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STANDING TO CHALLENGE STATE AND LOCAL IMMIGRATION REGULATION: HOW THE NOTION OF EXPRESSIVE INJURY CAN RESTORE FEDERAL POWER OVER IMMIGRATION

Timothy A. Newman*

INTRODUCTION

John Doe 1 was a tenant in Hazleton, Pennsylvania, in September, 2006.[1] Because he was not a United States citizen or permanent legal resident, he was confident the United States government could deport him at any time. But the city council of the town he called home, and not the federal government, was the first to take action against him.[2]

Most are familiar with the actions of Hazleton's city council during the summer and fall of 2006. In response to a recent influx of undocumented immigrants, the council passed a series of ordinances aimed at reducing the number of undocumented immigrants living within the city and thwarting the problems city leaders perceived as resulting from that influx.[3] Ordinances prohibiting the employment of illegal immigrants, requiring apartment dwellers to prove legal status prior to renting, and prohibiting employers from translating documents into any language other than English were all part of the effort.[4]

John Doe 1, other illegal alien tenants, and a host of American citizens filed suit against the city of Hazleton.[5] On July 26, 2007, the U.S. District Court for the Middle District of Pennsylvania acknowledged the standing of John Doe 1 and others to challenge these ordinances, granting relief in the form of a permanent injunction.[6] In short, the plaintiffs, including an undocumented immigrant, were granted standing to challenge a local ordinance pertaining to the conduct of illegal aliens.[7]

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[1] *See* Lozano v. Hazleton, 496 F. Supp. 2d 477, 496 (M.D. Pa. 2007) (citing the Deposition of John Doe 1, Dec. 8, 2006).

[2] *Id.* at 496–97.

[3] *Id.* at 484.

[4] *See id.*; Michael Powell & Michelle Garcia, *Pennsylvania City Puts Illegal Immigrants on Notice*, WASH. POST, Aug. 22, 2006, at A3.

[5] *Hazleton*, 496 F. Supp. 2d at 477.

[6] *Id.* at 555.

[7] *Id.* at 504.

Halfway across the nation, in a perhaps less-publicized but no less important scenario, a group of American citizen-students, from states other than Kansas, challenged a Kansas statute pertaining to illegal aliens.[8] The statute, passed on July 1, 2004, is one of several so-called state "DREAM Acts."[9] The statute effectively allowed undocumented immigrants to pay in-state tuition rates while attending state universities in Kansas.[10]

The District Court of Kansas denied standing to those students in regard to some grounds for their action and held that no private right of action had been created for others.[11] On August 30, 2007, the Tenth Circuit Court of Appeals affirmed the district court's decision.[12] In short, American citizens were denied standing to challenge a state statute governing the rights of illegal aliens.[13]

With the rising number of foreigners entering the United States illegally, regulation of immigration is increasingly important. In 2004, an estimated 10.3 million unauthorized migrants, or illegal aliens, were present in this country.[14] About eighty-six percent of that 10.3 million arrived in the United States sometime after 1990.[15] Calls for legislation restricting this movement have increased, citing a perceived strain on public resources, competition for jobs, diminished aesthetic appeal of communities, increased crime rates,[16] and national security concerns.[17] Not all of these perceptions, however, are supported by empirical data.[18] Some even assert that racial animus is the true motivation behind this recent push for legislation.[19]

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[8] Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *aff'd sub nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[9] *Id.* at 1025. These statutes are called "DREAM Acts" because the benefits they provide to undocumented immigrants are similar to those that were part of a failed federal attempt at immigration reform, the DREAM Act of 2007. S. 1348, 110th Cong. §§ 621–632 (2007).

[10] KAN. STAT. ANN. § 76-731a (2008).

[11] *Sebelius*, 376 F. Supp. 2d at 1031–40.

[12] Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[13] *Id.* at 1139–40.

[14] *See* JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 3 (2005), *available at* http://pewhispanic.org/files/reports/46.pdf.

[15] *See id.* at 5.

[16] *See, e.g.*, Ryan D. Frei, Comment, *Reforming U.S. Immigration Policy in an Era of Latin American Immigration: The Logic Inherent in Accommodating the Inevitable*, 39 U. RICH. L. REV. 1355, 1379–81 (2005).

[17] *See* Eric L'Heureux Issadore, Note, *Is Immigration Still Exclusively a Federal Power? A Preemption Analysis on Legislation by Hazleton, Pennsylvania Regulating Illegal Immigration*, 52 VILL. L. REV. 331, 340 (2007).

