# REJECTION OF UNCIVIL NATIVIST ARGUMENTS IN TEXAS COURTS

CARLOS R. SOLTERO



## I. INTRODUCTION

Nativism has flared up again recently in the United States. Challenging economic times, the non-European origin of many immigrants, and concerns of spillover violence and other serious problems in Mexico and Central America have stoked the expressions of contempt (or worse). Unfortunately, these degrading attitudes have again spilled over into arguments in public and private legal disputes. This year's presidential political process has tapped into resentment and manifested that acrimony in some of the most unstatesmanlike verbal attacks in generations demonstrating a similar lack of civility in our politics.

Status-based attacks have been reported in the news media, which seek to define people one-dimensionally by immigration status. Even worse is the barrage of counteranthropomorphization, or dehumanization, which is sometimes used to justify discrimination or target certain people. An example is a bumper sticker promoting "hunting permits" for immigrants.[1] Mak-

1. *See, e.g.*, Karla Zabludovsky, *Hunting Humans: The Americans Taking Immigration Into Their Own Hands*, NEWSWEEK (July 23, 2014), http://www.newsweek.com/2014/08/01/texan-ranchers-hunt-daily-illegal-immigrants-260489.html (providing that the Texas Border Volunteers dress in fatigues and patrol private ranches in South Texas); *see also* Andrew O'Reilly, *'Illegal Immigrant Hunting Permit' Sticker Draws Anger in Colorado*, FOX NEWS LATINO (Feb. 8, 2013), http://latino.foxnews.com/latino/news/2013/02/08/illegal-immigrant-hunting-permit-sticker-

ing a group of people "not human" but rather "less human than us" or even "animal-like" makes it easier to justify policies or conduct that most rational, civilized people would otherwise ordinarily consider unacceptable. Certainly, that phenomenon has manifested itself in some extreme statements in the discourse over immigration, even from public officials. For instance, Kansas representative Virgil Peck suggested that people crossing from Mexico should be shot like feral hogs and Tennessee representative Curry Todd suggested that giving U.S. citizen children health care benefits if their parents are immigrants is a license for immigrants to "go out there *like rats* and multiply."[2] Extermination or eradication language is potentially dangerous, particularly when expressed by public officials.

There is nothing new about local government officials bending to political pressure to target unpopular, politically disenfranchised people.[3] Particularly on the heels of bad economic times, immigrants or those perceived as foreign or outsiders may become targets of hostility and scapegoating.[4]

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draws-anger-in-colorado/ (reporting on "bumper sticker" indicating a hunter's permit for human immigrants).

2. *See* Scott Rothschild, *Kansas Legislator Suggests Using Hunters in Helicopters to Control Illegal Immigration, Likens Immigrants to Feral Hogs*, LJWORLD (Mar. 14, 2011, 12:15 PM), http://www2.ljworld.com/news/2011/mar/14/legislators-comment-illegal-immigration-criticized/ ("Peck made his comment during a discussion by the House Appropriations Committee on state spending for controlling feral swine."); *Latino Community Responds to TN State Rep. Curry Todd's 'Rat' Comments*, FOX13 (Nov. 11, 2010), http://www.myfoxmemphis.com/dpp/news/local/111110-latino-community-responds-to-state-representatives-comments (describing Tennessee state representative Curry Todd's Anti-immigrant rhetoric); Luke Johnson, *Joe The Plumber: 'Put a Damn Fence on the Border Going to Mexico and Start Shooting*, HUFF. POST (Aug. 13, 2012, 4:32 PM), http://www.huffingtonpost.com/2012/08/13/joe-the-plumber_n_1773590.html?utm_hp_ref ("You know, for years, I've said, you know, 'Put a damn fence on the border going to Mexico and start shooting,' he said.").

3. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (finding unconstitutional a law prosecuting a teacher who taught the German language to children); Bartels v. Iowa, 262 U.S. 404, 410 (1922) (striking down a law, which made it illegal to teach the German language before the eighth grade); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447–50 (1985) (striking down an ordinance excluding housing for the mentally handicapped because there was no evidence of any rational basis in the record to substantiate the validity of the zoning ordinance); Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356, 367–74 (1886) (providing that on July 28, 1880, the city of San Francisco passed an ordinance targeting Chinese laundry businesses); *but see* Kevin R. Johnson, "The New Nativism: Something Old, Something New, Something Borrowed, Something Blue," *in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 165–81 (Juan F. Perea ed., 1997) (discussing the *differences* as well as the similarities between historical nativism and recent anti-immigrant initiatives).

