quickly*, SAN DIEGO UNION-TRIB., Feb. 4, 2007, at N1 (describing reasons city abandoned its illegal immigration-housing ordinance, which also included “numerous constitutional problems”).

<sup>3</sup> Editorial, *Bad Ideas Come in Threes*, N. COUNTY TIMES (San Diego), Dec. 14, 2007, [http://www.nctimes.com/news/opinion/editorial/article\\_ca7a620c-1a7a-5fe1-b1ea-af71ff26941b.html](http://www.nctimes.com/news/opinion/editorial/article_ca7a620c-1a7a-5fe1-b1ea-af71ff26941b.html) (“First it was a rental ban; then it was a parking ban; now, if Councilman Ed Gallo has his way, people in Escondido—at least some of them—will be banned from standing.”); David Garrick, *Escondido Exploring New Restrictions on Day Laborers*, N. COUNTY TIMES (San Diego), Dec. 7, 2007, [http://www.nctimes.com/news/local/article\\_6de5a28f-c3d9-5270-b6f1-3ea631323260.html](http://www.nctimes.com/news/local/article_6de5a28f-c3d9-5270-b6f1-3ea631323260.html).

<sup>4</sup> Edward Sifuentes, *New Program Will Catch Illegal Immigrants in Jails*, N. COUNTY TIMES (San Diego), May 30, 2009, [http://www.nctimes.com/news/local/sdcounty/article\\_b4b2e046-3dea-50aa-a829-2eeef372e87f.html](http://www.nctimes.com/news/local/sdcounty/article_b4b2e046-3dea-50aa-a829-2eeef372e87f.html).

<sup>5</sup> See *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1044 (S.D. Cal. 2006) (granting temporary restraining order to enjoin ordinance penalizing individuals who rented to undocumented immigrants). The Escondido rental ordinance was rescinded because of litigation costs. See Anabelle Garay, *Local Immigration Laws Bring High Costs*, WASH. POST, May 5, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500523\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500523_pf.html) (“Escondido abandoned an ordinance that would punish landlords who rent to illegal immigrants after it discovered the legal bills could top \$1 million.”); Jones, *supra* note 2, at N1 (discussing Escondido council’s decision to abandon its immigration housing ordinance after being advised of potential cost); see also Kai Bartolomeo, Note, *Immigration and the Constitutionality of Local Self Help: Escondido’s Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 856 (2008) (providing background information on Escondido housing ordinance and ensuing litigation).

<sup>6</sup> The term “quality of life” is admittedly amorphous, but, for the purposes of this Note, I use it to refer to ordinances justified as necessary to enhance citizen satisfaction with residential locations. “Quality of life” ordinances are ordinances such as maximum-occupancy ordinances, parking restrictions, or “antiblitz” ordinances that seek to address the perceived symptoms of immigration without a facial reference to immigration. See *infra* Part I.B (providing descriptions of such ordinances). One example of this approach in Escondido was the effort to pass parking restrictions. See Paul Eakins, *Escondido Council Supports Residential Parking Restrictions*, N. COUNTY TIMES (San Diego), Mar. 29, 2007, [http://www.nctimes.com/news/local/escondido/article\\_75fc96f8-552f-5975-9746-49f8be12234be.html](http://www.nctimes.com/news/local/escondido/article_75fc96f8-552f-5975-9746-49f8be12234be.html).

Developments in Escondido exemplify the ways in which cities are attempting to regulate immigration through local ordinances and illuminate how localities have become sites of restrictionist activism. Sharp increases in local immigrant populations,<sup>7</sup> fiscal constraints,<sup>8</sup> and the lack of comprehensive federal immigration reform<sup>9</sup> have led many to argue for legislative action at the local level.

Much of this action is driven by restrictionist activism seeking to limit the number of immigrants flowing into the United States. One concern with this burgeoning movement is that its activities are sometimes tainted by racial prejudice or nativism. The rapid social and economic changes brought on by immigration have motivated a new wave of xenophobia against recent immigrants that finds legal expression in the form of local ordinances promulgated across the country.<sup>10</sup> As states such as Arizona experiment with using city ordinance violations as the basis for police questioning regarding immigration status, the

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<sup>7</sup> See Michael Hoefler, Nancy Rytina & Christopher Campbell, U.S. Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2006*, in POPULATION ESTIMATES 1 (2007), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ill\\_pe\\_2006.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ill_pe_2006.pdf) (“[T]here were an estimated 11.6 million unauthorized immigrants living in the United States as of January 2006. Nearly 4.2 million had entered in 2000 or later. An estimated 6.6 million of the 11.6 million unauthorized residents were from Mexico.”). However, the number of undocumented immigrants has recently declined. See Michael Hoefler, Nancy Rytina & Bryan C. Baker, U.S. Dep't of Homeland Sec., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009*, in POPULATION ESTIMATES 1 (2010), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf) (“DHS estimates that the unauthorized immigrant population living in the United States decreased to 10.8 million in January 2009 from 11.6 million in January 2008.”).

<sup>8</sup> Economic troubles can give state and local governments the incentive to enact their own version of immigration reform. Michael Wishnie has noted the propensity of states to “try to balance their budgets on the backs of indigent immigrants” by restricting eligibility for “life-sustaining public benefits.” Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 498 (2001).

<sup>9</sup> Congressional efforts towards comprehensive immigration reform have failed in recent years, including the Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438, 109th Cong. (2005), the Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006), and the Comprehensive Immigration Reform Act of 2007, also known as the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007). As of this writing, the Obama administration has not yet passed a comprehensive immigration reform bill.

<sup>10</sup> Many local decisionmakers attempt to discourage immigration through legislation. IVAN LIGHT, DEFLECTING IMMIGRATION: NETWORKS, MARKETS, AND REGULATION IN LOS ANGELES xi (2008) (“[C]ities deflect some immigrants elsewhere by enforcing municipal, regional[,] and state ordinances and laws that prohibit slums, sweatshops, and an impoverished life style. Deflection reduces the burden of immigrant integration by transferring it somewhere else.”).

threat of such ordinances may grow.<sup>11</sup> Some restrictionists have suggested that police officers could use city violations such as parking too many “cars on blocks in the yard” or having “too many occupants of a rental accommodation,” to justify police inquiries into immigration status under Arizona’s new law.<sup>12</sup>

Quality of life ordinances can therefore serve as “coded codes”—facially neutral ordinances enacted to address immigration concerns and target specific communities. As Escondido Councilman Sam Abed explained, the turn to quality of life ordinances was motivated by a desire to find methods of regulating immigration that would resist legal challenges: “We learned from the rental ordinance. . . . We changed our focus to quality of life issues.”<sup>13</sup> Quality of life ordinances are more likely to withstand litigation because they can effectively be challenged only through Equal Protection Clause discrimination claims, whereas other forms of immigration-related laws are often challenged primarily on preemption or First Amendment grounds.

The extent to which some quality of life ordinances are motivated by national-origin or racial discrimination is difficult to discern because of the current application of the Equal Protection Clause. A rich and complicated doctrine surrounds the Equal Protection Clause, but the process of identifying discriminatory intent involves an oversimplified and narrow understanding of evidence. In *Village of*

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<sup>11</sup> Andrea Nill, *Exclusive: Email from Author of Arizona Law Reveals Intent To Cast Wide Net Against Latinos*, THE WONK ROOM (Apr. 30, 2010, 3:43 P.M.), <http://wonkroom.thinkprogress.org/2010/04/30/kris-kobach-email> (quoting e-mail from Kris Kobach to Arizona state Senator Russell Pierce urging him to include language to SB 1070 that would allow police to use “violations of property codes ([e.g.], cars on blocks in the yard) or rental codes (too many occupants of a rental accommodation)” as an excuse to “initiate queries” of those suspected to be undocumented immigrants).

<sup>12</sup> *Id.*; see also Ruben Navarrette, *Rubio’s Troubling Immigration Flip-Flop*, CNN OP. (May 13, 2010), available at <http://www.cnn.com/2010/OPINION/05/13/navarrette.rubio.immigration/index.html> (commenting that Arizona immigration law now extends city ordinance violations as basis for “reasonable suspicion” of immigration status: “That could include loud parties, barking dogs, cars on blocks, overcrowded apartments, etc. One can easily imagine neighbors turning in one another, and an environment that is already poisoned with resentment and fear becoming more so”).

<sup>13</sup> Anna Gorman, *Undocumented? Unwelcome: Escondido Is Using a Wave of Policies To Try To Drive Away Illegal Immigrants*, L.A. TIMES, July 13, 2008, at B1; see also Eakins, *supra* note 6 (describing Escondido parking ordinances). Escondido has since begun to cite residents more aggressively for code violations such as garage conversions, graffiti, and junk cars. *Id.* In February 2008, Escondido banned front-yard parking, and, in September of that year, the city debated overnight parking restrictions. Angela Lau, *Overnight Parking Law Faces Discussion, Vote*, SAN DIEGO UNION-TRIB., Sept. 7, 2008, at N1. Members of the Escondido city council also advocated for the establishment of a new parking ordinance that would limit overnight parking to residents with permits. *Id.*

*Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>14</sup> the Supreme Court devised a six-factor test to assist judges in determining whether decisionmakers acted with discriminatory intent. In practice, courts tend to apply *Arlington Heights* narrowly in challenges to local ordinances,<sup>15</sup> looking principally to official documents within the local council, such as city council minutes, public hearings, and other official city records. Extracameral evidence of local decisionmakers' ties to discriminatory political mobilization is given short shrift.<sup>16</sup> Quality of life ordinances therefore expose the failure of current doctrine to recognize the influence of political mobilization outside official city chambers.<sup>17</sup>

Complicating matters further is the issue of "discrimination slippage," which refers to "anti-illegal" rhetoric and organizing that in fact may be targeted against immigrants generally,<sup>18</sup> or against Latinos specifically.<sup>19</sup> The slippage between "anti-illegal," anti-immi-

<sup>14</sup> 429 U.S. 252 (1977).

<sup>15</sup> See *infra* Part II.A.

<sup>16</sup> By "extracameral," I refer to occurrences or documents outside of official municipal meetings and hearings, such as interviews with the media or documents on the Internet.

<sup>17</sup> This Note acknowledges that scholars have levied a number of other critiques at judicial application of Equal Protection Clause doctrine. More recently, scholars have focused on the turn to colorblindness, the doctrinal definition of discriminatory intent, and the disparate impact theory of liability. See generally Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, The Ego, and Equal Protection,"* 40 CONN. L. REV. 931 (2008) (reviewing development of scholarship on unconscious racism since Lawrence's earlier foundational article on topic); Ian F. Haney Lopez, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985 (2007) (examining intellectual history of "reactionary colorblindness, meaning the current form of race blindness that principally targets affirmative action"); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (questioning value of disparate impact theory in challenging discrimination). This Note hopes to add to the discussion of modern Equal Protection Clause jurisprudence with a new perspective on *Arlington Heights* and the underappreciated value of extracameral evidence.

<sup>18</sup> Scholars have already identified slippage between anti-immigrant and "anti-illegal" efforts, as well as slippage between anti-immigrant and anti-Latino activism. See generally René Galindo & Jami Vigil, *Are Anti-immigrant Statements Racist or Nativist? What Difference Does It Make?*, 4 LATINO STUD. 419, 420 (2006) (discussing how nativism and race-based prejudice intersect in anti-immigrant discourse); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 79 (2009) (identifying "discrimination slippage" in "anti-illegal immigrant" housing ordinances, which, "while ostensibly targeted at illegal immigrants, may well be motivated by hostility to immigrants generally or animus against a particular national origin group, regardless of legal status"). Professor Kevin Johnson writes that "immigration and immigrants from Mexico" have become "the true focal point of the modern public debate over immigration." KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 64 (2007).

<sup>19</sup> "[L]ocal and state anti-immigration measures directed specifically at Latinos are centrally about race." Tom I. Romero II, *No Brown Towns: Anti-immigrant Ordinances and*

grant, and anti-Latino rhetoric is significant because the target of discrimination determines what level of constitutional scrutiny the court will apply: Legislation discriminating against undocumented immigrants receives the lowest level of judicial review, rational basis, while discrimination on the basis of race or national origin receives the highest level, strict scrutiny.<sup>20</sup> Discriminatory views certainly permeate immigration debates, and may even influence some local decisionmakers as they create ordinances.

This Note examines how quality of life ordinances serve as a nearly unreviewable form of immigration restrictionism due to the limitations of our current equal protection jurisprudence. Part I of this Note explains how local ordinances became the locus of national political efforts related to immigration and highlights the unreviewable nature of quality of life ordinances. Part II argues that *Arlington Heights* does not account for larger political mobilization but should. Part III demonstrates how to apply an expanded *Arlington Heights* review to quality of life ordinances and how this more rigorous review would bring discriminatory intent analysis in line with the contemporary realities of local political processes.

## I

### THE EXPANSION OF LOCAL IMMIGRATION ORDINANCES

The national immigration debate has reached a fever pitch in recent years. Between 2000 and 2005, the immigrant population in the United States rose 16%, building on already substantial growth in the 1990s.<sup>21</sup> Mexican immigrants, the nation's fastest-growing immigrant group, began to settle in a wider range of states and cities.<sup>22</sup> Public

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*Equality of Educational Opportunity for Latina/os*, 12 J. GENDER RACE & JUST. 13, 15 (2008). While most anti-immigrant ordinances are probably directed against Latinos, other ethnic groups can be targeted by them as well.