[18] *See, e.g.*, Marlin W. Burke, *Reexamining Immigration: Is It a Local or National Issue?*, 84 DENV. U. L. REV. 1075, 1076 (2007) (discussing the lack of empirical evidence supporting the notion that the presence of illegal immigrants leads to unfair competition for jobs).

[19] *See, e.g., id.* (discussing the perceived threat immigration poses to the "racial, religious, and social makeup of the country").

Regardless of what brought about the desire for regulation, Congress has provided no relief.[20] In the wake of federal inaction, states and localities have attempted to fill the void with immigration regulation of their own,[21] and their actions have been challenged in the courts. Courts have upheld some of these regulations—denying standing to those who brought the challenge[22]—while striking down others on constitutional and federal preemption grounds.[23] Important in those cases striking down state or local regulations is the discussion of constitutional standing to challenge.[24]

The purpose of this Note is to explore, paying particular attention to the courts' determination of standing, the effect of these decisions on the regulation of immigration. This discussion is not concerned with illegal immigrants' access to courts, but with standing in the context of immigration law.

Part I discusses the history of immigration regulation in the United States, addressing specifically the fact that the power to regulate has traditionally been enjoyed by Congress. Part II examines the impact of immigration and the state and local legislation that has resulted. Part III describes two representative attempts by state and local governments to provide that relief. Courts' responses, specifically the granting or denial of standing, will be discussed in detail. Part IV discusses the results of these court holdings in the context of immigration law. This Note argues that divergent determinations of standing create inconsistencies and uncertainty in terms of which level of government has the power to regulate in this increasingly important area of the law. Finally, Part V proposes some solutions to the problem, opting for one that would grant standing to citizens based on expressive injury.

The purpose in writing this Note is to bring attention to an emerging dynamic that could be problematic in the resolution of immigration struggles now and in the future. In discussing the problem and possible solutions, the goal is to encourage productive and efficient resolution of what could become a serious problem.[25]

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[20] Issadore, *supra* note 17 (citing numerous attempts by Congress to pass immigration reform legislation, all to no avail).

[21] *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf (requiring, *inter alia*, that landlords verify the legal status of immigrants before leasing property to them).

[22] *See, e.g.*, Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[23] *See, e.g.*, Lozano v. Hazleton, 496 F. Supp. 2d 477, 496 (M.D. Pa. 2007).

[24] *See, e.g., id.*

[25] For purposes of this Note, the following definitions will be used: 1) Alien: "A person who resides within the borders of a country but is not a citizen or subject of that country." BLACK'S LAW DICTIONARY 79 (8th ed. 2004); 2) Citizen: "A person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges." *Id.* at 261; 3) Illegal alien or undocumented alien: "An alien who enters a country at the wrong time or place, eludes an examination by officials, obtains entry by fraud, or enters into a sham marriage to evade immigration laws." *Id.* at 79; 4) Immigrant: "A

I. HISTORICAL PERSPECTIVE: FEDERAL POWER OVER THE REGULATION OF IMMIGRATION

A. Roots of Exclusive Federal Power

1. Early Viewpoint

The notion of Congress' exclusive power to regulate immigration is by no means a recent construct. In the *Federalist Papers*, John Jay spoke generally about the advantages of a united central government in the context of safety from foreign powers and internal discord.[26] James Madison discussed the dangers associated with allowing individual states to implement their own naturalization laws, asserting that "[w]e owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped."[27] At the root of this idea was the reality that the "Union w[ould] undoubtedly be answerable to foreign Powers for the conduct of its members."[28] Because the laws concerning naturalization and immigration were viewed as inextricably intertwined with foreign affairs, it was thought best to delegate the power of immigration regulation to the federal government.[29]

2. Supreme Court Cases

The Supreme Court advanced a similar notion in the late 1800s. In the years following the Civil War, Congress, in an effort to counteract a reduction in available labor, had purposely avoided legislation that would constrict immigration from foreign countries.[30] At times, Congress even encouraged an influx of foreigners to the United States.[31] The Burlingame Treaty of 1868, for example, established friendly relations between the United States and China and stated that Chinese citizens present in the United States were to "enjoy the same privileges, immunities and exemptions" as those enjoyed by American citizens.[32]

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person who arrives in a country to settle there permanently; a person who immigrates." *Id.* at 765.