4. In times of prior economic crisis and hardship, nativism against Mexicans has reared into law-making, particularly at local levels. *See, e.g.*, RICARDO ROMO, EAST LOS ANGELES: HISTORY OF A BARRIO 164–65 (U.T. Press 1983) (describing Los Angeles government's participation in mass deportation of Mexicans; noting that Mexicans had been "literally scared out of Southern California"); GEORGE OCHOA, ATLAS OF HISPANIC-AMERICAN HISTORY 137–39 (2001) (describing expulsion of Mexicans, including citizens, from the U.S. during Depression); JOAN MOORE &

There is also a time-weathered linkage between inflammatory, national-origin rhetoric and prejudice premised on citizenship or "immigration" matters against native-born Mexican-Americans or other residents of Hispanic descent.[5]

Regardless of shifting political winds, constitutional law principles should remain above politics. In the civil legal system, nativist-based views are often expressed in arguments, which at their core suggest that lack of legal immigration status ought to equate to a person having no legal rights.[6] Combined with the fact that millions of people without documented status perform back-breaking and other labor toiling for the benefit of other people in the United States (*e.g.*, the construction and hospitality industries, to mention a few), leads to a morally disturbing philosophy.

Meanwhile, the legal system has promoted "civility oaths" and similar attempts to diminish uncivil behavior in litigation, understanding that people can disagree without necessarily being disagreeable.[7] It seems that compliance with "civility oaths" would include refraining from making disparaging remarks based on a person's national origin, race, disability, or other personal characteristics such as sexual orientation, religious beliefs, or

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HARRY PACHON, HISPANICS IN THE UNITED STATES 137 (1985) (describing local and federal government repatriation estimated at more than 400,000 without formal deportation proceedings); Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 632, 663 (1980).

5. *See, e.g.*, Hinojosa v. Jones, 154 S.W.2d 275, (Tex. App.—San Antonio 1941, no writ) (reversing defense judgment in case in which an Anglo man spit in the eye of another, and counsel for the accused argued that plaintiff "rushed over to his *compadre, Dr. Garcia, another alien, another Mexican citizen.* . . ."); Basanez v. Union Bus Lines, 132 S.W.2d 432, 432–33 (Tex. App.—San Antonio 1939, no writ) ("[T]hey are still trying to get those thousands of dollars from . . . fellow citizens . . . [plaintiff] has not taken out any of his first papers yet. . . . I don't know whether he waded that river or swam . . . but *I think he is all wet in this law suit.*") (emphasis added); Penate v. Berry, 348 S.W.2d 167, 168 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.) (highlighting that the following argument, "in this country you can't come into court and reach your hands into the pocket of an *American* citizen and take his property from him—not for an *alien*" is an improper appeal to racial prejudice); Indep. Sch. Dist. v. Salvatierra, 33 S.W. 2d 790, 791, 792–94 (Tex. Civ. App. 1930), *cert denied*, 284 U.S. 580 (1931) (describing "Mexican school" in Del Rio segregated from Anglo school justified on grounds of being children of migrants).

6. Sometimes these arguments are made even more overtly. For instance, in the 2011 Legislative Session, then Texas State Representative Leo Berman sponsored House Bill 294 seeking to curtail the legal rights of people who lack citizenship or immigration documentation and included the following: "An illegal alien may not bring a claim or otherwise seek legal or equitable relief, including as a counterclaimant or cross-claimant, in a court of this state." Tex. H.B. 294, 82nd Leg., R.S. (2011). Had H.B. 294 become law, not only would undocumented persons not have been able to sue in Texas (including presumably a person seeking a divorce in a domestically abusive situation), but amazingly, if sued, members of this discrete and insular group would have been forbidden from defending themselves by asserting counterclaims or cross-claims asserting that another party should share all or some responsibility for a civil act.

7. *See, e.g.*, TEX. GOV'T CODE §82.037(a)(4) (West Supp. 2015).

gender, as provided in the rules of professional conduct.[8] Given the rise in these "civility oaths"—including in Texas—how has the Texas legal system done in rejecting uncivil nativist arguments?

This Article discusses clashes in the Texas civil legal system between nativism and core American values of due process and equal protection. This Article focuses on two Texas Supreme Court cases that rejected nativist arguments suggesting that non-citizen persons without documented legal status should have diminished or no legal rights in tort cases as well as a high-profile case where the Fifth Circuit struck down a local Texas governmental ordinance preventing the rental of living spaces to people without documented status.[9]

## II. GOVERNMENT CONDONING OF NATIVISM IS CONTRARY TO THE U.S. CONSTITUTION

Modern Texas remains a bulwark on this aspect of civility and recognizes that status-based animus is contrary to Texas laws and the Constitution of the United States that guarantees equal protection and due process to all persons. Texas, with its unique history, large population of people of Mexican national origin, a long border with Mexico, and several centuries of cross-border interactions has more strongly rejected nativist arguments in the legal system than other states who are relative newcomers to having substantial Mexican immigrant workers in their society, like some places in Midwestern states.[10] Unlike Texas courts, which have for decades consistently rejected attempts to kill or minimize the claims of people working and

8. Tex. Disc. R. Prof. C. 5.08 (stating "(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, *national origin*, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity") (emphasis added).