<sup>20</sup> In contrast to national origin discrimination, which receives strict scrutiny, see *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (requiring strict scrutiny for discrimination based on race or national origin), the highest level of review applied to a law discriminating against undocumented immigrants arose in *Plyler v. Doe*, 457 U.S. 202, 229 (1982). That case arguably examined the legislation under a "rational basis with bite" test, but *Plyler* is distinguishable because it dealt with the rights to public education of undocumented children. *Id.* This Note does not attempt to draw lines between discrimination on the basis of race or national origin because of recognized slippage, and it draws upon evidence of both types of discrimination because both types of discrimination receive strict scrutiny.

<sup>21</sup> See Rick Lyman, *New Data Shows Immigrants' Growth and Reach*, N.Y. TIMES, Aug. 15, 2006, at A1; see also *supra* note 7 (describing growth in U.S. immigrant population).

<sup>22</sup> See generally David Card & Ethan G. Lewis, *The Diffusion of Mexican Immigrants During the 1990s: Explanations and Impacts*, in MEXICAN IMMIGRATION TO THE UNITED STATES 193, 193–94 (2007) (describing widening geographic distribution of Mexican immigrants).

debate about the social and economic impact of such significant demographic change increased dramatically,<sup>23</sup> while federal reform efforts stalled.<sup>24</sup> States took it upon themselves to tackle the issue, creating an “unprecedented surge in state-level lawmaking” on immigration.<sup>25</sup>

Cities also have become a major forum for national immigration politics. Over one hundred cities have enacted restrictionist immigration ordinances in recent years.<sup>26</sup> As this Part will explain, housing and labor ordinances have been the most common local immigration ordinances, but quality of life ordinances are growing in number because they effectively evade judicial review. Section A surveys the types of local immigration ordinances that cities have proposed in recent years, while Section B explains how quality of life ordinances

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<sup>23</sup> Debates about immigrant acculturation and assimilation exploded in the press, scholarly journals, and books between the late 1990s and 2000s. *See, e.g.*, ALEJANDRO PORTES & RUBÉN G. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* (3d ed. 2006). The fiscal impact of immigration also became a major topic of debate and research. *See, e.g.*, Philip Martin & Elizabeth Midgley, *Immigration: Shaping and Reshaping America*, 61 *POPULATION BULL.* 1, 22–23 (2d ed. 2006) (discussing studies of economic contributions of individual immigrants); George Skelton, *Immigration a Factor in Budget Math*, *L.A. TIMES*, Feb. 2, 2009, at B1 (“Illegal immigrants are not the sole cause of the state’s deficit. But they are a drain.”); Kevin Yamamura, *Governor Refuses To Blame Illegal Immigrants for Budget Problems*, *SACRAMENTO BEE*, Mar. 27, 2008, at A1.

<sup>24</sup> Congress has attempted to enact comprehensive immigration reform in recent years. *See supra* note 9 (discussing failed federal immigration bills). Media attention to immigration grew during this period as well. In the spring of 2006, public debates also led to major marches in Los Angeles and Chicago in support of immigration reform. *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, 102–04 (2007) (describing 2006 marches and political movements behind immigration reform).

<sup>25</sup> Julia Preston, *Immigration Is at Center of New Laws Around U.S.*, *N.Y. TIMES*, Aug. 6, 2007, at A12. Between 2005 and 2009, state legislatures drastically increased their activity regarding immigration legislation. In 2005, 300 bills were introduced and 38 laws were enacted. *See* Immigrant Policy Project, *State Laws Related to Immigrants and Immigration in 2008*, *NAT’L CONF. OF STATE LEGISLATURES*, 1 (Jan. 27, 2009), <http://www.ncsl.org/Portals/1/documents/immig/StateImmigReportFinal2008.pdf> (discussing immigration bills introduced in United States). Activity doubled in 2006, when 570 bills were introduced and 84 laws were enacted. *Id.* In 2007, the numbers tripled to 1562 bills introduced and 240 laws enacted. *Id.* Figures stayed high in 2008, with 1305 pieces of legislation introduced and 206 laws and resolutions enacted nationwide. *Id.* State laws have addressed a number of immigration-related issues, including employment regulations, public benefits, immigration enforcement, and identification requirements. For a helpful review of 2007 data discussing the subjects of local immigration regulation, see generally LAUREN LAGLAGARON, CRISTINA RODRIGUEZ, ALEXA SILVER & SIRITHON THANASOMBAT, *MIGRATION POLICY INST., REGULATING IMMIGRATION AT THE STATE LEVEL: HIGHLIGHTS FROM THE DATABASE OF 2007 STATE IMMIGRATION LEGISLATION AND THE METHODOLOGY* (2008).

<sup>26</sup> S. Karthick Ramakrishnan & Tom (Tak) Wong, *Immigration Policies Go Local: The Varying Responses of Local Governments to Undocumented Immigration* 10 (Chief Justice Warren Inst. on Race, Ethnicity and Diversity, Working Paper No. 1, 2007), *available at* [http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal\(1\).pdf](http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal(1).pdf) (“[T]here were 100 municipalities by July 2007 that had proposed restrictionist ordinances . . .”).

are growing as a means of immigration restrictionism. Section C explores the extent to which quality of life ordinances have a disparate impact on immigrant and Latino communities and whether they are motivated by intentional discrimination.

### A. *Local Immigration Ordinance Experimentation and Legal Challenges*

Cities from states as diverse as California, Alabama, and Alaska have passed or have considered passing immigration ordinances.<sup>27</sup> Because these localities are so diverse, identifying shared conditions among them is difficult.<sup>28</sup> A range of economic and social objectives, such as maintaining the health and welfare of a city or minimizing crime, may motivate cities to engage in various forms of immigration control.<sup>29</sup> In large part, however, national political mobilization may explain why such disparate cities have adopted such similar immigration-related ordinances. Similar local ordinances spread across the country because city leaders often draw from activist groups and the experiences of other cities in creating new legislation.

Before the advent of quality of life ordinances, two major approaches characterized local attempts to regulate immigration. The first approach was to restrict housing and employment opportunities of “illegal immigrants.”<sup>30</sup> In 2006, the city of Hazleton, Pennsylvania, enacted a bundle of immigration-related ordinances titled the “Illegal

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<sup>27</sup> See David Fried, *Local Illegal Immigration Laws Draw a Diverse Group of Cities*, N. COUNTY TIMES (San Diego), Sept. 2, 2006, [http://www.nctimes.com/news/local/article\\_03dfcb93-677d-5b4f-b1af-ed123a8a49fc.html](http://www.nctimes.com/news/local/article_03dfcb93-677d-5b4f-b1af-ed123a8a49fc.html); Kyle Hopkins, *Bauer Wants To Let Police Ask ‘Are You a Citizen,’* ANCHORAGE DAILY NEWS, Sept. 10, 2007, at A1 (on file with the *New York University Law Review*).

<sup>28</sup> Cities with both large and small Latino populations have considered local immigration ordinances. See Ramakrishnan & Wong, *supra* note 26, at 11–14. Poverty levels also vary greatly amongst cities that have enacted immigration ordinances. *Id.*

<sup>29</sup> See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 577–80 (2008) (describing fiscal, cultural, and demographic shifts that may both inspire restrictionist measures designed to halt further changes and implicate “rule of law” concerns); see also Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 806 (2008) (discussing state concerns regarding national security, increased immigrant populations, and increased costs due to undocumented immigration). Some local actors may simply be “[f]ed up” with what they view as the “federal government’s failure to control illegal immigration,” and they seek to step in where they feel the federal government has fallen short. Jason Englund, Note, *Small Town Defenders or Constitutional Foes: Does the Hazleton, PA Anti-illegal Immigration Ordinance Encroach on Federal Power?*, 87 B.U. L. REV. 883, 884 (2007).

<sup>30</sup> Terminology related to immigrant populations is varied and often carries political connotations. The term “immigrant” is used for those born outside of the United States who wish to reside in the country on a long-term basis and includes naturalized U.S. citizens. The term “noncitizen” is used when it is important to distinguish immigrants that have not yet naturalized. I use the term “undocumented,” as opposed to “illegal,” for

Immigration Relief Act Ordinance” (IIRA) and the “Tenant Registration Ordinance.”<sup>31</sup> The IIRA served as a model for dozens of other cities across the United States, including Escondido.<sup>32</sup> The ACLU, the Mexican American Legal Defense and Education Fund (MALDEF), Latino Justice-PRLDEF, and private counsel challenged these ordinances on behalf of local Hazleton residents, business owners, and landlords. The case was heard in federal district court, and, in 2007, U.S. District Judge James M. Munley ruled that the ordinances violated the Supremacy Clause of the Constitution under federal preemption doctrine.<sup>33</sup> Preemption claims have been successful in other cities as well.<sup>34</sup> Ordinances like the IIRA have since waned in popularity because they invite costly litigation battles that cities often lose on preemption grounds.<sup>35</sup>

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immigrants not lawfully present and use the latter term only when it was originally used by sources or to convey the intention of restrictionists.

<sup>31</sup> The Hazleton ordinances (1) made it unlawful for business entities “to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City” and (2) imposed civil monetary penalties on persons who knowingly rented or leased property to undocumented immigrants. Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), *available at* [http://www.hazletoncity.org/090806/2006-18%20\\_Illegal%20Alien%20Immigration%20Relief%20Act.pdf](http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf); Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), *available at* [http://www.smalltowndefenders.com/090806/2006-13%20\\_Landlord%20Tenant%20Ordinance.pdf](http://www.smalltowndefenders.com/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf).

<sup>32</sup> See James P. Luther, *Immigration Law: A Tale of Two Cities: Is Lozano v. City of Hazleton the Judicial Epilogue to the Story of Local Immigration Regulation in Beaufort County, South Carolina?*, 59 S.C. L. REV. 573, 575 (2008) (“These [Hazleton] ordinances became the model legislation for dozens of similar measures passed by numerous local governments.”); Romero, *supra* note 19, at 19 (stating that “dozens” of communities passed “Hazleton-type” ordinances). More than ninety cities passed similar ordinances. Anabelle Garay, *Local Immigration Laws Bring High Costs*, WASH. POST, May 5, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500523\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050500523_pf.html). As of 2008, these cities included Valley Park, Missouri; Riverside, New Jersey; Farmers Branch, Texas; and Beaufort County, South Carolina. See Mex. Am. Legal Def. and Educ. Fund, List of Local Anti-Immigrant Legislation (Jan. 17, 2008) (on file with the *New York University Law Review*) [hereinafter MALDEF].

<sup>33</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 520, 523, 529 (M.D. Pa. 2007) (holding Hazleton ordinance invalid on express preemption, field preemption, and conflict preemption grounds).

<sup>34</sup> For example, preemption claims struck down a IIRA-like ordinance in Farmers Branch, Texas. See *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 866–74 (N.D. Tex. 2008) (holding that federal law preempted local housing ordinance requiring evidence of citizenship or lawful immigration status to enter lease because it regulated immigration). For a review of the use of preemption doctrine in challenges to local regulations related to immigration, see Mark S. Grube, Note, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391 (2010).

<sup>35</sup> See Garay, *supra* note 32 (describing legal bills amounting to hundreds of thousands of dollars for Escondido, Hazleton, Farmers Branch, and other cities that passed similar legislation).

Second, cities have employed antilabor solicitation ordinances as a means to address concerns over the presence of day laborers. Ordinances that attempt to limit labor solicitation in some way have been proposed or passed in localities such as Baldwin Park, Escondido, Orange, Redondo Beach, and San Bernardino in California; Coweta County, Georgia; Herndon, Virginia; and Mesa, Arizona.<sup>36</sup> These solicitation ordinances have been successfully challenged by litigators on First Amendment grounds in some cities,<sup>37</sup> though a recent Ninth Circuit case upholding a Redondo Beach antisolicitation ordinance as a valid time, place, and manner restriction casts doubt on the strength of First Amendment claims for future antisolicitation ordinance challenges.<sup>38</sup>

### *B. The Emerging Turn Towards Quality of Life Ordinances*

Cities have begun to look to new forms of ordinances that would impact immigration, yet are likely to withstand judicial review. Rather than enact explicit immigration legislation, local legislators have created ordinances that target the perceived *effects* of immigration rather than immigration *itself*. The perceived symptoms of undocumented immigration, such as residential overcrowding, are the current focus of many local ordinances. Challengers cannot feasibly defeat quality of life ordinances with the preemption and First Amendment claims that have successfully challenged other types of immigration-related ordinances,<sup>39</sup> and therefore quality of life challenges must rely more on equal protection claims that are more difficult to prove.

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<sup>36</sup> See MALDEF, *supra* note 32.

<sup>37</sup> Courts have found that prohibitions on individuals gathering on corners violate the right to freedom of association. For example, Baldwin Park, California, created an ordinance that prohibited day laborers from soliciting employment on public sidewalks if doing so would limit pedestrians to less than three feet of walking space. This ordinance was halted by a preliminary injunction in July 2007. *Jornaleros Unidos de Baldwin Park v. City of Baldwin Park*, No. 07-CV-4135 (C.D. Cal. July 17, 2007). An ordinance in Cave Creek, Arizona, was struck down on First Amendment grounds because it discriminated amongst speech and activity on the basis of content. *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1032–34 (D. Ariz. 2008). A similar ordinance in Glendale, California, was held to be content neutral but invalid because it was vague and not sufficiently narrowly tailored. *Comite de Jornaleros de Glendale v. City of Glendale*, No. 04-CV-3521, 2005 U.S. Dist. LEXIS 46603, at \*8 (C.D. Cal. May 13, 2005).

<sup>38</sup> See *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1196 (9th Cir. 2010). The Ninth Circuit's decision suggests that equal protection claims may be relied upon more by challengers of such ordinances in the future, given the potential ineffectiveness of First Amendment claims. *But see* Kristin S. Agostoni, *Appeals Court To Revisit Redondo Beach Day Laborers Case*, DAILY BREEZE (Los Angeles), Oct. 18, 2010, [http://www.dailybreeze.com/news/ci\\_16368330](http://www.dailybreeze.com/news/ci_16368330) (announcing that Ninth Circuit will rehear case en banc).