[26] *See* THE FEDERALIST NO. 3 (John Jay).

[27] THE FEDERALIST NO. 42, at 237 (James Madison) (E.H. Scott ed., 1898).

[28] THE FEDERALIST NO. 80, at 435 (Alexander Hamilton) (E.H. Scott ed., 1898).

[29] *See* THE FEDERALIST NOS. 3, 4, 5 (John Jay), NO. 42 (James Madison), NO. 80 (Alexander Hamilton). As James Madison pointed out, there are two sources of potential danger when allowing non-federal entities to regulate immigration—unfair treatment of immigrants at the hands of the law and creating such a confusing regime of law that immigrants are unable to navigate through the system and follow the rules. *See* THE FEDERALIST NO. 42 (James Madison), *supra* note 27, at 237–38. The latter, as will be shown, may become more of an issue as states and localities begin to try their hand at immigration regulation.

[30] *See* DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 25–26 (2000).

[31] *See id.*

[32] Burlingame Treaty, U.S.-P.R.C., art. VI, July 28, 1868, 16 Stat. 739; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 592–93 (1889) (discussing the Burlingame Treaty).

In subsequent years, however, viewpoints concerning foreign immigrants shifted from one of welcome to one of disdain. Both the federal and many state governments passed legislation aimed at stemming the flow of immigrants into the United States.[33] Immigrants challenged many of these statutes both at the federal and state level.[34] The Supreme Court's treatment of the statutes was very different depending on whether the statute being challenged was federal or local.[35]

The first challenge to federal law came in *Chae Chan Ping v. United States*, known as the Chinese Exclusion Case.[36] In *Chae Chan Ping*, the plaintiff, a legal Chinese resident and worker in the United States, was denied entry upon his return from a trip to China.[37] During his leave, Congress had nullified the law that would have made his entry possible with a simple certificate of residence.[38] Instead of being allowed simple admission, he was denied entry altogether.[39]

The Supreme Court approved the federal government's exclusion of the plaintiff.[40] In so holding, the Court announced a theory of immigration known as the plenary power doctrine.[41] Under this doctrine, sovereign nations have the absolute right to exclude.[42] Under the United States Constitution, that power has been delegated to the federal government, and as a result, the judiciary will not review decisions made by the federal government in the context of exclusion.[43] In 1893, the Court extended the notion of plenary power to deportation.[44]

During this same period when federal immigration statutes were upheld, state statutes were largely struck down. Many states, faced with supporting a quickly increasing population which included large numbers of infirm and unemployed, considered legislation a necessity to preserve resources for their own citizens.[45] The Supreme Court first addressed these statutes in *Henderson v. Mayor of New York*[46]

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[33] The Chinese Exclusion Laws of 1884, 1888, and 1892 imposed progressively harsher restrictions on foreign immigrants hoping to enter the United States. *See* Act of July 5, 1884, ch. 220, 23 Stat. 115; Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565; Act of May 5, 1892, ch. 60, 27 Stat. 25; *see also* Chy Lung v. Freeman, 92 U.S. 276 (1875) (challenging a California immigration statute).

[34] *See infra* notes 40–50 and accompanying text.

[35] *See Chae Chan Ping*, 130 U.S. 581; *infra* text accompanying notes 40–53.

[36] 130 U.S. 581.

[37] *Id.* at 582.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 581.

[41] *See id.* at 603–10.

[42] *See id.* at 606–07.

[43] *See id.* at 609.

[44] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[45] See, for example, the arguments made by New York and California in support of the statutes at issue in *Henderson* and *Chy Lung*. Henderson v. Mayor of New York, 92 U.S. 259, 264 (1875); Chy Lung v. Freeman, 92. U.S. 275, 277 (1875).

[46] 92 U.S. 259.

and *Chy Lung v. Freeman*.[47] At issue in these cases, which were considered jointly, were state statutes that regulated the conditions under which masters of vessels could land foreign passengers at ports within the states of New York and California, respectively.[48] The Court, citing the dangers of allowing states to regulate an area of law with such great foreign policy implications, struck down the statutes on pre-emption and supremacy grounds.[49] This result is in stark contrast to the decision in the Chinese Exclusion Case, where the Court affirmed the federal government's absolute power to exclude and deport.[50]

A decade later, the Supreme Court addressed a city ordinance bearing on the treatment of undocumented immigrants present in the United States.[51] At issue in *Yick Wo v. Hopkins* was a San Francisco ordinance that prohibited the use of laundries constructed of wood.[52] The Court cited the Fourteenth Amendment in holding that the discriminatory enforcement of the ordinance by the city violated equal protection guaranteed to all present within the United States.[53] Again, in stark contrast to the rulings of the Court with respect to federal regulation of immigration, the Court struck down the regulation, refusing to acknowledge any power over immigration other than federal power.