9. While this article focuses on Texas, nativist arguments have also again arisen recently in the civil legal systems of other states as well. *See, e.g.*, Ayala v. Lee, 81 A.3d 584, 598–99 (Md. Ct. Spec. App. 2013) (rejecting argument that illegal immigrant status should be allowed at trial for impeachment); Salas v. Sierra Chemical Co., 59 Cal. 4th 407 (2014), *cert. denied*, 135 S. Ct. 755 (2014) (refusing to find California's employment antidiscrimination law FEHA preempted by IRCA's prohibition of employment of unauthorized aliens); Moyera v. Quality Pork Int'l, 284 Neb. 963, 972, 825 N.W.2d 409, 417 (2013) (rejecting argument that undocumented persons are excluded from workers' compensation act); WASH. RULES OF PROF'L CONDUCT r. 4.4 cmt. 4 (2013) (stating that a lawyer's duty to respect the rights of third persons "includes a lawyer's assertion or inquiry about a third person's immigration status when the lawyer's purpose is to intimidate, coerce, or obstruct that person from participating in a civil matter. Issues involving immigration status carry a significant danger of interfering with the proper functioning of the justice system. *See* Salas v. Hi-Tech Erectors, 230 P.3d 583, 586 (Wash. 2010).")

10. The title of a book about a small border community, THE RIVER HAS NEVER DIVIDED US: A BORDER HISTORY OF LA JUNTA DE LOS RIOS by Jefferson Morgenthaler, illustrates a view that many Mexicans and non-Mexicans who have lived in border communities have understood about the realities of areas of common economic, social, and other interactions.

living in the United States based on immigration or nativist-based arguments, other courts who are "newcomers" appear more susceptible to nativist arguments in recent cases.[11]

The U.S. Supreme Court has, as a matter of settled American constitutional law, clearly rejected the fundamental premise of nativism as being contrary to the commands of the U.S. Constitution in its unequivocal and unambiguous writings. The Constitution's bedrock and steadfast commitment to equal protection and due process is clear:

> Whatever his status under the immigration laws, *an alien is surely a 'person'* in an ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.[12]

In the landmark immigration case striking down most of Arizona's high-profile anti-immigrant S.B. 1070, the Supreme Court wrote, "As a general rule, it is not a crime for a removable alien to remain present in the United States."[13] Decades earlier in the context of a business dispute, the Fifth Circuit underscored the point: "We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability."[14] Hand-in-hand with the discussions where local police forces have at times urged immigrants—regardless of legal status—to report criminal activity, the stripping away of legal rights and access to the legal system or basic means of sustaining life (like housing) does not solve immigration problems but rather breeds criminality, vigilantism, and expands pockets of lawlessness in society.

### A. *The Texas Supreme Court has rejected nativist attempts to prevent undocumented persons from seeking protection in the civil legal system in Texas*

Some uncivil manifestations of nativism in the civil legal system include arguments suggesting that people without documented status should be prohibited from asserting their legal rights in court like modern day outlaws or that it is somehow acceptable to use the heavy prejudice currently existing against undocumented immigrants against them in legal proceedings. Two Texas Supreme Court cases stand clearly for the proposition that

11. *See, e.g.*, Escamilla v. Shiel Sexton Co., 54 N.E.3d 1013 (Ind. Ct. App. 2016) (holding that employee's immigration status was relevant to a claim of lost earning capacity).

12. Plyler v. Doe, 457 U.S. 202, 210 (1982) (emphasis added).

13. Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

14. Moreau v. Oppenheim, 663 F.2d 1300, 1308 (5th Cir. 1981); *see also* Torrez v. State Farm Mut. Auto. Ins. Co., 705 F.2d 1192, 1202–03 (10th Cir. 1982) (providing that the estate of an unauthorized alien could recover for wrongful failure to settle death claim arising from auto accident).

in most civil cases, immigration status is irrelevant and should not be infused into civil trials or litigation.