<sup>39</sup> See *supra* notes 33–34 and 36–37, respectively, for a discussion of preemption and First Amendment challenges to ordinances related to immigration.

Maximum-occupancy ordinances are one such type of local immigration regulation. Some city leaders have expressed concern over growing immigrant populations and responded by passing new ordinances or increasing penalties to limit the number of people that may live in a single residence.<sup>40</sup> Areas that have experimented with these new enforcement efforts or ordinances include the suburbs surrounding Atlanta, Boston, and Washington, D.C.<sup>41</sup>

Another approach cities employ is parking restrictions. Parking restrictions serve as another way to limit the number of adults sharing households together and may target immigrants because they are often associated with parking problems.<sup>42</sup> As one news report put it, “Local officials getting tough on illegal immigrants have a new target: their cars.”<sup>43</sup> Cities such as Escondido have supported restrictions on parking in residential areas, including prohibitions on overnight parking.<sup>44</sup> Other examples of this approach include limiting the number of cars per residence.<sup>45</sup>

A third variation of quality of life ordinances regulates public activities or appearances. These include restrictions on yard or garage

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<sup>40</sup> For example, the Mayor of Manassas, Virginia, expressed concern that immigrants were “eroding the strong spirit of [his] city,” and the city passed a housing ordinance that restricted households to immediate relatives. Stephanie McCrummen, *Anti-Crowding Law Repealed: Latinos Were Focus of Manassas Ban on Extended Families in Homes*, WASH. POST, Jan. 12, 2006, at A10.

<sup>41</sup> See Charisse Jones, *Crowded Houses Gaining Attention in Suburbs*, USA TODAY, Jan. 31, 2006, at A5 (describing “[p]olice crackdowns and ordinances limiting the number of unrelated people or extended family members living in a home” in several cities). In Cobb County, Georgia, for example, the municipality established a new rule requiring “50 square feet of sleeping space per occupant, excluding bathrooms, closets, hallways and garages.” *Id.*

<sup>42</sup> See LIGHT, *supra* note 10, at 78 (“Vigorous parking enforcement, a strictly local issue, thus became a tool of immigration control inasmuch as immigrants could not work without parking illegally.”).

<sup>43</sup> Emily Bazar, *Car Ordinances Hurt Illegal Immigrants*, USA TODAY, Aug. 15, 2007, at A3 (discussing parking and license-related ordinances). For more on state laws and policies restricting the availability of driver’s licenses to noncitizens, see María Pabón López, *More than a License To Drive: State Restrictions on the Use of Driver’s Licenses by Non-citizens*, 29 S. ILL. U. L.J. 91, 98–108 (2004) (describing three types of state regulations on driver’s licenses and their impact on immigrant communities).

<sup>44</sup> See Paul Eakins, *Escondido Council Supports Residential Parking Restrictions*, N. COUNTY TIMES (San Diego), Mar. 29, 2007, [http://www.nctimes.com/news/local/escondido/article\\_75fc96f8-552f-5975-9746-49fbe12234be.html](http://www.nctimes.com/news/local/escondido/article_75fc96f8-552f-5975-9746-49fbe12234be.html) (describing Escondido’s proposed restrictions).

<sup>45</sup> A Dalton, Georgia, ordinance would prohibit parking on grass, more than four parked cars per residence, and wrecked or unlicensed cars outside houses. Perla Trevizo & Erin Fuchs, *Reactions Mixed on Parking Limits*, CHATTANOOGA TIMES FREE PRESS, Aug. 6, 2007, at 1 (“A proposal to limit the number of cars parked at residences has revved up debate about whether the ordinance targets Hispanics.”).

sales and street vending.<sup>46</sup> One proponent of such an ordinance argued that such activities are “unsightly.”<sup>47</sup> Along the same lines, some cities have begun more stringent efforts in the realm of property maintenance and “antiblight” ordinances.<sup>48</sup> The increase in fines for such violations of local nuisance ordinances may be as high as \$1000 a day with a \$50,000-a-year cap.<sup>49</sup> Increasing fines such as these may be a relatively unnoticed development in many communities. The three types of quality of life ordinances limit residential and lifestyle choices and may have a disparate impact on immigrant and Latino communities, as the next Section examines.

### C. *Disparate Impact and Discrimination*

Immigrants who live in crowded conditions are likely to bear the brunt—as well as the fees—of quality of life ordinances. Sociologists, political scientists, and urban planners have documented the overcrowded living conditions of recent immigrants, who experience the “highest rates of overcrowding” in the nation.<sup>50</sup> Immigrant working families are nearly 70% more likely than native-born Americans to

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<sup>46</sup> Los Angeles found itself the subject of controversy in 2008 after the city increased the fines on taco trucks that remain in place for more than one hour. Ben Bergman, *Taco Truck Battle Heats Up in Los Angeles*, NAT'L PUB. RADIO, May 5, 2008, <http://www.npr.org/templates/story/story.php?storyId=90149577>. This type of ordinance seemed to favor local restaurants.

<sup>47</sup> See Stacy Anne Harwood, *Struggling To Embrace Difference in Land-Use Decision Making in Multicultural Communities*, 20 PLANNING, PRACTICE & RES. 355, 365 (2005) (describing words of La Habra City Council member).

<sup>48</sup> Antiblight ordinances take a number of different forms and generally work to reduce urban or residential decay. For example, the city of La Habra established a property maintenance ordinance in 1994 that worked to abate nuisances such as “graffiti, overgrown weeds, broken pavement, inoperable vehicles, and even clotheslines.” *Id.* at 365–66. For further discussions of blight and local policy, see generally Stefan H. Krieger, *A Clash of Cultures: Immigration and Housing Code Enforcement on Long Island*, 36 HOFSTRA L. REV. 1227 (2008) (examining how anti-immigrant bias influences housing policy and understandings of blight); Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305 (2004) (describing vague and various definitions of blight as used by cities in local economic development policies).

<sup>49</sup> Gig Conaughton, *Bad News for Bad Neighbors: San Diego County Hiking Code Enforcement Fines - By a Lot*, N. COUNTY TIMES (San Diego), Sep. 4, 2007, [http://www.nctimes.com/news/local/article\\_3eccb4a7-3e45-5958-a5f9-5cd4ed1bd977.html](http://www.nctimes.com/news/local/article_3eccb4a7-3e45-5958-a5f9-5cd4ed1bd977.html) (discussing recent proposal by San Diego County and noting that “[t]hose fines could swell to \$2,500 a day, or up to \$125,000 a year, if the violations [sic] also break state laws”).

<sup>50</sup> See, e.g., Dowell Myers, William C. Baer & Seong-Youn Choi, *The Changing Problem of Overcrowded Housing*, 62 J. AM. PLAN. ASS'N 66, 70 (1996) (“Of householders who arrived in the United States during the 1980s, 35.9% are overcrowded and 21.6% extremely overcrowded . . .”); Gary Painter & Zhou Yu, *Immigrants and Housing Markets in Mid-size Metropolitan Areas*, 44 INT'L MIGRATION REV. 442 (2010) (finding that immigrants are less successful in achieving home ownership and experience higher rates of overcrowded conditions than native-born whites of non-Hispanic origin).

spend at least half their income on housing and are approximately six times more likely to be living in crowded conditions.<sup>51</sup> As one commentator has noted, “[T]oday’s immigrants are facing more than the traditional [housing] challenges of their predecessors.”<sup>52</sup>

Overcrowding is also more common in particular immigrant ethnic groups. An article analyzing data from the 1990 census found that “Asian and Hispanic households amount to 8.3% of all households but account for 46.6% of all overcrowded households (62.3% of all severely overcrowded households).”<sup>53</sup> More recent studies also point out the high proportion of Latino and Asian immigrants with critical housing needs.<sup>54</sup> Given these statistics, quality of life ordinances that target residential overcrowding may have a disparate impact on immigrants and Latinos in many communities.

In addition, members of the general public have noted that these ordinances raise disparate impact concerns and hinted that they point to discriminatory intent on the part of lawmakers. Reporters often comment on how quality of life ordinances may target immigrants or Latinos.<sup>55</sup> Housing advocates are concerned that local occupancy ordinances are “truly . . . directed at the new Latino immigrant population.”<sup>56</sup> For example, when the City Council in Manassas, Virginia, passed an ordinance in 2006 that barred extended family members from living together, many perceived the ordinance to be directly

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<sup>51</sup> See Barbara J. Lipman, Center for Housing Policy, *America’s Newest Working Families: Cost, Crowding, and Conditions for Immigrants*, 4 NEW CENTURY HOUSING 1, 12–13 (2003) (describing cost and crowding of housing). This study was developed by the National Housing Conference (NHC).

<sup>52</sup> Michael O. Adams & Gbolahan S. Osho, *Migration, Immigration and the Politics of Livable Space: Immigration and Local Housing Issues in the United States*, 8 RES. J. INT’L STUD. 5, 9 (2008) (quoting “National Housing Chairman,” leading officer at the Center for Housing Policy).

<sup>53</sup> Myers et al., *supra* note 50, at 70–71.

<sup>54</sup> Lipman, *supra* note 51, at 14 (finding that Hispanics and Asians make up approximately 60% and 20%, respectively, of all immigrants with critical housing needs).

<sup>55</sup> See, e.g., David Garrick, *Escondido: City Delays Adoption of Parking Ordinance*, N. COUNTY TIMES (San Diego), Sept. 10, 2008, [http://www.nctimes.com/news/inland/escondido/article\\_1460b521-37f6-512d-8634-4dc08a69e9f4.html](http://www.nctimes.com/news/inland/escondido/article_1460b521-37f6-512d-8634-4dc08a69e9f4.html) (“[O]pponents have argued that [the parking ordinance is] targeting poor Latino families who congregate in single-family homes to save money.”); Angela Lau, *Overnight Parking Law Faces Discussion, Vote*, SAN DIEGO UNION-TRIB., Sept. 7, 2008, at N1 (pointing to criticism that Escondido’s quality of life ordinances are ultimately “about driving out its population of illegal immigrants”); McCrummen, *supra* note 40, at A10 (noting that anticrowding ordinance “targeted the city’s growing Latino population”).

<sup>56</sup> See Jones, *supra* note 41, at A5 (quoting Shanna Smith, president of National Fair Housing Alliance).

targeted at immigrant families, who often share their home with extended family.<sup>57</sup>

Apart from disparate impact concerns, other issues suggest cause for alarm regarding recent quality of life ordinances. When cities enact several such ordinances at once, even innocuous individual pieces of legislation can become oppressive in combination with other ordinances and elevated fines. Selective enforcement of facially neutral ordinances is another potential equal protection issue—although one that is not evaluated under *Arlington Heights*<sup>58</sup>—as evidenced by one housing enforcement incident in Farmingville, Long Island that appeared to target Latino immigrants.<sup>59</sup> These ordinances also often lead to protests by supporters and opponents, inflaming civic tensions.<sup>60</sup> Pushed far enough, such civic tensions may lead to another source of concern—hate crimes.<sup>61</sup>

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<sup>57</sup> McCrummen, *supra* note 40, at A10. The Council later rescinded the ordinance after outcry from the public and the ACLU. *Id.*

<sup>58</sup> Discriminatory enforcement is a separate branch of facially neutral Equal Protection Clause doctrine. Since selective enforcement is not addressed under *Arlington Heights*, I will not address discriminatory enforcement of quality of life ordinances in detail.

<sup>59</sup> The Farmingville incident illuminates how neutral ordinances can be used to target specific communities. Farmingville, Long Island, a hamlet within the town of Brookhaven, witnessed its Hispanic population roughly double between 1990 and 2000. City leaders tried to limit and manage day laborer solicitation in 1999, exacerbating tensions between immigrant advocates and city leadership. Campbell Robertson, *Immigrant Policies Take a More Aggressive Turn*, N.Y. TIMES, Nov. 14, 2004, at L11. In 2006, as part of an enforcement campaign called “Operation Firestorm,” police locked up eleven houses that were supposedly dangerously overcrowded. Bruce Lambert, *L.I. Is Ordered To Give Notice of House Raids*, N.Y. TIMES, Dec. 17, 2005, at B3. About 200 tenants, all Latino and many of them day laborers, were evicted. According to Foster Maer of Latino Justice-PRLDEF, “[T]he town wasn’t going after any housing except that occupied by Latino day laborers.” Charisse Jones, *Crowded Houses Gaining Attention in Suburbs*, USA TODAY, Jan. 31, 2006, at A5. Latino Justice-PRLDEF sued on behalf of the tenants. *Id.*

<sup>60</sup> See Paul Eakins & Edward Sifuentes, *Rental Ban Divides Escondido Protesters; Crowds Erupt in Shouting Match After Vote*, N. COUNTY TIMES (San Diego), Oct. 19, 2006, [http://www.nctimes.com/news/local/article\\_acbe808b-e9cc-59b0-b005-dc9289488bef.html](http://www.nctimes.com/news/local/article_acbe808b-e9cc-59b0-b005-dc9289488bef.html) (describing “two raucous crowds,” one “predominantly Latino” and other “predominantly white,” in shouting match after City Council vote on housing ordinance). See also *supra* note 57 and accompanying text for another example of heated local tensions over a Manassas ordinance.