B. An Historic Cycle of State Challenges to Federal Power

The late-1800s was not the only time in which states have attempted to regulate immigration. In the years leading up to World War I, states were again overrun by foreign immigrants searching for a better life.[54] And again, states responded by creating legislation aimed at preserving resources for their respective citizens. In *People v. Crane*, the Court of Appeals of New York addressed the constitutionality of a New York statute that denied government contracts to those employing anyone not a citizen

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[47] 92 U.S. 275.

[48] *Henderson*, 92 U.S. at 259–60; *Chy Lung*, 92 U.S. at 275.

[49] *Henderson*, 92 U.S. at 260; *Chy Lung*, 92 U.S. at 275–76.

[50] *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[51] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[52] *Id.* at 357.

[53] *Id.* at 373–74. It may seem suspect that equal protection did not prevent the federal government from discriminating against foreign-born residents, but the Fifth Amendment was not considered to include an equal protection element until 1954. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). It should also be noted that although immigration cases reached the Supreme Court prior to the Civil War, those decided in the decades following the Civil War provide the most useful backdrop for our discussion because they focused on the distinction between federal and local regulation. *See, e.g.*, *Yick Wo*, 118 U.S. at 356 (scrutinizing a San Francisco city ordinance through the prism of Fourteenth Amendment equal protection).

[54] *See* AUGUSTINE J. KPOSOWA, THE IMPACT OF IMMIGRATION ON THE UNITED STATES ECONOMY 19 (1998) (citing EDITH ABBOTT, HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM (1926)).

of the United States.[55] It was asserted that the state's right to pass such legislation was grounded in the interest of its citizens.[56] Although the court upheld the statute as not in violation of the Equal Protection Clause, Justice Cardozo was careful to point out that "[i]t *is* a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating, not its own property, but private business, bars the alien from the right to trade and labor."[57] The Supreme Court affirmed this decision in *Crane v. People of the State of New York*,[58] but only on the narrow grounds of "special public interest."[59]

Much like it had done after the Civil War, Congress allowed, and even encouraged, immigration to the United States in an effort to replace the labor shortage following World War II.[60] As they had in the past, states responded to the resulting influx by passing their own immigration reforms, and citizen challenges to these reforms soon came before the courts.[61] In *Hines v. Davidowitz*, the Supreme Court struck down a Pennsylvania alien registration statute on preemption grounds.[62] In *Takahashi v. Fish and Game Commission*, the Court struck down a California statute restricting fishing licenses to United States citizens on similar grounds.[63] In *Takahashi*, the Court denied California's assertion of "special public interest,"[64] an argument successfully argued by the state of New York, although not in so many words, in *Crane* three decades before.[65]

It is important to note that in each wave of state attempts to regulate immigration, it was the judicial branch that stepped in to reassert federal authority. Since the last great wave, the Supreme Court recognized the exclusive power of Congress to regulate immigration in the context of granting nonimmigrant visas,[66] employment of aliens not lawfully admitted to residence in the United States,[67] denial of in-state tuition to

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[55] 108 N.E. 427 (N.Y. 1915).

[56] *Id.* at 429.

[57] *Id.* at 432.

[58] 239 U.S. 195 (1915).

[59] The notion of "special public interest" was asserted but denied by the Court only thirty years later in *Torao Takahashi v. Fish and Game Commission*. 334 U.S. 410 (1948); *see supra* notes 64–65 and accompanying text.

[60] *See, e.g.*, KPOSOWA, *supra* note 54, at 21 (discussing the Bracero Program permitting Mexican farm workers temporary entry and stay in the U.S.).

[61] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 61 n.8 (1941) (discussing actions by state and local governments in the context of immigration regulation).

[62] *Id.* at 53.

[63] 334 U.S. 410 (1948).

[64] *Id.* at 417–20.

[65] People v. Crane, 108 N.E. 427, 430–33 (N.Y. 1915).