*1.* TXI v. Hughes

*TXI* involved a fatal collision between a Yukon in which a family was travelling on a state highway and a gravel truck going the other way, resulting in the death of three people. The driver of the cement truck working for TXI, Ricardo Rodriguez, was undocumented and had used a fake social security number to obtain a commercial driver's license.[15] Apart from the other theories of liability, counsel for the family of the deceased chose to focus on Mr. Rodriguez's immigration status in front of the jury at trial in a North Texas rural county where the only Latino jurors had been struck.[16] The Court noted that in the trial record there were "over forty references to Rodriguez's status, including thirty-five to his status as an 'illegal immigrant' and seven to his prior deportation. TXI representatives were also cross-examined regarding whether they owed a 'duty' to the public to prevent an 'illegal' from driving a TXI truck."[17] The jury awarded over $15 million in compensatory damages and over $6.6 million in punitive damages to the family members of the deceased.

The Texas Supreme Court tossed out the jury verdict, primarily because of the erroneous, prejudicial infusion of Mr. Rodriguez's immigration status before the jury.[18] The Court's opinion succinctly and clearly explained the error and the harm in admitting immigration evidence in this civil jury trial:

> The Error
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> Although Rodriguez's statements about his immigration status may have been offered for impeachment as prior inconsistent statements, they were not admissible for at least two different reasons. First, Rodriguez's immigration status was clearly a collateral matter, that is, a matter that was "not relevant to proving a material issue in the case." *Rodriguez's immigration status clearly was not a material part of the plaintiffs' case*; it was not something the plaintiffs had to prove to prevail. As a collateral matter—not relating to any of plaintiffs' claims on the merits, and merely serving to contradict Rodri-

15. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 241 (Tex. 2010).

16. The Texas courts rejected the *Batson* challenges to the exclusion of these Latino jurors. TXI Transp. Co. v. Hughes, 224 S.W.3d 870, 891–93 (Tex. App—Fort Worth 2007), *rev'd on other grounds*, 306 S.W.3d 230, 241 (Tex. 2010). The law is settled that striking Latino jurors based on national origin violates the Constitution's equal protection requirements. Hernandez v. New York, 500 U.S. 352, 355 (1991).

17. *TXI*, 306 S.W.3d at 243.

18. *Id.* at 245.

> guez on facts irrelevant to issues at trial—it was inadmissible impeachment evidence.[19]
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> The Harm
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> TXI complains that the repeated references to Rodriguez's immigration problems and alleged misrepresentations were inflammatory and deliberately calculated to cause the jury to disbelieve Rodriguez . . . The dissenting justice in the court of appeals concluded that the Hughes's "repeated injection into the case of Rodriguez's nationality, ethnicity, and illegal-immigrant status, including his conviction and deportation, was plainly calculated to inflame the jury against him." 224 S.W.3d at 931 (Gardner, J., dissenting). We agree . . . Even assuming the immigration evidence had some relevance, its prejudicial potential substantially outweighed any probative value.[20]

In sum, in *TXI*, the Texas Supreme Court unanimously reiterated the settled law that immigration status is neither admissible nor relevant in wrongful death cases, and that the trial court erred in admitting prejudicial evidence of immigration matters.[21] Thus, the Court rejected the argument that guilt for civil liability should be presumed from violation of any other laws (e.g. immigration), based on one's status, or suggesting that an undocumented person should not have the equal opportunity to defend himself or herself based on the specific facts and merits of a case rather than prejudice against those born outside the United States.

### 2. Boerjan v. Rodriguez

Just a few years later in 2014, the Texas Supreme Court again considered another wrongful death case where one of the parties premised part of their liability theory on the other side's immigration status.[22] However, this time, the shoe was on the other foot. The nativist argument was made by the defendants at summary judgment which the trial court in Brooks County—an epicenter of death and "civilian patrolling" of undocumented immigrants in recent years[23]—accepted that the alleged "unlawful acts" doctrine[24]

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19. *Id.* at 242 (emphasis added).

20. *Id.*

21. *Id.* at 241–44.

22. Rodriguez v. Boerjan, 399 S.W.3d 223, 229 (Tex. App.—San Antonio 2012), *rev'd*, 436 S.W.3d 307 (Tex. 2014).

23. *See* Miguel Almaguer, Tracy Connor, & Olivia Santini, *Texas' Brooks County is 'Death Valley' for Migrants*, NBCNEWS.COM (July 9, 2014), http://www.nbcnews.com/storyline/immigration-border-crisis/texas-brooks-county-death-valley-migrants-n152121 (describing the dangers faced by migrants in Brooks County); Miguel Bustillo, *Near the U.S.-Mexico Border, a Grim New Reality*, WALL ST. J., http://www.wsj.com/articles/SB10001424127887323820304578412561295471882 (last updated Apr. 13, 2013) (expressing that Brooks County, with a population slightly over 7,000, "accounted for more than a quarter of suspected illegal immigrant deaths along the entire U.S.-Mexico border last year"); Hannah Rappleye & Lisa Riordan Seville, *Deadly Cross-*

barred the wrongful death claims of the family members. The San Antonio Court of Appeals, which reversed the trial court, summarized the defendants' arguments in its opinion:

> They contended that the decedents' illegal acts were their (1) ongoing attempts to enter the United States without permission and (2) fleeing to "elude[ ] examination or inspection by immigration officers." *See* 8 U.S.C.§1325(a) (2006).[25]

The defendants' argument was premised solely on unadjudicated claims that the three deceased (a father, mother, and 7-year-old girl) violated federal immigration laws in their travel to the United States, which, of course, are not continuing offenses once a person is physically in the United States, including Texas. Texas Agriculture Commissioner Todd Staples filed an *amicus* letter brief in support of defendants purportedly on behalf of other agricultural, ranching, and "private property owners' rights."

This case threatened settled Texas jurisprudence that injured persons who may be undocumented can recover for tort injuries. In published cases every decade since the Civil Rights Act of 1964, Texas courts have rejected arguments from litigants suggesting that undocumented workers should be prevented from suing or recovering for tort injuries.[26] As a court of appeals in El Paso wrote in 1972, an "illegal alien is not barred from prosecuting his action for personal injuries" and a person "whose entry may be contrary to the immigration laws is not barred, by that reason alone" from receiving

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*ing: Death Toll Rises Among Those Desperate for the American Dream*, NBCNEWS.COM (Oct. 9, 2012), http://investigations.nbcnews.com/_news/2012/10/09/14300178-deadly-crossing-death-toll-rises-among-those-desperate-for-the-american-dream ("Ground zero is over 70 miles north of the border, in Brooks County. Last year the remains of about 50 presumed undocumented immigrants were found in this county. This year, the tally has reached about 104, with nearly three months to go."); Erin Murray, *The tragedy that befalls some undocumented immigrants in Brooks County*, NBCLATINO.COM (Mar. 2, 2013), http://nbclatino.com/2013/03/02/the-tragedy-that-befalls-some-undocumented-immigrants-in-brooks-county-texas/ (noting 129 deaths in the brush in 2012).

24. Under this theory, "no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party." *Boerjan*, 436 S.W.3d at 310.

25. *Rodriguez*, 399 S.W.3d at 229.

26. Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 636–37 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.); Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir. 1988); Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 770 n.1 (Tex. App.—El Paso 1993, writ denied) ("The current state of Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity, *nor will this Court espouse such a theory*.") (emphasis added); Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App.—Tyler 2003, no pet.); Contreras v. KV Trucking, 2007 WL 2777518, at *1 (E.D. Tex. Sept. 21, 2007); Republic Waste Servs., Ltd. v. Martinez, 335 S.W.3d 401, 411 (Tex. App.—Houston [1st Dist.] 2011, no pet.); Grocers Supply, Inc. v. Cabello, 390 S.W.3d 707, 721–24 (Tex. App.—Dallas 2012, no pet.).

relief from the courts such as worker's compensation benefits.[27] Working without proper immigration documents is contrary to federal law, yet Texas courts have always allowed injured workers (or their relatives in a wrongful death case) to recover regardless of immigration status.[28]

In *Boerjan*, the Texas Supreme Court again rejected the immigration-based arguments, relying on a 2013 case involving claims that the mother of a son who overdosed on an illegal drug should be barred based on her son's illegal acts because comparative responsibility law abrogated any unlawful acts doctrine.[29]

In *Boerjan*, the rejected unlawful acts argument was based solely on alleged violations of immigration laws by the family members of those killed in the incident. The inescapable logic and conclusion of this argument is that a person not in the United States "legally" can be killed, maimed, or otherwise injured with civil impunity. Accepting this doctrine would have essentially proclaimed open season on "illegal" aliens. The law does not confer upon private citizens the privilege to tortiously injure or kill people with impunity if they lack immigration status. Texas law, as recently reiterated by the Supreme Court in *TXI* and *Boerjan* unequivocally respects the Constitution's command of equal protection and due process over uncivil nativist arguments in Texas civil litigation.

### B. *The Fifth Circuit rejected attempts to prevent undocumented persons from having shelter or housing*

Like politicians in Hazelton, Pennsylvania and other communities, the politicians running the local government of the town of Farmers Branch, Texas in the Dallas Metroplex area decided that Farmers Branch should kick out undocumented immigrants from its town by passing an ordinance

27. *Galindo*, 484 S.W.2d at 637. In *Galindo*, the court took judicial notice that Mexican citizens are not generally enemy aliens unless shown otherwise, and therefore entitled to the protections of 42 U.S.C. §1981. *Id.* at 637.