<sup>61</sup> For example, a report on the recent increase in hate crimes against immigrants pointed to increased civic tensions brought about by extremist anti-immigration groups and the push for anti-immigrant ordinances. LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND, *CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA 17* (2009), available at [http://www.civilrights.org/publications/hatecrimes/lccref\\_hate\\_crimes\\_report.pdf](http://www.civilrights.org/publications/hatecrimes/lccref_hate_crimes_report.pdf) (linking hate crime in Shenandoah, Pennsylvania, to anti-immigrant sentiment that arose after efforts to establish Hazleton-like ordinance: “[T]he Hazleton ordinance caused considerable tension between the town’s Hispanic and white communities, which had formerly enjoyed peaceful relations”); see also Spencer S. Hsu, *Immigration Debate Tied to Rise in Hate Crimes*, WASH. POST, Jun. 17, 2009, at A4 (referencing Leadership Conference report and discussing alleged close correlation between nation’s immigra-

Disparate impact is difficult to discern and may not exist in every community, but research suggests that some communities are indeed disproportionately impacted by quality of life ordinances.<sup>62</sup> Assuming for the sake of discussion that at least some of these ordinances have a disparate impact on immigrant or Latino communities, then equal protection analysis requires that we ask whether any such ordinances are motivated by discriminatory intent. However, we must also ask whether our current application of Equal Protection Clause doctrine is capable of capturing such intent, should it exist. These ordinances have existed previously but have emerged recently with greater prominence, likely as a response to immigration. This is not to say that all of these ordinances are motivated by discriminatory intent, or even that most are. These quality of life ordinances have rational justifications, such as basic health and safety reasons.<sup>63</sup> Still, at least in some cases, these rationales may be a façade intended to shield cities from liability.<sup>64</sup> The next Part examines how the failure of equal protection doctrine to fully assess extracameralevidence and political mobilization permits quality of life ordinances to evade review.

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tion debate and 40% rise in hate crimes targeting Hispanic Americans between 2003 and 2007).

<sup>62</sup> Ellen Pader discusses challenges to maximum-occupancy laws in the 1990s and the difficulty in proving disparate impact and discrimination. In one 1994 New Jersey case, the U.S. Department of Justice “successfully argued that the [maximum-occupancy ordinance] would have a disparate impact on local Latino households.” See Ellen J. Pader, *Space of Hate: Ethnicity, Architecture and Housing Discrimination*, 54 RUTGERS L. REV. 881, 882 nn.1–3 (2002).

<sup>63</sup> Proponents of maximum-occupancy ordinances claim that residential overcrowding creates fire hazards and excess trash, reduces parking availability, and lowers home values. Jones, *supra* note 41, at A5. Those who favor parking restrictions point to safety and property value justifications. Eakins, *supra* note 44. Some proponents of property maintenance ordinances suggest that their intent is to “target dilapidated properties and to clean up the community.” Harwood, *supra* note 47, at 366.

<sup>64</sup> *Dews v. Town of Sunnyvale* stands out as one of the few cases in which a court has not only found discriminatory intent in city zoning decisions but also held explicitly that the defendant town was using its quality of life rationales “as a facade in an unsuccessful attempt to shield itself from liability” for excluding a racial group. 109 F. Supp. 2d 526, 572 (N.D. Tex. 2000). For more discussion of *Dews* and the court’s *Arlington Heights* analysis, see Sarah Martinez, *Expanding the Intent Doctrine: The Viability of the Arlington Heights Equal Protection Standard in Race Discrimination Causes of Action 15–19* (2006) (unpublished seminar paper) (on file with the Race Equity Project, Legal Services of Northern California).

II  
SHORTCOMINGS OF CURRENT APPLICATION OF  
*ARLINGTON HEIGHTS*: ASSESSING  
EXTRACAMERAL EVIDENCE AND  
POLITICAL MOBILIZATION

Equal protection doctrine is intended to “weed out” discrimination without inculcating neutral actions. In a critical step in the process of identifying discriminatory intent, courts use the six factors described in *Arlington Heights* to evaluate evidence of such intent: (1) the discriminatory effect of the official action, (2) the historical background of the decision, (3) the specific sequence of events leading up to the challenged decision, (4) departure from the normal procedural sequence, (5) departure from the normal substantive standards, and (6) legislative or administrative history of the decision.<sup>65</sup> Unfortunately, as this Note argues, courts apply *Arlington Heights* in ways that ignore or downplay extracameral evidence of political mobilization beyond local official chambers, contributing to the Equal Protection Clause’s increasingly peripheral application in challenges to quality of life ordinances.<sup>66</sup> This Part evaluates how courts currently examine evidence of discriminatory intent, shows how quality of life ordinances escape judicial review, and argues that courts miss a variety of extracameral evidence of political mobilization that could demonstrate intent.

A. *Current Equal Protection Doctrine and the Insurmountable Application of Arlington Heights*

Current equal protection doctrine involves several steps before the examination of evidence of discriminatory intent. Put simply, a court will apply strict scrutiny only if (1) the law classifies on its face on the basis of race or national origin or (2) it can be shown that a facially neutral law has an impact and a purpose that discriminate on such basis.<sup>67</sup> If a law falls into the latter category, discriminatory impact must be proven before the court will evaluate whether there was intent to discriminate. In *Washington v. Davis*, the Court stated that discriminatory impact alone was insufficient to prove the existence of impermissible racial classification.<sup>68</sup> *Personnel Administrator*

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<sup>65</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1997).

<sup>66</sup> See *infra* notes 102–03 and accompanying text.

<sup>67</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 671 (3d ed. 2006).

<sup>68</sup> The Court stated that discriminatory impact, “[s]tanding alone, . . . does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” 426 U.S. 229, 242 (1976).

of *Massachusetts v. Feeney* further explained the purpose requirement of the test.<sup>69</sup> Relying on *Washington v. Davis* and *Arlington Heights*, the Court held in *Feeney* that even if a disparate impact was foreseeable, the constitutional standard for discriminatory intent requires proof that decisionmakers acted *because of* this impact, not merely *in spite of* it.<sup>70</sup>

Without proof of discriminatory intent, a facially neutral law will receive deferential, rational basis review. Strict scrutiny is the highest level of equal protection review and will be applied only if the alleged discrimination is on the basis of race, national origin, or alienage. If the court instead finds that the ordinance discriminated against undocumented immigrants, rather than individuals of a certain race or noncitizens generally, it will proceed with rational basis review.<sup>71</sup> Quality of life ordinances are facially neutral, but some may have a disparate impact,<sup>72</sup> so application of strict scrutiny depends upon finding discriminatory intent on the basis of race or national origin.

*Arlington Heights* established the standard for judicial evaluations of evidence of discriminatory decisionmaking. First, courts look to any direct evidence of discriminatory purpose and intent, such as an open discussion in the legislative history that the law was intended to disfavor a racial group. Where direct evidence is unavailable, as it often is, courts are to make “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available” and look at the totality of the relevant evidence to determine “whether invidious discriminatory purpose was a motivating factor” for the decision.<sup>73</sup> Courts then examine the aforementioned six factors.<sup>74</sup>

Unfortunately, the current inquiry into the existence of discriminatory intent does not pay enough attention to extracameral evidence, the significance of model legislation, or the relationship of city leaders

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<sup>69</sup> 442 U.S. 256 (1979).

<sup>70</sup> *Id.* at 279 & n.24.

<sup>71</sup> See *supra* notes 18–19 and accompanying text for a discussion of discrimination slippage in relation to immigration. Given this slippage, whether a court understands legislation to discriminate against undocumented immigrants specifically, immigrants more generally, or Latinos as a racial and ethnic group has a tremendous impact on the outcome of the case, as only the first of the three groups receives rational basis review.

<sup>72</sup> See *supra* Part I.C (discussing disparate impact as it relates to quality of life ordinances).

<sup>73</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1997). The court in *Arlington Heights* acknowledged that all decisions have mixed motives “because legislators and administrators are properly concerned with balancing numerous competing considerations” but distinguished racial discrimination because “racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.” *Id.* at 265–66.

<sup>74</sup> See *supra* text accompanying note 65 (describing *Arlington Heights* test).

to external public debate and political mobilization. Equal protection doctrine instructs courts to examine the local events leading up to the law's passage, and most courts rely almost exclusively on traditional sources of evidence, such as city council meeting minutes.<sup>75</sup> This narrow scope of review ignores the reality that local immigration legislation has become increasingly influenced by outside model legislation, Internet activism, and other modern forms of political mobilization.<sup>76</sup> Review of local decisionmakers' intent is conducted with blinders, and courts may be neglecting relevant context.

Case law illustrates how judges apply discriminatory intent doctrine. Cases decided shortly after *Washington v. Davis* and *Arlington Heights* exhibited how courts judging the existence of discriminatory intent have relied narrowly on the public statements of decisionmakers. As a result, equal protection challenges rarely succeeded. In the 1981 case *City of Memphis v. Greene*,<sup>77</sup> black residents brought a class action that challenged the Tennessee city's decision to close a street, claiming that the closure was a discriminatory attempt to separate the city racially in a way that benefited the white community and adversely affected the black community. The majority found no evidence of discriminatory intent,<sup>78</sup> basing their investigation into intent on City Council hearing testimony and statements and resolutions by City Council members when making their decision to close the public street.<sup>79</sup> The Court disregarded evidence introduced at trial "in support of the contention that the community activists (demanding closure of the street) were motivated by the desire to limit black vehicular traffic through their neighborhood."<sup>80</sup> The majority found that the citizenry's intent was irrelevant to the intent of public officials instead of more closely examining the relationship between public officials and activists.<sup>81</sup> In contrast, Justice Marshall's dissent empha-

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<sup>75</sup> See Martinez, *supra* note 64, at 23 ("Courts pay lip service to the *Arlington Heights* test but continue to rely exclusively on direct evidence of intent.").

<sup>76</sup> See *infra* Part II.C.

<sup>77</sup> 451 U.S. 100 (1981).

<sup>78</sup> The majority rejected the residents' challenge, finding no impairment of property interests for the purposes of 42 U.S.C. § 1982 and noted that, under *Arlington Heights* analysis, the lack of discriminatory intent barred any Equal Protection Clause claim. The Court began its analysis of the residents' Thirteenth Amendment claim with the conclusion of a lack of discriminatory intent and ultimately held that since the city's stated interests in safety and tranquility were sufficient, the road closing was a "routine burden of citizenship" that did not implicate the Thirteenth Amendment. *Greene*, 451 U.S. at 126–29.

<sup>79</sup> *Id.* at 106–08, 114 & nn.22–27.

<sup>80</sup> Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397, 432–33.

<sup>81</sup> 451 U.S. at 114 n.23. Professor Gayle Binion argues that the "Court's bifurcation of governmental officials and citizens on the question of intent conflicts with basic principles of democracy as we know them." Binion, *supra* note 80, at 433. Binion adds, "In the

sized the larger social context surrounding the city's decision, including Memphis's "unfortunate but very real history of racial segregation."<sup>82</sup>

Thus, the Court set a standard for proof of discriminatory intent in the late 1970s and early 1980s that focused almost exclusively on evidence derived from city council meetings, hearings, and reports in cases dealing with local laws and ordinances. The problem with the Court's approach is that textual analysis of official documents rarely provides evidence of intentional discrimination.<sup>83</sup> Even in cases where plaintiffs may have had strong claims that city leaders were aware that their decisions would harm a minority community, because of the combination of *Feeney*<sup>84</sup> and the narrow scope of evidence of intent, the equal protection claim simply ends.

More recent immigration-related cases illustrate the ongoing barriers to making a successful equal protection challenge. In the aforementioned *Lozano v. City of Hazleton* case, plaintiffs attempted to enter newspaper interviews and other extracameral sources as evidence, but the district court's opinion instead focused on the official testimony of Mayor Lou Barletta and the specific procedures utilized by the City Council.<sup>85</sup> The opinion neglected relevant contemporary evidence in its conclusion that there was no record of discriminatory intent. For example, Barletta stated on his website, that "illegal immigrants" create a "sense of fear," a "language barrier," and an eco-

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*Memphis* case, . . . the challenged municipal action was initiated by and continuously pressured for by the residents of Hein Park. To dismiss their intentions as irrelevant because they were not the defendants in the suit is to undermine whatever virtue might otherwise attach to the intent rule." *Id.*

<sup>82</sup> 451 U.S. at 144. Marshall's incorporation of social context led him to infer intent from the fact that the actions and deviations from normal procedure by officials "acting on behalf of . . . an all-white community" were likely to injure a "predominantly Negro community." *Id.* at 149 n.14.

<sup>83</sup> Plaintiffs claiming that city decisions have a disparate impact on minority communities must provide official documentation that shows intentional racial discrimination. *See Comm. Concerning Cmty. Improvement v. City of Modesto*, No. CV-F-04-6121, 2007 WL 2204532, at \*7 (E.D. Cal. July 30, 2007) (finding that city planning documents and official testimony were insufficient to prove racial animus because "[p]laintiffs d[id] not present any evidence of racial considerations by the Board during the [decisionmaking] process, racial comments or racially related topics"), *rev'd on other grounds*, 583 F.3d 690 (9th Cir. 2009). Official documents are unlikely to include expressions of discriminatory motive that would create liability for the city, however.

<sup>84</sup> *See supra* notes 69–70 and accompanying text (discussing *Feeney*'s holding that constitutional standard for discriminatory intent requires proof that decisionmakers acted *because of* this impact, not merely *in spite of* it).