[66] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[67] DeCanas v. Bica, 424 U.S. 351 (1976). Although the Supreme Court upheld the California statute in question, it did so because there was no evidence that the statute was at odds with federal legislation, not because Congress did not enjoy exclusive power to regulate immigration. *Id.* at 354–55.

nonimmigrant aliens and their dependents,[68] and release of alien juveniles following detention on suspicion of being deportable.[69] But states have not been disheartened by the Court's historic and recent assertions that the federal government retains power over immigration regulation. An increasing number of cases relating to state and local immigration regulation have come before federal district courts and courts of appeal in recent years.[70] These cases will be discussed in greater detail in Part III.

II. CURRENT IMMIGRATION AND LEGISLATIVE TRENDS

The flow of illegal immigrants to the United States is on the rise and states have responded by passing legislation regulating those immigrants' conduct.[71] Between January and December of 2007, state legislatures considered more than 1500 pieces of immigration legislation.[72] Two hundred forty of those bills considered became law during that same time.[73] The number of enactments in 2007 nearly tripled from 2006.[74] Over forty-five states stepped in to regulate where Congress had not.[75]

A. Numbers

At the root of state and local action is a dramatic influx in the flow of immigrants, legal or not, to the United States. In 2003, more than thirty-three million people present in the United States were foreign born.[76] This is more than double the number of immigrants that were in this country in 1980.[77] Not only is the number of immigrants on the rise, but the rate at which immigrants enter the country is on the rise at an unprecedented clip.[78] More than thirty-six percent of all foreign born persons present in America in 2003 had entered the country between 1990 and 2000.[79] This decade

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[68] Toll v. Moreno, 458 U.S. 1 (1982).

[69] Reno v. Flores, 507 U.S. 292 (1993).

[70] *See, e.g.*, Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *aff'd sub nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[71] *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2008) [hereinafter NCSL SURVEY], *available at* http://www.ncsl.org/print/immig/2007immigrationfinal.pdf.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] LUKE J. LARSEN, U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003, at 1 (2004), *available at* http://www.census.gov/prod/2004pubs/p20-551.pdf.

[77] Steven A. Camarota, *Census Releases Immigrant Numbers for Year 2000*, CTR. FOR IMMIGRATION STUDIES, June 4, 2002, http://www.cis.org/articles/2002/censuspr.html.

[78] *See id.*

[79] LARSEN, *supra* note 76, at 3.

of increase is second to none in the nation's history.[80] As a result, the foreign born population is out-pacing the native population, comprising an increasingly larger sector of the country's total population.[81]

B. Local Impact and Perceived Problems

Local and state government officials argue that they bear the burden of supporting increasing immigrant populations, especially in the context of illegal immigrants.[82] Job displacement and exhaustion of public resources are among the most common complaints,[83] and empirical evidence[84] (and even the Supreme Court[85]) supports the notion that illegal immigrants deprive American citizens of jobs and depress wages. Empirical evidence also supports the notion that public resources are exhausted by illegal immigrant populations.[86] The cost of public assistance aimed at illegal immigrants in America totaled $5.4 billion in 1990, and $11.9 billion was spent on public assistance and displacement costs in 1992.[87] Couple these estimates with the increasing rate of immigration, and the numbers become astounding.

A representative example of the aggressive assertions concerning the burdens carried by local and state governments as a result of illegal immigration came from Oklahoma State Representative Randy Terrill, arguing the necessity of Oklahoma legislation regulating immigration. Terrill claimed illegal immigrants contribute at best $21 million to the state fisc in income and sales tax, while costing the state hundreds of millions of dollars in increased public services ranging from the increased

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[80] Other than the 1990s, the greatest increase was thirty-one percent in the decade from 1900–1910. Camarota, *supra* note 77.

[81] *Id.* Needless to say, not all immigrants to the United States are legal. Of the over thirty-three million foreign born present in the United States, an estimated ten million are citizens, and an estimated seventeen million are non-citizens. A. DIANNE SCHMIDLEY, U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, at 3 (2001), *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf.

[82] Julian L. Simon addresses this issue in some detail, including reference to empirical data and interviews with immigrants as they leave the country. *See* JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 313–21 (1999). Simon arrived at the conclusion that although the overall national effect immigrants have on public coffers is positive, the effect on state and local coffers may very well be negative. *Id.* at 315; *see also* Michael J. Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?*, 72 BROOK. L. REV. 655, 660–61 (2007) (discussing empirical evidence supporting the notion that local communities are burdened by immigration).