28. *See supra* note 26; *see also,* Benny Agosto, Jr. & Robert Rodriguez, *The Immigration Debate: Can Undocumented Workers Recover Lost Wages in Personal Injury Suits?* 44 HOUS. LAW. 16, 20 (Sept./Oct. 2006) ("Contrary to many lawyers' belief, undocumented workers can sue for lost wages. Courts throughout this nation recognize the prejudice that is engendered within the term 'illegal alien' . . . Texas has made its position clear that the alien status of an injured plaintiff in a particular case has no bearing on his or her ability to make a claim for lost wages."). A trial court in Jim Wells County also recently rejected a rather transparent twist on these nativist arguments where defendants sought to apply "Mexican law" to the damages claims of the children of a Texas resident who died in a vehicular accident in Texas solely because he was Mexican and some of his family resided in Mexico. Order of April 30, 2015 in Cause No. 13-02-51973-CV; *Marcia Garcia Cano, et al. v. Kevin Westbrook, et al.*; In the 79th District Court of Jim Wells County, Texas.

29. *Boerjan*, 436 S.W.3d at 310 (citing Dugger v. Arredondo, 408 S.W.3d 825, 832 (Tex. 2013)).

designed to prevent people from renting housing to those who lack proof of lawful documented status.[30] The ordinance created seven Class C misdemeanors punishable by a $500 fine upon conviction.[31] This became a high-profile example of local ordinances intending to address the national immigration problems by denying undocumented persons a place to live. Farmers Branch was soundly defeated in litigation and ultimately had to pay $1.2 million in attorneys' fees to those challenging the ordinance in addition to paying over $5 million to its own attorneys in a losing effort.[32] Kris Kobach, an activist attorney with an anti-immigrant agenda worked to convince the governmental entity that it should pass the ordinances and then was a lawyer Farmers Branch hired to represent it to defend the ordinance.

Ordinance 2952 empowered the government agent known as a building inspector to suspend the rental license of owners or managers who knowingly allow a person to occupy a rental unit without a "residential occupancy license" and prevented owners and managers from accepting money for renting their property.[33] Farmers Branch had previously passed another ordinance making it a crime to rent a dwelling to someone seeking shelter.[34]

Like other local government attempts, Farmers Branch tried to criminalize or otherwise penalize people for one of the most basic commercial human acts: exchanging a reasonable amount of money for a place to live, sleep, eat, or raise a family. Normally, landlords are not required by law to inquire as to whether their prospective tenants are: properly paying income taxes, bankrupt or in debt, acting immorally, subject to court orders of various types, or whether they have engaged in activity that a governmental agency may consider criminal.

The Fifth Circuit's *en banc* majority opinion in the last *Famers Branch* decision begins this way:

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30. Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524, 545 n.3 (5th Cir. 2013). Two concurring justices compared the trend of local governments trying to take immigration matters into their own hands and singling out undocumented immigrants for adverse treatment to the "anti-Japanese fever" the existed in the 1940s. *Id.* at 543 (Reavley, J. and Graves, J. concurring only in the judgment).

31. *Id.* at 527.

32. Jennifer Coleman, Note, *Shaping Farmers Branch: How the Courts Have Leveled the Playing Field*, 27 GEO. IMMIGR. L.J. 829, 831 n.12 (2013); Associated Press, *Farmers Branch to Pay Legal Fees, End Rental Case*, WASH. TIMES (June 4, 2014), http://www.washingtontimes.com/news/2014/jun/4/farmers-branch-to-pay-legal-fees-end-rental-case/l; Kurt Orzeck, *Texas City to Pay $1.4M in Attys' Fees in Immigrant Rental Row*, LAW360 (June 4, 2014), www.law360.com/texas/articles/544856?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles.

33. *Villas at Parkside Partners*, 726 F.3d at 526–27.

34. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 877–79 (N.D. Tex. 2008).