<sup>85</sup> 496 F. Supp. 2d 477, 540–41 (M.D. Pa. 2007). On review, the Third Circuit did not address equal protection and discrimination matters directly because the City of Hazleton did not appeal the district court's dismissal of plaintiff's equal protection claims. *See Lozano v. City of Hazleton*, No. 07-3531 (3d Cir. Sept. 9, 2010).

conomic burden for Hazleton, and contribute to crime.<sup>86</sup> Barletta also said that “[i]llegal immigrants are destroying the city. I don’t want them here, period.”<sup>87</sup> Although Barletta referred specifically to “illegal” immigrants in this quote and insisted his concern was legal status, the large number of ills that Barletta blamed on immigrants could suggest discriminatory scapegoating and slippage against Latinos or immigrants generally. When the lines between potential target groups are blurry and deciphering the precise intent of legislators is crucial to the outcome of the case, extracameral evidence is vital. Evidence that originates outside a city council chamber does not render it outside the purview of the Fourteenth Amendment because it may still indicate intent.

A major problem with the narrow evidentiary scope of intent analysis is that official city council meetings may offer little to no discussion when passing a given ordinance, and extracameral evidence is too easily dismissed. When two ordinances strikingly similar to those of Hazleton’s emerged in Valley Park, Missouri, a coalition of landlords and civil rights groups quickly challenged them in federal court.<sup>88</sup> The court ruled that the ordinances were not preempted by federal law<sup>89</sup> and also dismissed any claims that the ordinances were passed with an intent to discriminate.<sup>90</sup> Plaintiffs submitted evidence of Valley Park Mayor Whitteaker’s statements in a local newspaper interview, including his statement that “You got one guy and his wife that settle down here, have a couple kids, and before long you have *Cousin Puerto Rico* and *Taco Whoever* moving in.”<sup>91</sup> In the same article, the Mayor stated that his lawyers did not want him to do interviews because they were concerned that he would use words like

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<sup>86</sup> Lou Barletta, Mayor, City Council Speech (June 15, 2006), available at <http://www.smalltowndefenders.com/node/10> (transcript).

<sup>87</sup> Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1043 (2007) (discussing Mayor Barletta’s defense of City of Hazleton Illegal Immigration Relief Act Ordinance of 2006 (citing Robert Tanner, *Illegal Immigration Now a Local Issue*, TULSA WORLD, July 20, 2006, at A12, available at [http://www.tulsaworld.com/news/article.aspx?articleID=060720\\_NE\\_A12\\_Illeg37342&breadcrumb=article](http://www.tulsaworld.com/news/article.aspx?articleID=060720_NE_A12_Illeg37342&breadcrumb=article))).

<sup>88</sup> As in *Lozano v. City of Hazleton*, one of the Valley Park ordinances penalized landlords who leased to illegal immigrants, and the other penalized the employment of illegal immigrants. See *Gray v. City of Valley Park*, No. 4:07CV00881ERW, 2008 WL 294294, at \*10 n.13 (E.D. Mo. Jan. 31, 2008), *aff’d*, 567 F.3d 976 (8th Cir. 2009).

<sup>89</sup> *Id.* at \*15.

<sup>90</sup> The court found that the plaintiffs lacked standing but still reviewed their claims of discrimination based on national origin. *Id.* at \*22–23, \*25–27.

<sup>91</sup> Kristen Hinman, *Valley Park to Mexican Immigrants: “Adios, Illegals!”*, RIVERFRONT TIMES, Feb. 28, 2007, <http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals/> (emphasis added).

“wetbacks” and “beaners” to refer to people of Mexican descent.<sup>92</sup> Mayor Whitteaker also happened to have orchestrated local Aldermen decisions related to immigration.<sup>93</sup> Despite the mayor’s pivotal role, the court found his discriminatory statements alone insufficient to prove intent.<sup>94</sup> A common problem with municipal decisions— “[a] lack of discussion during the meeting at which the Ordinance was passed”<sup>95</sup>—is thus made more problematic when the court ignores the extracameral commentary of principal decisionmakers.

Though some argue that modern judges examine a wider range of evidence than did their predecessors when reviewing legislative intent in other contexts,<sup>96</sup> in discrimination challenges, courts continue to ignore or sidestep evidence of discriminatory intent.<sup>97</sup> Courts seem to demand signs of explicit racism in official settings,<sup>98</sup> where such views are unlikely ever to be expressed.<sup>99</sup> Few plaintiffs can find official doc-

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (“Last July the mayor orchestrated the Valley Park Board of Aldermen’s unanimous passage of a controversial ordinance declaring that ‘illegal immigration . . . diminishes our overall quality of life.’ Without debate, questions or research, the all-white, all-male board ceded to Whitteaker’s demand to make English the city’s official language.”).

<sup>94</sup> One reason the Court found the evidence insufficient was that “[p]laintiffs must show discriminatory intent by the Alderman, and not only by the Mayor.” *Gray*, 2008 WL 294294, at \*26.

<sup>95</sup> *Id.*

<sup>96</sup> See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1881 (2008) (“Modern courts are willing to impute impermissible motivations to the legislature on the basis of materials that founding-era courts would not have considered.”).

<sup>97</sup> Defendants also encourage courts to dismiss extracameral evidence through evidence rules. In the *Hazleton* case, Defendants sought to preclude Plaintiff’s submission of newspaper articles and scholarly pieces through hearsay. See Memorandum of Law in Support of Oral Motion in Limine of Defendant, City of Hazleton, To Preclude Articles, Op-Ed Pieces and Studies Listed as Trial Exhibits in Plaintiff’s Pretrial Memorandum, at 1–2, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv-1586).

<sup>98</sup> See *Martinez*, *supra* note 64, at 24 (“Courts consistently reject evidence that could satisfy any one of the *Arlington Heights* factors[,] requiring instead explicit evidence of a perpetrator’s subjective intent to discriminate.”); see also *supra* note 94 and accompanying text (discussing need to discern intent on part of multiple participants in lawmaking process, rather than just one).

<sup>99</sup> Courts seem to ignore the likelihood that even if a local leader happened to harbor discriminatory intent in favoring an ordinance or bill, societal norms would discourage any savvy politician from disclosing these views in official settings. Courts focus almost exclusively on signs of explicit discrimination within officially recorded statements and documents. Express statements regarding possible discrimination may even be understood by courts as signs of a lack of intent. For example, in a case involving a large illegal landfill situated near African-American communities in Texas, the district court interpreted statements by one or two city council members suggesting outrage over possible discrimination as proof that the larger council could not have intended to discriminate. See *Cox v. City of Dallas*, No. 3:98-CV-1763BH, 2004 WL 2108253, at \*15–16 (N.D. Tex. Sept. 21, 2004), *aff’d*, 430 F.3d 734 (5th Cir. 2005); see also *supra* note 83 and accompanying text (dis-

uments that include references to racial characteristics or stereotypes as proof of animus in city decisionmaking.<sup>100</sup> Courts have also already limited the extent to which legislators can testify about the motives of other legislators.<sup>101</sup> Furthermore, in contrast with congressional decisions, there are often no hearings that can illuminate legislative intent at the local or municipal level. All of these aforementioned characteristics limit the types of evidence that can be relied upon to assess legislative intent and legislative history for local ordinances, resulting in incomplete information.

The narrow focus on the testimony of the immediate decisionmakers and on the official paper trail preceding the legislation is based on the underlying rationale that the scope of equal protection review should be equivalent to its source. Courts believe the relevant sphere of influence for a local decision must be local as well because the purpose of discriminatory intent review is to weed out culpable actions without imposing undue scrutiny on actors or factors outside of the immediate decisionmaking sphere.

The problem with this approach is that it assumes that localized review will capture the entirety of relevant circumstances and actors. It also assumes that local decisions take place in isolation, such that decisionmakers respond only to local desires and circumstances. Relationships to or commentary on potential outside influences—a larger grassroots movement, popular depictions of the problem at hand, and attention to national pressures—are ignored. Courts should look to the actions and expressions of local leaders outside city council chambers and consider whether the discriminatory views perpetuated by others have had an undue influence on decisionmakers. If litigators and courts do not take steps to expand their understanding of evi-

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cussing cases relying exclusively on official documents for evidence of discriminatory intent and addressing shortcomings of that approach).

<sup>100</sup> One 1980 case, *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), is an exception. Plaintiffs showed that city officials deviated from previous procedural patterns, that they adopted an ad hoc method of decision making, and that city leaders relied on reports “that referred to explicit racial characteristics, and that they used stereotypic references to individuals from which the trier of fact could infer an intent to disguise a racial animus.” *Id.* at 1389. However, due to changed norms, city leaders with racial animus might be more savvy today, leading them to be more cautious about what they include in their official documents.

<sup>101</sup> In a case brought by MALDEF challenging California’s redistricting plans, the court dealt with the question of whether a legislator could testify about the motives of other legislators in support of an *Arlington Heights* inquiry into legislative intent, or whether the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1, granted legislative privilege. The court held that a legislator may testify as to his or her own legislative motives and opinions about the motivations of the body as a whole but may not testify as to the motives of any other legislator who does not waive his or her privilege. *Cano v. Davis*, 193 F. Supp. 2d 1177, 1180–81 (C.D. Cal. 2002).

dence of discriminatory intent, many laws will continue to resist challenge, even if they may have been passed with the goal of targeting protected classes. The following Section explains how quality of life ordinances currently evade review.

### B. *The Evasive Nature of Quality of Life Ordinances*

The consequences of the failure to consider extracameral evidence are particularly evident with quality of life ordinances. These ordinances may represent a legislative trend towards using unreviewable, de facto immigration policies to discriminate against particular communities. Previous cases show that it is very difficult to prove discriminatory intent with local immigration-related ordinances,<sup>102</sup> so litigators tend not to depend on such claims, instead alleging selective enforcement.<sup>103</sup> Plaintiff's litigators, including the Department of Justice, sometimes avoid equal protection claims altogether.<sup>104</sup> Since

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<sup>102</sup> The aforementioned housing and labor ordinances have been vulnerable to federal preemption and First Amendment claims but have resisted equal protection challenges. In *Lozano v. City of Hazleton*, plaintiffs failed to establish intent to discriminate in the passage of the city's Illegal Immigration Relief Act (IIRA). 496 F. Supp. 2d 477, 540 (M.D. Pa. 2007). When the *Lozano* plaintiffs raised an equal protection claim, the district court was not convinced. Relying on the official testimony of Mayor Lou Barletta and the specific procedures utilized by the City Council, the district court found this evidence insufficient to demonstrate that the IIRA was motivated by discriminatory intent. *Id.* at 540–41; *see also supra* note 85. In a challenge to a Redondo Beach labor solicitation ordinance, equal protection claims took a backseat to First Amendment claims at the district court level. The final district court opinion referred to equal protection only in relation to discretionary enforcement. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 965 (C.D. Cal. 2006). The Ninth Circuit later reversed and found the ordinance to be a valid time, place, and manner restriction and made no mention of equal protection claims. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178 (9th Cir. 2010).

<sup>103</sup> Interestingly, in the Brookhaven class action brought by Latino Justice-PRLDEF (formerly the Puerto Rican Legal Defense and Education Fund), *see supra* note 59, the class consisted of “all Latino persons living in Brookhaven Township, New York.” *Valdez v. Town of Brookhaven*, No. 05-CV-4323JSARL, 2005 WL 3454708, at \*1 (E.D.N.Y. Dec. 15, 2005). The plaintiffs made procedural due process claims and statutory arguments under the Fair Housing Act (FHA), 42 U.S.C. § 3613(a) (2006), regarding their right to be free of discriminatory enforcement of housing laws. *Valdez*, 2005 WL 3454708, at \*5. The court accepted only the latter arguments. Though the plaintiffs addressed discriminatory enforcement in their FHA claims, they did not raise an equal protection claim. *Id.* at \*11 & n.11. This was likely not an oversight, but a strategic choice given the claim's ineffectiveness in this area.

<sup>104</sup> Indeed, the Department of Justice, along with other civil rights groups, challenged Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, *Ariz. Rev. Stat. Ann.* § 11-1051 (2010), originally introduced as Senate Bill 1070. Opposition to the law has largely focused on Section 2, which requires police officers to check the immigration status of anyone “where suspicion exists” that the person is in the country illegally because many believe this provision discriminates against legal immigrants and Latinos. *Id.* Despite the public outcry, the Obama administration “advanced a sweeping challenge to the law, avoiding any race-based arguments and asserting instead that all six sections were

they generally elude review under current equal protection doctrine, quality of life ordinances might be attractive to those with discriminatory intent. Indeed, one law firm produced a memo surveying the options available to local governments dealing with the “problems” of immigration and specifically pointed to maximum-occupancy and other zoning ordinances as an approach that is likely to survive litigation.<sup>105</sup>

Furthermore, quality of life ordinances do not fit conveniently within any other established constitutional doctrines typically used to challenge immigration-related ordinances. Thus, they make excellent vehicles for “backdoor” attempts at immigration restrictionism<sup>106</sup> designed to withstand legal challenge. Preemption doctrine does not necessarily apply as it has with many other forms of immigration ordinances,<sup>107</sup> nor do the First Amendment claims used against labor solicitation ordinances.<sup>108</sup>

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trumped, or ‘preempted,’ by federal law.” James Doty, *A Case the Obama Administration Deserves To Lose*, SALON.COM (July 28, 2010), [http://www.salon.com/news/politics/war\\_room/2010/07/28/sb10170\\_obama\\_today](http://www.salon.com/news/politics/war_room/2010/07/28/sb10170_obama_today) (criticizing Department of Justice’s decision to litigate case purely on preemption grounds, rather than equal protection arguments). On July 28, 2010, U.S. District Judge Susan Bolton issued a preliminary injunction enjoining on preemption grounds the enforcement of several provisions of SB 1070, including the provision of Section 2 that would require officers to attempt to determine the immigration status of those they had a reasonable suspicion were unlawfully present in the United States. *United States v. Arizona*, 703 F. Supp. 2d 980, 993–98 (D. Ariz. 2010), *appeal docketed*, No. 10-16645 (9th Cir. July 29, 2010).