[83] *See* Almonte, *supra* note 82.

[84] *Id.* (citing Frei, *supra* note 16, at 1379).

[85] *Id.* (citing DeCanas v. Bica, 424 U.S. 351, 356–57 (1976)).

[86] *Id.* (citing David M. Turoff, Note, *Illegal Aliens: Can Monetary Damages Be Recovered from Countries of Origin Under an Exception to the Foreign Sovereign Immunities Act*, 28 BROOK. J. INT'L L. 179, 184 n.40 (2002)).

[87] Turoff, *supra* note 86, at 183–84.

costs of providing medical care to uninsured illegal immigrants to the increased costs of law enforcement as a result of illegal immigrant activities.[88] Rape, murder, drugs, prostitution rings, gangs, and horse gambling operations are among the activities illegal immigrants are allegedly responsible for.[89] According to Terrill, the increased use of non-emergency medical care by illegal immigrants is "literally killing the [University of Oklahoma] Medical Center."[90] Mayor Lou Barletta of Hazleton, Pennsylvania, cited similar concerns in support of Hazleton's Illegal Immigration Relief Act.[91]

C. Why States and Localities Are Attempting to Regulate Immigration

Because of the costs to local and state government associated with increased immigration, either real or only perceived, leaders and the public have pleaded for action from Congress. Consider the following passage from the *Dallas Morning News*, one of many members of the media to address the situation: "Gov[ernor] Rick Perry is one of 13 governors who say this situation needs fixing. We agree.... This newspaper favors addressing the aspects of illegal immigration, including Dream Act provisions, through comprehensive reform."[92]

Although Congress made several attempts to pass comprehensive immigration regulation during 2007, those attempts have failed. The Comprehensive Immigration Reform Act of 2007 was one of several measures considered and rejected by Congress.[93] As will be shown in Part III, the void left by Congress in the context of immigration law has been filled by state and local measures targeting illegal immigrants.

III. PRINCIPAL CASES—*LOZANO V. CITY OF HAZLETON* AND *DAY V. BOND*

This Part explains what steps have been taken by local and state governments in the context of immigration law. Because the focus of this Note is to address how courts' use of standing has and will continue to create difficulties in immigration law,

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[88] *See Tell Me More* (NPR radio broadcast Oct. 31, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=15803374 (Interview by Michelle Martin with Randy Terrill, Okla. State Rep.).

[89] *See id.*

[90] *Id.*

[91] *See* Lou Barletta, Small Town Defenders, Welcome to Small Town Defenders (June 13, 2006), http://www.smalltowndefenders.com/public/.

[92] Editorial, *The Legal Route*, DALLAS MORNING NEWS, Sept. 21, 2007, at 18A, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/opinion/editorials/stories/DN-inline_21edi.ART.State.Edition1.427fa5a.html. "Dream Act provisions" refers to provisions included in Congress' failed comprehensive immigration reform that would have created a means by which illegal immigrant high school students could obtain legal status through attendance at a public university or service in the military. *See* S. 1348, 110th Cong. § 1 (2007).

[93] S. 1348.

the discussion of local and state efforts will be couched in a discussion of the judicial challenges that resulted from those efforts, and how courts have addressed these challenges. Some states and localities chose to enforce restrictive legislation while others chose to attract illegal immigrants by providing additional state benefits. This Part discusses each method in turn.

In order to enhance the discussion in this Part, a brief review of standing will be helpful. Under Article III of the Constitution, in order for an individual plaintiff to be heard in a federal court, he must satisfy three requirements.[94] First, the plaintiff "must allege some threatened or actual injury resulting from the putatively illegal action."[95] That injury shown by the plaintiff must be "'real and immediate,' not 'conjectural' or 'hypothetical.'"[96] Second, the plaintiff must show that the injury is traceable to the defendant in the controversy.[97] Finally, the injury alleged must be redressable by the court, meaning that action by the court is capable of compensating the plaintiff for his injury.[98]

A slightly modified analysis applies to organization plaintiffs. Essentially, an organization has standing to sue when "the organization's members would have standing to sue on their own, . . . the interests the organization seeks to protect are germane to its purpose, and . . . neither the claim asserted nor the relief requested requires individual participation by its members."[99]

A. Restrictive Ordinances—Hazleton, Pennsylvania

The city of Hazleton, Pennsylvania, with a population around 25,000,[100] was one of the first to fight back against the flood of immigration through restrictive ordinances.[101] Most notable was the city's "Illegal Immigration Relief Act Ordinance,"

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[94] In reality, Article III only discusses the requirement of case or controversy, but the Supreme Court has fleshed out this requirement. *See infra* notes 95–98 and accompanying text.