> 'America's history has long been a story of immigrants.' That story, a complicated history of inclusion and exclusion, has unfolded according to law, but also contrary to law. As the Supreme Court has emphasized—an indeed, as a constitutional imperative—a country's treatment of non-citizens within its borders can gravely affect foreign relations.[35]

The Fifth Circuit concluded that enforcement of the ordinance conflicted with federal law and thus was preempted by federal law governing immigration pursuant to the Constitution's Supremacy Clause.[36] Regulation of immigration and the classification of non-citizens—like the regulation of currency, commerce with Indian Tribes, bankruptcy, the military, patents, and the postal service[37]—is the exclusive province of the federal government and contrary local laws are pre-empted.[38] The Supreme Court—even during the *Plessy* era—has repeatedly found the federal government "preeminent" with respect to regulations of aliens within the borders of the United States.[39] The Supreme Court has noted "the substantial limitations upon the authority of the States in making classifications based upon alienage."[40] Local governmental entities have even less interest regulating immigration or alienage matters than states. As the Third Circuit wrote in the case striking down the City of Hazleton's anti-immigrant ordinance, "It is, of course, not our job to sit in judgment of whether state and local frustration about federal immigration policy is warranted. We are, however, required to intervene when states and localities directly undermine the federal objectives embodied in statutes enacted by Congress."[41]

In some limited cases, the Supreme Court has upheld state laws related to immigration, specifically in the employment context "not because of an absence of congressional intent to pre-empt, but because Congress intended that the States be allowed" to regulate the employment of illegal aliens.[42] As the Third Circuit noted in finding Hazelton's ordinance unconstitutional, "[L]ocal regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature

35. *Villas at Parkside Partners*, 726 F.3d at 545 n.3.

36. *Id.* at 528.

37. U.S. CONST., art I, §8.

38. *Villas at Parkside Partners*, 726 F.3d at 537.

39. *See* Toll v. Moreno, 458 U.S. 1, 10 (1982) (cataloguing cases); Fok Young Yo v. United States, 185 U.S. 296, 302 (1902) ("The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to such regulations. . . .").

40. *Toll*, 458 U.S. at 10.

41. Lozano v. City of Hazleton, 620 F.3d 170, 219 (3d Cir. 2010), *vacated on other grounds*, 563 U.S. 582 (2011), *aff'd in part, rev'd in part*, 724 F.3d 297, 300 (3d Cir. 2013) (en banc).

42. *Toll*, 458 U.S. at 13 n.18 (emphasis added).

than . . . restrictions on employment."[43] Congress has in no way suggested that the States (much less towns or cities) should be allowed to regulate where people may or may not rent or live based on status or that any federal immigration law prevents renting or selling property to undocumented immigrants. Therefore, these attempts have been found preempted by federal immigration law.[44] That is precisely the basis of the Fifth Circuit's holding in *Farmers Branch*:

> [W]e hold that because the power to classify non-citizens is reserved exclusively to the federal government, the judicial review section of the Ordinance also is preempted by federal law. *See* 8 U.S.C. § 1229a(a)(3) (setting out the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States").[45]

The Third Circuit reached the same conclusion as the Fifth Circuit, but the Eighth Circuit ruled essentially the opposite, finding local governmental ordinances permissible despite the federal government's exclusive domain over immigration matters.[46] The U.S. Supreme Court may ultimately resolve this split.

There may also be conflicts between these types of ordinances and federal anti-discrimination laws and requirements, particularly in mixed status households. Federal law forbids certain discrimination in housing because of race, color, familial status, or national origin.[47] The Constitution also deems the right to live with one's extended family to be a fundamental right.[48] Therefore, laws applying limits to mixed families of legal and undocumented persons could potentially interfere with fundamental rights of citizens to live with their undocumented relatives.

Not even actual law enforcement officers can constitutionally profile based *merely* on a person "looking Mexican" or appearing to have "Mexican ancestry."[49] Although local housing ordinances may arguably seem facially neutral, it is not difficult to understand the targets of local govern-

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43. *Lozano*, 620 F.3d at 219–20; *Lozano*, 724 F.3d at 315–17.

44. *Lozano*, 620 F.3d at 222 ("Stitched into the fabric of Hazleton's housing provisions, then, is either a lack of understanding or a refusal to recognize the complexities of federal immigration law . . . , as in every single instance in which Hazleton would deny residence to an alien based on immigration status rather than on a federal order of removal, Hazleton would act directly in opposition to federal law."); *but see* Keller v. City of Fremont, 719 F.3d 931, 942, 951 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2140 (2014) (expressly disagreeing with the results reached by the circuit courts in *Lozano* and *Villas at Parkside Partners* and reversing the district court's rulings that the ordinance provisions are preempted).

45. *Villas at Parkside Partners*, 726 F.3d at 537.

46. *Compare Villas at Parkside Partners*, 726 F.3d at 537, and *Lozano*, 724 F.3d at 323, *with Keller*, 719 F.3d at 942, 951.

47. 42 U.S.C. § 3604(a–e).

48. Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

49. United States v. Brignoni–Ponce, 422 U.S. 873, 876 (1975).

ments: Mexicans (people from Mexico) and other immigrants from Latin America.[50] Quite telling on this point is a portion of the Eighth Circuit's background section in *Keller*, a court in places without a traditionally large population of people of Mexican or Latino ancestry, but with a recent influx:

> Located near Omaha, Fremont is a "city of the first class" with a population of approximately 26,000. In recent years, as reflected in U.S. Census Bureau data, the City's Hispanic or Latino population nearly tripled, rising from 1,085 in 2000 (4.3% of the City's population) to 3,149 in 2010 (11.9%). According to the 2000 Census, Latinos then comprised about 80% of the City's foreign-born population.[51]

These types of views are hardly new. For instance, in the seminal case on the status or Puerto Rico, which rejected a Puerto Rican newspaper editor's right to a jury trial in a criminal proceeding alleging libel of the governor, a unanimous Supreme Court followed nativist-based reasoning:

> [T]he jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse. *Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities,* with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.[52]

The right to participate in the justice system as jurors and voting rights are some of the most fundamental rights of American citizens, yet for decades, even citizens like every person born in Puerto Rico since 1917, have been the targets of nativist-based arguments in legal proceedings.

The Due Process Clause of the Fourteenth Amendment provides, among other things, that no State shall deprive a person of property without due process of law. The Supreme Court stated almost a century ago regarding due process that:

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50. IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 2 (Juan F. Perea ed., 1997) ("The targets of today's nativism wear Mexican, Central American, and Asian faces. Indeed, the public identification of 'illegal aliens' with persons of Mexican ancestry is so strong that many Mexican Americans and other Latino citizens are presumed foreign and illegal."); *see also* Alfredo Mirandé, *Is there a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365, 387 (2003) (expressing that the phrase 'illegal alien' has "become virtually synonymous with being Mexican").

51. *Keller*, 719 F.3d at 937.

52. Balzac v. People of Porto Rico, 258 U.S. 298 (1922) (emphasis added).

> Without doubt, it denotes not merely *freedom* from bodily restraint but also the right of the individual *to contract*, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privilege long recognized at common law as essential to the orderly pursuit of happiness by free men.[53]

Surely, a governmentally-imposed requirement that a restaurant "check" or verify a proper "ID" before serving food to a hungry person would not pass constitutional muster.[54] Bus drivers or cab drivers could not constitutionally or reasonably be required to check their prospective passenger's "papers" before giving someone a ride across town under fear of "transporting" or "harboring" aliens.[55] Requiring those renting a place to live to do the same was found by the Fifth Circuit to be preempted by federal law.

## III. CONCLUSION

The Fourteenth Amendment forbids state laws and state action that deny to *any person* the equal protection of the laws.[56] Three decades ago, the United States Supreme Court wrote that the constitutional protections in the Fourteenth Amendment are "*universal in their application, to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality."[57] The Fourteenth Amendment "reaches into every corner of a State's territory" and reaches "every exercise of state authority."[58] This includes the 254 counties of Texas. The common thread in these cases is the antipathy towards newly arrived immigrants with the foil of "violating federal law."

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53. *Meyer*, 262 U.S. at 399 (emphasis added).

54. Could a local government mandate signs saying "no shirt, no shoes, no verified immigration status, no service"? Not that long ago in Texas there were signs denying access to Mexicans at restaurants along with dogs and others. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475, 476–480 (1954) ("At least one restaurant in town prominently displayed a sign announcing 'No Mexicans Served.' On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked 'Colored Men' and 'Hombres Aqui' ('Men Here')."); *see also* A CLASS APART (Public Broadcasting Service 2009), http://www.pbs.org/wgbh/americanexperience/films/class/ (exhibiting the history of Mexican Americans in the United States and the story "of a civil rights movement" in connection to *Hernandez* case); CYNTHIA E. OROZCO, NO MEXICANS, WOMEN, OR DOGS ALLOWED: THE RISE OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT (U.T. Press 2009) (describing issues faced in the Mexican American civil rights movement).

55. *See* Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1029 (9th Cir. 2013) (affirming injunction at pastor's request to portion of Arizona's S.B. 1070 making it a crime to transport aliens based on vagueness and federal preemption where the pastor runs a homeless program and a "Samaritans" program offering transportation and shelter to "unauthorized aliens").

56. U.S. CONST. amend. XIV, § 1.

57. *Plyler*, 457 U.S. at 212 (emphasis in original).

58. *Id.* at 212, 215.

Uncivil nativist arguments based on immigration-related issues raise what the Supreme Court has acknowledged "the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to [others which] presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law."[59] After all, a central component distinguishing the rule of law in civilized societies from other systems of governing throughout the world based solely on politics is the intent of *universal* application of laws and rules.[60]

59. *Id.* at 219.

60. LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 8 (HRAF Press 1974).