<sup>105</sup> Memorandum from Barbara J. Saint André, Perini & Assoc., Immigration Issues Facing Local Governments, 5th Annual Mun. Law Conference 2007, Mass. Continuing Legal Educ., Inc. (March 16, 2007), at 1, *available at* [http://www.petrinilaw.com/wp-content/uploads/2007.02.07%20MCLE%20Municipal%20law%20update%20immigration%20\(2700-11\).pdf](http://www.petrinilaw.com/wp-content/uploads/2007.02.07%20MCLE%20Municipal%20law%20update%20immigration%20(2700-11).pdf). The maximum-occupancy approach is not altogether new. *See generally* Pader, *supra* note 62 (reviewing discriminatory use of zoning in early twentieth century and its reemergence in 1990s).

<sup>106</sup> This approach has been largely unnoticed by legal scholars, although not by political scientists. *See generally* Monica W. Varsanyi, *Immigration Policing Through the Backdoor: City Ordinances, the “Right to the City,” and the Exclusion of Undocumented Day Laborers*, 29 URBAN GEOGRAPHY 29 (2008) (arguing that many city governments employing land-use ordinances, and ordinances limiting behavior associated with immigrant day laborers in public spaces, achieve local immigration policy by proxy).

<sup>107</sup> *See supra* notes 33–34 (discussing challenges to IIRA ordinances based on preemption). Preemption does not apply to quality of life ordinances largely because they are not facially directed at immigrants and demonstrating any explicit connection to federal immigration reulation is difficult. Even if preemption claims could somehow be effective, preemption doctrine does not address the issue of animus and disparate impact on immigrant communities. As a result, a preemption claim against a quality of life ordinance would bypass the underlying questions of discrimination that would likely motivate a challenge in the first place.

<sup>108</sup> *See supra* notes 37–38 (discussing First Amendment arguments used in antilabor solicitation ordinance challenges).

Today, even when disparate impact is proven and strict scrutiny applies, our current standards for proof of discriminatory motive do not fit with the contemporary realities of anti-immigrant political organizing. The following Section focuses on the failure of *Arlington Heights* to incorporate extracameral evidence in order to suitably account for the influence of discriminatory political mobilization.

### C. *The Need To Assess Extracameral Evidence of Modern Political Mobilization and Statutory Diffusion*

The principal problem with judicial review of evidence of discriminatory intent, and one key reason quality of life ordinances survive such review, is that courts do not examine enough extracameral evidence of political mobilization. National interest groups influence the immigration policy decisions of cities in a variety of ways that may not even have been seriously considered when *Arlington Heights* was decided thirty years ago, such as websites and the instantaneous dissemination of model ordinances.<sup>109</sup> Laws related to immigration have been particularly shaped by national movements in the Information Age. Across the country, national interest groups have organized to combat immigration, and their efforts have had an impact on the decisions of cities, small towns, and states. Economic pressures and national security justifications have motivated private interest groups to become active in the legislative decisions of state and local bodies regarding immigration because efforts at the federal level have proven ineffective thus far. Some elements of the anti-immigrant movement may also be motivated by xenophobia.<sup>110</sup>

One of the primary ways the anti-immigrant movement has mobilized across the country is through the Internet. Through websites and blogs, individuals and organizations are now able to disseminate information easily to gain support for restrictionist measures. Examples of such organizing are numerous. Mayor Barletta created a website to promote Hazleton's anti-immigration efforts and seek

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<sup>109</sup> At times, this advocacy takes the form of lobbying for local policy reform or raising funds for cities defending immigration ordinances. See, e.g., Tom Finkel, *Valley Park Aldermen to Mayor: Adios, Whitteaker!*, RIVERFRONT TIMES BLOG (Mar. 7, 2007, 2:36 PM), [http://blogs.riverfronttimes.com/dailyrft/2007/03/valley\\_park\\_aldermen\\_to\\_mayor.php](http://blogs.riverfronttimes.com/dailyrft/2007/03/valley_park_aldermen_to_mayor.php) ("Valley Park is racking up legal bills in its defense of the ordinances, but its legal fund got a boost at Monday night's meeting when two women representing Missourians Against Illegal Immigration and the Constitution Party of Missouri presented the city a check for \$5,000.").

<sup>110</sup> Slippage exists between "anti-illegal," anti-immigrant, and anti-Latino terms and efforts. See *supra* notes 18–19 and accompanying text.

donations to cover legal costs.<sup>111</sup> The Federation for American Immigration Reform announces on its website that it can provide model labor solicitation ordinances to deal with day laborers in one's community.<sup>112</sup> Some minutemen groups organize via websites to stem undocumented immigration at the local level.<sup>113</sup> *The Wall Street Journal* reported on the emergence of over two-hundred "so-called nativist" organizations by 2006 and noted that "these grass-roots organizations are having an impact." The article described instances in North Carolina, Georgia, and Arizona in which an "anti-illegal immigration group" was able to influence specific legislative or executive decisions of state or local leaders.<sup>114</sup> Websites also provide evidence of the influence of anti-immigrant groups on the Internet. Before its original website shut down, [www.saveourstate.org](http://www.saveourstate.org) was a major forum for restrictivist activists and included links to over two hundred other "anti-illegal" websites and blogs.<sup>115</sup> Groups across the country, such as Mothers Against Illegal Aliens, advocated against day laborers and bilingual education.<sup>116</sup>

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<sup>111</sup> See SMALL TOWN DEFENDERS, <http://www.smalltowndefenders.com> (last visited Oct. 19, 2010). The court appears not to have considered evidence from this website in *Lozano v. City of Hazleton*. See 496 F. Supp. 2d 477 (M.D. Pa. 2007). Funds from activists might encourage city leaders to enact legislation that could be discriminatory because of their support and because litigation becomes less of a fiscal concern.

<sup>112</sup> See FED'N FOR AM. IMMIGR. REFORM, *Confronting Illegal Day Labor Issues in Your Community*, [http://www.fairus.org/site/PageServer?pagename=team\\_team6c4e](http://www.fairus.org/site/PageServer?pagename=team_team6c4e) (last visited Oct. 19, 2010).

<sup>113</sup> According to Frédéric Douzet, "[M]inutemen groups are very diverse. Some . . . are very local, rather small with a loose informal structure, while others such as the MDCDC, are highly structured with regular activities and up-to-date websites." *The Minutemen and Anti-immigration Attitudes in California*, EUR. J. AM. STUDIES 1, 4 (Special Issue 2009), <http://ejas.revues.org/7655>. A Brookings Institute case study of local responses to immigration in Prince William County, near Washington, D.C., highlights the impact of a local Minutemen group in the town of Herndon. After the Town Council approved the use of public funds for a day labor hiring site in 2005, "[t]wo grassroots organizations quickly formed in opposition: Help Save Herndon and the Herndon Minutemen. By May 2006, and in time for a local election, these groups had raised the visibility of the issue, the Town Council was voted out, and the center was subsequently closed." AUDREY SINGER, JILL H. WILSON & BROOKE DERENZIS, METRO. POLICY PROGRAM AT THE BROOKINGS INST., IMMIGRANTS, POLITICS, AND LOCAL RESPONSE IN SUBURBAN WASHINGTON 15 (2009), available at [http://www.brookings.edu/~media/Files/rc/reports/2009/0225\\_immigration\\_singer/0225\\_immigration\\_singer.pdf](http://www.brookings.edu/~media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf).

<sup>114</sup> Miriam Jordan, *In Immigrant Fight, Grass-Roots Groups Boost Their Clout*, WALL ST. J., Sept. 28, 2006, at A1, A14.

<sup>115</sup> In 2009, this website closed due to reorganization of the Save Our State board and returned as [www.saveourstate.info](http://www.saveourstate.info). SAVE OUR STATE, <http://www.saveourstate.info> (last visited Oct. 19, 2010). Save Our State is a nonprofit organization that first emerged in California, but, thanks to the Internet, it now has supporters across the United States.

<sup>116</sup> See Susan Ferriss, *Groups Cite Hate in Immigration Debate*, SEATTLE TIMES, Nov. 23, 2007, at A7.

Larger political mobilization efforts also help explain a curious phenomenon in recent immigration policy: the emergence of immigration ordinances as a “preventative” measure against nonexistent or nascent immigrant populations. Many cities that do not have significant immigrant populations—but fear that the demographic shift occurring elsewhere might soon affect their communities—have enacted restrictionist legislation. This suggests that the wave of mobilization has had such an impact that it induces legislation even where it is not presently relevant. For example, an Anchorage, Alaska, Assemblyman described his reasons for supporting a restrictionist policy: “It’s a preventative measure . . . . Let’s not be a gateway for illegals.”<sup>117</sup> The Assemblyman, Paul Bauer, leads “Alaskans for Legal Presence,” an anti-immigration group that has worked with leaders of the Federation for American Immigration Reform.<sup>118</sup> In many localities, a court engaging in our current equal protection analysis would not find a history of discriminatory treatment towards immigrants or Latinos because they simply had not existed there previously and because present-day discriminatory motivations are unlikely to be recorded in City Council meetings.

These courts would miss the larger social context, even though the link between local ordinances and national restrictionist activism is quite proximate. One reporter, in an attempt to find a common link between the diverse cities that have passed local restrictions on immigration, found that the only thing they had in common was a connection to Joseph Turner, the founder of Save Our State, an anti-illegal immigration group promoting a model ordinance restricting illegal immigrants’ abilities to live and work in a given city.<sup>119</sup> Turner

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<sup>117</sup> Kyle Hopkins, *Bauer Wants To Let Police Ask ‘Are You a Citizen’*, ANCHORAGE DAILY NEWS, Sept. 10, 2007, at A1 (on file with the *New York University Law Review*). The Mayor of Valley Park, Missouri, has also described the city’s efforts as “preventative maintenance.” David Fried, *Local Illegal Immigration Laws Draw a Diverse Group of Cities*, N. COUNTY TIMES (San Diego), Sept. 2, 2006, [http://www.nctimes.com/news/local/article\\_03dfcb93-677d-5b4f-b1af-ed123a8a49fc.html](http://www.nctimes.com/news/local/article_03dfcb93-677d-5b4f-b1af-ed123a8a49fc.html). Some cities may therefore promote anti-immigrant ordinances without ever having a significant population of noncitizens.

<sup>118</sup> See Brendan J. Kelley, *FAIR Play? A Controversial D.C.-Based Anti-immigration Group Organizes in Alaska*, ANCHORAGE PRESS (Dec. 2, 2009) <http://www.anchoragepress.com/articles/2009/12/14/news/doc4b16f4b83c9e5745387324.txt>.

<sup>119</sup> See Fried, *supra* note 27 (“Try to determine a common denominator among the cities, however, and there is only one: Joseph Turner, the founder of Save Our State, an anti-illegal immigration group that tried to drum up support for a similar initiative he wrote.”). The link between Joseph Turner and many local ordinances is founded on the model ordinance that Turner promoted and the strikingly similar local ordinances that emerged across the country. The Southern Poverty Law Center asserts that the Federation for American Immigration Reform has orchestrated the passage of many local immigration ordinances and that it hired Joseph Turner as its “western field representative, a key organizing position,” after he developed his “model anti-illegal immigrant ordinance.”

embodies the nativist activism that has spread across the country in recent years. The problem with Turner's influence, and the movement he represents, is its xenophobia. Turner has defended white separatism<sup>120</sup> and has expressed concern with the possibility that the United States may become a "Third World cesspool."<sup>121</sup> Turner and activists that share his views disguise the racism of their anti-immigration rhetoric under the banner of combating illegal behavior. They may purport to be motivated by patriotism and rule of law, but prejudice seemingly underlies their concerns. As a result, outside actors and mobilization have an increasing and discriminatory influence on local decisionmaking that is not detected when courts look exclusively to official city documents in their analyses of discriminatory intent.

Statutory diffusion represents another aspect of modern local decisionmaking. Once a model ordinance emerges on a hot-button issue, similar legislation often arises across the country. In the immigration context, copycat ordinances are widespread.<sup>122</sup> Restrictionist groups are aware of the potential impact of a model ordinance that can be copied across the country. For example, the Immigration Law Reform Institute has created at least two model ordinances and provides the text of state and local legislation it favors on its website.<sup>123</sup> With the dispersal of information through the Internet and the rise of national anti-immigrant organizations, a wide range of cities may look to the same sources for legislative inspiration.<sup>124</sup> The adop-

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HEIDI BEIRICH, S. POVERTY LAW CTR., *THE NATIVIST LOBBY: THE THREE FACES OF INTOLERANCE* 11 (2009), available at [http://www.splcenter.org/sites/default/files/downloads/splc\\_nativistlobby.pdf](http://www.splcenter.org/sites/default/files/downloads/splc_nativistlobby.pdf). This evidence suggests a larger anti-immigration network.

<sup>120</sup> BEIRICH, *supra* note 119, at 11 (quoting Turner's written statements on Save Our State website: "I can make the argument that just because one believes in white separatism that that does not make them a racist. . . . I don't think that standing up for your 'kind' or 'your race' makes you a bad person").

<sup>121</sup> Jordan, *supra* note 114, at A1 (describing Turner's anti-immigrant actions and stated motivations).

<sup>122</sup> This is evident with the IIRA ordinances, the antilabor solicitation ordinances, and a variety of other ordinances. See *supra* notes 31–32, 36 and accompanying text (describing ordinances that have served as models in other localities); see also Catharine Slack, *Municipal Targeting of Undocumented Immigrants' Travel in the Post 9/11 Suburbs: Waukegan, Illinois Case Study*, 22 GEO. IMMIGR. L.J. 485, 501 (2008) (noting Mayor of Waukegan's claim that sixteen copycat ordinances followed Waukegan car impoundment ordinance).

<sup>123</sup> *Resources*, IMMIGRATION LAW REFORM INSTITUTE, <http://www.irli.org/links.html> (last visited Oct. 19, 2010) (listing model ordinances related to illegal immigration); *State and Local Laws*, IMMIGRATION LAW REFORM INSTITUTE, <http://www.irli.org/laws.html> (last visited Oct. 19, 2010) (linking to description of anti-illegal immigrant state and local laws).

<sup>124</sup> See David Fried, *supra* note 27 ("There are industrial cities in the Northeast, rural towns that barely stand out on a map, and growing metropolitan suburbs in 13 states that have all looked at doing what Escondido has proposed . . .").

tion of similar statutory language and models by different localities is often indicative of a larger political movement.

The example of Joseph Turner and the IIRA ordinance illuminates the way in which political mobilization and statutory diffusion operate in the immigration context. Turner was originally concerned with his home city of San Bernadino, California, but he soon developed immigration initiatives that would be transferable across the country. In one interview, he stated, “Without a doubt, I was trying to franchise an idea, a cookie-cutter.”<sup>125</sup> The IIRA model ordinance soon “spread like wildfire.”<sup>126</sup> “Through his Web site, Mr. Turner has . . . helped ignite a nationwide movement by local governments to crack down on illegal immigration.”<sup>127</sup> Turner’s work influenced other local city leaders: “Through the Internet and conservative talk radio, local city council members in other towns across the country heard about the San Bernadino effort and proposed anti-immigrant efforts of their own.”<sup>128</sup> Mayor Barletta of Hazleton enacted an ordinance modeled after Turner’s IIRA ordinance,<sup>129</sup> and dozens of cities across the country have followed suit.<sup>130</sup>

Political mobilization and statutory diffusion have impacted the local decisionmaking process in the immigration context. It is reasonable, then, for courts to analyze extracameralevidence and evidence of external relationships when they analyze discriminatory intent.<sup>131</sup>

<sup>125</sup> *Id.*

<sup>126</sup> JILL ESCHBENSHADE, IMMIGRATION POLICY CTR., DIVISION AND DISLOCATION: REGULATING IMMIGRANTS THROUGH LOCAL HOUSING ORDINANCES 9 (2007).

<sup>127</sup> Jordan, *supra* note 114, at A1; *see also id.* (“Mr. Turner is part of an anti-immigrant brushfire that is gathering force at the grass-roots level around the U.S. Small groups like Mr. Turner’s Save Our State are cropping up from coast to coast, recruiting members and devising tactics to tackle illegal immigration in their communities.”).

<sup>128</sup> Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1042 (2007).

<sup>129</sup> *See* Jordan, *supra* note 114, at A14 (describing how Mayor Barletta was inspired by Turner’s IIRA Internet petition).

<sup>130</sup> Luther, *supra* note 32, at 575 (2008) (“These [Hazleton] ordinances became the model legislation for dozens of similar measures passed by numerous local governments.”).

<sup>131</sup> While the speech of national interest groups is protected under the First Amendment, if legislators can be proven to have been influenced by discriminatory views of such groups, resulting legislation raises equal protection concerns. Evidence indicates that groups with discriminatory views have exerted influence on the local legislative process. Civil rights groups such as the Leadership Conference on Civil Rights Education Fund have identified a number of groups opposing immigration—the Federation for American Immigration Reform (FAIR), the Center for Immigration Studies (CIS), and Number-USA—as using “racist stereotypes and bigotry” to promote their restrictionist cause. “[T]hese seemingly ‘legitimate’ advocates against illegal immigration are frequently quoted in the mainstream media, have been called to testify before Congress, and often hold meetings with lawmakers and other public figures.” *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUC. FUND, CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN

The next Section offers a proposal for expanding the evidentiary review of discriminatory intent.

### III

#### APPLYING AN EXPANDED *ARLINGTON HEIGHTS* TEST TO QUALITY OF LIFE ORDINANCES

##### A. *An Expanded Arlington Heights Test*

In order to develop a more robust and relevant discriminatory intent inquiry for local legislation, courts and litigators should revise their approach to *Arlington Heights* to ask whether and how local actors have ties to national activism and the extent to which such relationships are probative evidence of discriminatory intent. This Section therefore points to two types of evidence that courts should look to when examining potentially discriminatory local ordinances that may have been influenced by national mobilization. It then shows how corresponding approaches can help draw out such evidence.

The first type of evidence is extracameral but local. This type of evidence includes the statements or writings of local city leaders involved in the decisionmaking process that would not normally be found in official records. Extracameral evidence includes interviews given by local leaders to the media, statements they have posted on the Internet, websites they helped create, etc. As we saw in the *Valley Park* case, courts do sometimes accept media interviews of local leaders as evidence, and plaintiffs' lawyers should do more investigative work in this area. Courts need a better picture of local leaders' attitudes in order to understand their intent. Even if such evidence would not implicate all decisionmakers,<sup>132</sup> more thorough analysis of these sources might make an important contribution to the circumstantial evidence.

The second type of evidence provides information as to whether local decisionmakers have relationships with groups known to have discriminatory views or whether local decisionmakers intentionally borrowed from a model ordinance, or an ordinance enacted in another city, that appears to have been motivated by discriminatory views. The benefit of this type of evidence is that it might reveal invidious discrimination obscured in official documents. This type of evi-

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AMERICA 14 (2009), available at [http://www.civilrights.org/publications/hatecrimes/lccref\\_hate\\_crimes\\_report.pdf](http://www.civilrights.org/publications/hatecrimes/lccref_hate_crimes_report.pdf).

<sup>132</sup> See *supra* note 94 (discussing *Gray v. City of Valley Park*, No. 4:07CV00881ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), which held that discriminatory intent of ordinance was not shown by proving discriminatory intent of Mayor alone); see also *infra* note 137 and accompanying text (discussing imputed intent).

dence focuses on the direct political ties to and influences on local decisionmakers that exist outside of city council chambers.

In order to assist courts in identifying and eliciting these two types of evidence, this Note proposes two corresponding approaches that would significantly improve the *Arlington Heights* test's ability to identify discriminatory intent. First and most importantly, plaintiffs' lawyers and courts should examine certain types of extracameral evidence. Local decisionmakers may be more candid outside of official chambers about the motives behind the ordinances they sponsor. Statements of decisionmakers found in interviews, website publications, and recorded public speeches are relevant pieces of evidence for understanding intent. This approach does not necessarily require deviating from the current six-factor *Arlington Heights* test but simply uses extracameral evidence to apply the doctrine with more rigor.

The second approach probes the links between legislative decisions and discriminatory activism and examines the significance of statutory borrowing. Courts should examine the extent to which the sponsors may have intentionally borrowed from model legislation promoted by discriminatory groups.<sup>133</sup> If a direct link is identified between local legislation and outside activists and groups, courts should then engage in another layer of analysis—asking whether the local leader drew from the group because he or she was motivated by discriminatory intent. This would involve an investigation into statements and web postings,<sup>134</sup> for example, for evidence of the extent of any discriminatory motivations.<sup>135</sup> Such an inquiry would identify links between the instant legislation and model legislation proposed by Joseph Turner and Save Our State, for example. Were courts to adopt this approach, the ties between local legislators and anti-immigrant mobilization would not escape review.

In addition, courts should ask whether the legislation is modeled on legislation that another court has found to be motivated by discriminatory intent. This inquiry would provide courts with better tools to begin the vexing task of deciphering the intent behind copycat ordinances and statutory diffusion. Courts would determine whether a relationship between the two ordinances is evident, such as partial or

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<sup>133</sup> A party to the case could present the court with evidence that the legislation at issue borrowed text from model legislation or followed a particular policy approach recommended by the group. The court would then examine the extent to which the local ordinance replicated the model. This approach would better deal with modern activist tactics, such as website and network mobilization.

<sup>134</sup> Other indicative sources might be statements given to the press and declarations found in group organizing materials, such as pamphlets or flyers.

<sup>135</sup> An example pertinent here might be extensive anti-Mexican rhetoric.

complete replication. If so, courts would look to whether local leaders adopted the model ordinance because it was understood to target particular communities directly and efficiently. Local leaders could be questioned as to where they first found the model ordinance and why they adopted it. Extracameral evidence could supply answers as well. This inquiry would deal with the issue of statutory diffusion in ways that our current doctrine does not.

Courts should consider adding this second inquiry as an additional factor to the current *Arlington Heights* test because doing so would encourage judges to look at a wider range of relevant evidence. As with any other current factor, its finding alone would not suffice to prove discriminatory intent. Courts look comprehensively at all of the evidence at hand and weigh all relevant factors in their discriminatory intent analysis. An identifiable nexus with an external discriminatory source is not alone a smoking gun, but it is something judges should take into account.

The two approaches presented here would add greater context to the *Arlington Heights* test through more complete evidence of contemporary legislative influences. The former of the two approaches essentially calls on courts to add additional evidence to their application of the six-factor *Arlington Heights* test, while the latter requires courts to consider adding a prong to the test itself. Courts would determine whether there is an identifiable nexus between outside influences and local legislation, as evidenced through public declarations of local leaders or Internet activism or by keen similarities with legislative developments elsewhere. Expanding the doctrine's scope would change the way that courts confront the issue of modern political mobilization, which is often propelled by discriminatory motivations. Groups that mobilize through the dissemination of discrimination would no longer be shielded by an equal protection doctrine that ignores their existence.

### B. *Limitations*

These inquiries should be subject to limitations in order to avoid overreaching evaluations of discrimination liability. An expanded discriminatory intent inquiry should still remain tied to local actions. One limitation is temporal: Any outside evidentiary sources should be relatively contemporaneous to the decision at hand. While comparison with historical events is insightful and can identify whether a similar legislative approach was used in a discriminatory fashion before, *Arlington Heights* instructs courts to look more to the immediate background of a decision. Courts should focus on extracameral evi-

dence of a decisionmaker's motive so as not to use historical evidence too sweepingly.

Another evidentiary limitation relates to subject matter. Courts should look for consistency between the discriminatory target of the local legislation and the target of the external mobilization allegedly tied to the local action. For example, it would be relevant to know that a mayor made discriminatory statements about Mexicans in a newspaper interview if the ordinance was challenged as discriminatory against Latinos.<sup>136</sup> A geographic limitation, however, would be unnecessary as long as a direct nexus could be identified, since the primary objective of an extended approach is to allow evidence from outside regions and states to factor into a court's analysis.

Evidence of local relationships to outside sources also raises the question of whether courts might impute intent in a way contrary to discriminatory intent doctrine's emphasis on direct intentionality,<sup>137</sup> and whether such examination might chill actions protected by the First Amendment.<sup>138</sup> Courts should not simply impute discriminatory intent based on possible ties between local leaders and discriminatory groups. Doing so could lead to haphazard analysis. First Amendment protections must remain intact to protect expression, but when discriminatory mobilization is behind the decisionmaking process, it

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<sup>136</sup> Due to discrimination "slippage," however, such statements might also be relevant to an ordinance challenged as anti-immigrant. See *supra* notes 18–19 and accompanying text (discussing slippage).

<sup>137</sup> Such questions include whether to impute intent to the borrower of a model ordinance or to the members of a larger body when the drafter or promulgator of a measure is associated with discriminatory intent. A thorough discussion of the issue of imputed intent is beyond the scope of this Note. Some scholars note the difference in deciphering the intent of individuals and the intent of a larger body. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1992) ("[A]scribing a purpose to a human institution is an activity related to, but different from, ascribing a purpose to an individual . . ."). Discussions of imputed intent often arise in employment law through the concept of "cat's paw" liability, which examines whether a subordinate coworker's animus can be imputed to an employer in employment discrimination cases. See, e.g., Tim Davis, *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 255–61 (2007) (discussing origin of "cat's paw" liability and arguing that "an employer should be liable whenever an animus-tinged report, from any source, whether employee or not, has a substantial influence on a decision to take an adverse employment action against an employee"); Emily M. Kepner, Note, *True to the Fable?: Examining the Appropriate Reach of Cat's Paw Liability*, 5 SEVENTH CIRCUIT REV. 108, 110 (2009), available at <http://www.kentlaw.edu/7cr/v5-1/kepner.pdf> ("The cat's paw theory of liability emerged to account for the fact that employers' decisionmaking processes have become more complicated and discriminatory motives can exist at various levels.").

<sup>138</sup> For example, a local leader might challenge a court's examination into his or her private correspondence with activists or the use of model ordinances drafted or sponsored by a particular organization known to have anti-immigrant leanings as within his or her First Amendment protections.

needs to be identified and considered by courts. Scholars have written extensively on the tension between equal protection and First Amendment concerns when racist speech is directly regulated in some form,<sup>139</sup> but it is important to distinguish between directly regulating discriminatory speech and evaluating the discriminatory intent of decisionmakers upon a legal challenge. In order to avoid de facto limitations on speech that could chill First Amendment expression, courts should pursue detailed case-by-case analysis to determine if a direct nexus exists between legislators and outside groups or legal models.<sup>140</sup> Courts would have to clarify that mere membership in a discriminatory group would not be enough to suggest a leader's discriminatory intent. Courts and litigators should draw extracameral evidence from interviews or websites that can provide more concrete information—for example, direct quotes—as to whether a local decisionmaker was motivated by discriminatory intent when he or she adopted a model ordinance, for example.

Finally, courts have to confront the issue of discrimination slippage.<sup>141</sup> In order for local immigration or residential ordinances to receive strict scrutiny, courts must be willing to take a closer look at statements referring to undocumented immigrants. Only if they take that step and find that Latinos or legal residents are the true targets of such statements and legislation can courts proceed with a thorough discriminatory intent analysis.

### C. *Case Study: Applying an Expanded Arlington Heights Test to the Escondido, California Ordinances*

This Note has argued for the need to expand the scope of discriminatory intent analysis by applying the original *Arlington Heights* test with more rigor, examining extracameral evidence of intent, and scrutinizing the impact of national political mobilization and statutory diffusion. This Part shows what an expanded discriminatory intent

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<sup>139</sup> See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing for independent tort for racial slurs); Anne C. Knight, Note, *Striking the Balance Between Anti-discrimination Laws and First Amendment Freedoms: An Alternative Proposal To Preserve Diversity*, 30 T. JEFFERSON L. REV. 249 (2007) (recommending statutorily required forum that would balance antidiscrimination and First Amendment interests in university setting); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1990) (exploring problems with regulating racist speech in colleges and universities).

<sup>140</sup> Case-by-case analysis has been recommended elsewhere as a method of dealing with this balance. See Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 48–50 (1985).

<sup>141</sup> See *supra* notes 18–19 and accompanying text (describing and defining problem of slippage).

analysis would look like in practice. Escondido, California, serves as the basis for the following hypothetical challenge.

Suppose a group of Latino plaintiffs challenged the quality of life ordinances that emerged in Escondido, California, in 2008 as a coded form of discrimination. City leaders there argued that they focused on the public nuisances of illegal immigration, citing residents for code violations such as garage conversions, graffiti, and junk cars, and limiting overnight parking permits.<sup>142</sup> For the purposes of this hypothetical, I shall assume that plaintiffs bring a case against the City to challenge a maximum-occupancy ordinance.

Suppose plaintiffs made an equal protection claim that challenged the ordinance as discriminatory against members of the local Latino community. The plaintiffs would argue that the ordinance disparately impacted them and deprived them of equal housing opportunities because it subjected them to additional scrutiny or even discouraged landlords from renting to them. For our purposes, I assume that a court will find that a maximum-occupancy ordinance would have a disparate impact on Latino plaintiffs<sup>143</sup> and that a discriminatory intent inquiry may proceed. The plaintiffs would then have the burden of proving discriminatory intent.

To succeed, the plaintiffs would have to show that the ordinance was passed with intent to discriminate against either Latinos or immigrants generally. They would need to present evidence that demonstrates a desire to target not just undocumented immigrants but Latinos or people of non-U.S. origin.<sup>144</sup> The status of the plaintiffs alone is not what would determine whether the regulation would get strict scrutiny—Latino plaintiffs could bring a claim, but if the court determines that animus were aimed only at undocumented immi-

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<sup>142</sup> See *supra* notes 2, 13 and accompanying text (discussing immigration-related measures proposed by Escondido City Council).

<sup>143</sup> Such challenges are difficult but not impossible. Several maximum-occupancy ordinances have been successfully challenged as having a disparate impact on Latino plaintiffs. For example, through a Fair Housing Act claim, the Department of Justice was able to obtain a consent order blocking a maximum-occupancy ordinance in Wildwood, New Jersey. See *United States v. City of Wildwood, C.A., No. 94CV1126 (JEI)* (Dep't of Justice 9/4/1994) (consent order), available at <http://www.justice.gov/crt/housing/documents/wildwoodsettle.php>. In *Briseño v. City of Santa Ana*, 8 Cal. Rptr. 2d 486 (Ct. App. 1992), the judge ruled that the local maximum-occupancy law was preempted by state law, but the lawyer for the plaintiff also asserted that “the city had racist intentions and was trying to rid the city of the growing number of people of Mexican origin.” Ellen Pader, *Housing Occupancy Standards: Inscripting Ethnicity and Family Relations on the Land*, 19 J. ARCHITECTURAL & PLAN. RES. 300, 313 (2002); see also *id.* at 313–14 (describing several disparate impact challenges to maximum-occupancy ordinances).

<sup>144</sup> See *supra* notes 20, 67–68 and accompanying text for discussion of the level of scrutiny applied to discrimination on the basis of race or national origin, as opposed to discrimination against those with undocumented status.

grants, it would not apply strict scrutiny. On the other hand, a claim brought by undocumented Latinos could get strict scrutiny if plaintiffs were able to convince the court that the ordinance was intended to discriminate against all Latinos, documented or undocumented.

The court would review discriminatory intent through the current application of *Arlington Heights*. It would likely examine the local context leading up to the decision only through city council meeting minutes, official planning documents, and hearing testimony. Unfortunately for the plaintiffs in our hypothetical, it is likely that there was limited-to-no debate amongst the council members in official settings. Under these circumstances, a court would find no evidence of discriminatory intent. A court might admit additional evidence of discriminatory statements by city leaders made outside council chambers, such as a newspaper interview, but likely would not give such statements much consideration. Under the present standard, the *Arlington Heights* inquiry would likely not result in a finding of discriminatory intent, and the equal protection claim would be dismissed. The more rigorous *Arlington Heights* review advocated for in this Note would use a wider range of sources and could result in a different outcome.

### 1. *Improving Application of the Current Arlington Heights Test*

Courts can improve upon the current application of the *Arlington Heights* test simply by applying the six-factor test with more exactitude and including extracameralevidence. The first *Arlington Heights* factor, the discriminatory effect of the official action, could rely on more extracameralevidence, such as newspaper articles and academic reports.

The second *Arlington Heights* factor looks to the historical background of the decision. Usually, courts look only to the immediate historical background in the locality at hand. Instead, a court should consider the fact that strong anti-immigrant and anti-Mexican sentiment is sweeping southern California, providing the backdrop for Escondido's decision. Expert testimony would support this. For example, Professor Wayne Cornelius, one of the nation's leading experts on Mexican immigration, described Escondido as having a conservative population and being a destination for both legal and illegal immigration, making it a "hotbed of anti-immigration activity."<sup>145</sup> These sources provide added circumstantial evidence of discriminatory intent.

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<sup>145</sup> Anna Gorman, *Undocumented? Unwelcome; Escondido Is Using a Wave of Policies To Try To Drive Away Illegal Immigrants*, L.A. TIMES, July 13, 2008, at B1. Professor

If courts were to consider a more rigorous *Arlington Heights* inquiry, extracameralevidence of statements made by council members in the press would assist plaintiffs. Councilman Ed Gallo was quoted in an article about the quality of life ordinances as saying, “If you are not here legally, you don’t belong here. . . . We’re talking about image and appearance. . . . We are trying to change the image of Escondido.”<sup>146</sup> This statement suggests that perhaps Councilman Gallo was concerned about more than documentation—his focus on *image* begs the question of whether he is focused on the ethnic appearance of the population, rather than invisible documentation.<sup>147</sup> Another report stated, “In March, [Escondido Councilman] Daniels said the parking restrictions may have some of the effects on illegal immigrants originally intended with the rental ban, but without the legal pitfalls.”<sup>148</sup> Councilman Daniels’s statement echoes Councilman Sam Abed’s interview statements about evading review<sup>149</sup> and suggests that council members targeted a particular community through their ordinances. These interview statements provide extracameralevidence that could assist a court in determining that a decision was driven by discriminatory intent.

The third factor—the specific sequence of events leading up to the challenged decision—is critical to a more robust application of *Arlington Heights*. Here, the plaintiffs would point to the recent ordinances proposed by city leaders. City leaders proposed their new quality of life ordinances soon after they rescinded their IIRA-like ordinance. Though these “quality of life ordinances” often say nothing about immigration on their face, Escondido leaders were clearly motivated by a desire to curtail immigration: “Escondido officials said they were taking immigration enforcement into their own hands. They said they were fighting the perception that Escondido, a city in affluent northern San Diego County with a burgeoning Latino population, has become a destination for illegal immigrants.”<sup>150</sup> Factors four and five instruct courts to look at departures from the normal procedural

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Wayne Cornelius is the Director of the Center for Comparative Immigration Studies at UC San Diego.

<sup>146</sup> *Id.*

<sup>147</sup> Defendants might counter that Gallo’s discussion of image was about blight rather than race. Plaintiffs could have difficulty proving the comments were discriminatory, which demonstrates why quality of life ordinances are so slippery.

<sup>148</sup> Paul Eakins, *Critics, Council Disagree on Parking-Ordinance Motive*, N. COUNTY TIMES (San Diego), Aug. 5, 2007, [http://www.nctimes.com/news/local/article\\_d8fb305d-2f8b-514f-b59e-522930de168d.html](http://www.nctimes.com/news/local/article_d8fb305d-2f8b-514f-b59e-522930de168d.html). Although this statement refers to “illegal immigrants,” this quote indicates Daniels’s desire to avoid stringent judicial review.

<sup>149</sup> See *supra* note 13 and accompanying text (discussing Escondido City Council’s attempts to regulate flow of immigrants).

<sup>150</sup> *Id.*

sequence and to the normal substantive standards in a given decision, while the sixth and final factor looks to the administrative or legislative history of the decision. The final factor is usually examined only through official documents. This Note has shown this is insufficient.

## 2. *Expanding the Arlington Heights Inquiry*

Plaintiffs could also present evidence that is extracameral but not local in order to examine the effects of national political mobilization and statutory diffusion. Regarding political mobilization, plaintiffs would look to see whether local leaders purposefully drew from outside groups or cities in the adoption of a discriminatory model ordinance. Plaintiffs might look to see whether a local legislator had a direct tie to the local Escondido Minutemen group, which has been active in local protests against day laborers and works with other groups that have promoted legislation that targets immigrants.<sup>151</sup> Plaintiffs could search through Internet sources and see whether other such groups promoted the ordinance and whether such groups were acting with explicitly discriminatory intent.

In addition, litigators and courts could examine whether there is evidence of statutory diffusion that suggests discrimination. The issue of statutory diffusion is more easily deciphered with IIRA-like ordinances, where a clear model has been disseminated in cities across the country. With quality of life ordinances, statutory diffusion is less obvious because various forms of these ordinances have long been common in cities in the United States.<sup>152</sup> Because variations of quality of life ordinances are widespread, plaintiffs might find it more fruitful to examine whether the city copied more stringent fines or particular

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<sup>151</sup> See Sarah Wilkins & Jo Moreland, *Escondido Man Forms City's Minutemen Brigade*, N. COUNTY TIMES (San Diego), Feb. 1, 2007, [http://www.nctimes.com/news/local/article\\_2d34dc86-c8b8-54b8-a372-906ae122e888.html](http://www.nctimes.com/news/local/article_2d34dc86-c8b8-54b8-a372-906ae122e888.html).

<sup>152</sup> San Francisco's 1870 "Cubic Air Ordinance" is a very early example of such a regulation. Much like some present-day maximum-occupancy ordinances, it required 500 cubic feet of air for each adult in any home or apartment. Arrests for violations began in 1873. California enacted its own Cubic Air Ordinance in 1876. The ordinances targeted the Chinese community: "Organized labor groups used, among other strategies, public health measures to create an environment so hostile as to 'persuade' Chinese immigrants to return to China." Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 AM. J. PUB. HEALTH 440, 440 (2009). Housing ordinances were also used against blacks to segregate residential areas in the early twentieth century across the United States. See, e.g., Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 289 (1992) (describing various segregation ordinances passed throughout South). Housing and zoning ordinances also targeted Latinos in the 1990s. See Paul F. Cuadros, *Zoning Laws Hit Latinos in Suburbs*, reprinted in CHI. REPORTER, Aug. 15, 2007, [http://www.chicagoreporter.com/index.php/c/Cover\\_Stories/d/Zoning\\_Laws\\_Hit\\_Latinos\\_in\\_Suburbs](http://www.chicagoreporter.com/index.php/c/Cover_Stories/d/Zoning_Laws_Hit_Latinos_in_Suburbs) ("The use of occupancy ordinances to keep out minorities is not new.").

features of an ordinance, such as restrictions on extended family members.

As the case study has shown, courts that would normally dismiss challenges to quality of life ordinances would apply greater scrutiny under my proposed expanded approach. A more rigorous application of the *Arlington Heights* six-factor test, as well as the inclusion of extracameral evidence illuminating political mobilization and statutory diffusion, would help revive the doctrine's ability to discern discriminatory intent. Courts would correctly find many quality of life ordinances to be nondiscriminatory, but expanding our analysis of evidence of discriminatory intent would prevent those that are motivated by discrimination from slipping through the cracks of our current doctrine.

### CONCLUSION

The issues raised by quality of life ordinances at the local level reflect state and national concerns. As this Note goes to press, the country is engaged in vigorous debate regarding the role of states and localities in immigration law, as well as the issue of whether laws that, on their face, do not target legal immigrants or Latinos could actually be motivated by discriminatory intent against them. This debate is spurred by Arizona's recent anti-undocumented immigration measure<sup>153</sup> and fueled by the tensions that have been mounting over the last decade. At the local level, quality of life ordinances raise similar issues.

Quality of life ordinances may be intentionally coded to avoid review. Our current equal protection doctrine—specifically the way in which courts evaluate facially neutral laws that have a disparate impact—leaves possibly discriminatory ordinances free from judicial review. When courts apply *Arlington Heights* to examine evidence of discriminatory intent, they use an exceedingly narrow understanding of the sociohistorical background for a given decision and rely almost exclusively on documents created within official chambers. Yet policy debates and prescriptions now often take place on the Internet or in the press, not simply within City Council chambers. Extracameral evidence can reveal much more about the intent of local decisionmakers, as well as the extent to which they had ties to larger political mobilization. An expanded evidentiary analysis helps bring the doctrine of discriminatory intent up to date with the realities of decisionmaking and modern political mobilization at the state and local levels.

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<sup>153</sup> See *supra* note 104 (discussing Arizona's recent immigration legislation and public and litigation response).