[95] O'Shea v. Littleton, 414 U.S. 488, 493 (1974) (citation and internal quotation marks omitted).

[96] City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted).

[97] *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000).

[98] *See* U.S. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). There are prudential concerns encompassed in a standing analysis as well. *See, e.g.*, Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). These considerations are not included in this discussion.

[99] *Hazleton*, 496 F. Supp. 2d at 492 (quoting Pub. Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70 (3d Cir. 1990)). Further discussion of the organizations party to the Hazleton litigation will be omitted for simplicity sake.

[100] History—Official Website of the City of Hazleton, Pennsylvania, http://www.hazletoncity.org/public/life/history.html (last visited Jan. 20, 2009).

[101] Daniel Patrick Sheehan, *Pennsylvania Town Moves to Stem Growth of Immigrants*, PITTSBURGH POST-GAZETTE, July 15, 2006, at A10. By all accounts, San Bernadino, California was the first city to take action to restrict immigration, and it was San Bernadino's ordinance after which the leaders of Hazleton modeled their ordinance. *See id.*

or Ordinance 2006-18.[102] This Ordinance, approved on September 21, 2006, required anyone applying for a business or construction permit with the city to sign an affidavit "affirming that they d[id] not knowingly utilize the services or hire any person who is an unlawful worker."[103] "Unlawful worker" was defined as

> a person who does not have the legal right or authorization to work due to an impediment in any provision of federal, state or local law, including but not limited to a minor disqualified by nonage, or an unauthorized alien as defined by United States Code Title 8, subsection 1324a(h)(3).[104]

An additional provision of the Ordinance prohibited the leasing of property to an illegal immigrant while "knowing or in reckless disregard of the fact that" the illegal immigrant was within the United States in violation of United States immigration law.[105] The first violation of this provision would result in the landlord's inability to receive rent payments or fees; subsequent violations would lead to monetary penalties.[106]

In the following months, Hazleton's city council also approved a "Tenant Registration Ordinance," which required tenants to register for permits of tenancy based on the legality of their status in the country, and an "Official English Ordinance" which, among other things, prohibited the translation of any employment-related documents into any language other than English.[107]

Although the intended purpose of Hazleton's ordinances was to reduce the number of illegal aliens living in Hazleton (and any perceived detriment to the community that resulted from their presence),[108] there were clear repercussions for other groups of citizens as well. Business owners were forced to verify the immigration status of employees, an administratively costly endeavor for which most business owners do not have training,[109] and landlords were faced with the same predicament.[110] Litigation was a natural result of the ordinances as well.[111] While these citizens struggled to

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[102] Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See* Lozano v. Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007); Hazleton, Pa., Ordinance 2006-19 (Sept. 21, 2006), *available at* http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf.

[108] *See, e.g.*, Sheehan, *supra* note 101.

[109] *See* Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041, 1049 (2007).

[110] *Id.* at 1052–53.

[111] *Id.* at 1050, 1053. It is interesting to note that the city of Farmers Branch, Texas, which passed an ordinance restricting immigration discussed *infra*, text accompanying notes 149–53, has established a fund into which citizens may deposit money to fund the city's litigation

avoid liability for violating the city's ordinances, they found it difficult to operate within the bounds of federal immigration law and Title VII of the Civil Rights Act, both barring discriminatory practices in hiring and leasing.[112]

Landlords, business owners, tenants, workers, and various organizations filed suit in the Middle District of Pennsylvania in an attempt to enjoin enforcement of the ordinances.[113] Their principle theory was that the Illegal Immigration Relief Act Ordinance violated the Supremacy Clause,[114] the Due Process Clause,[115] and the Equal Protection Clause[116] of the United States Constitution.

The court took great care in discussing the standing of these plaintiffs, addressing their complaints in tandem until reaching the issue of redressability. Every plaintiff satisfied the first requirement, a showing of injury.[117] After the ordinances were passed, one landlord in Hazleton had difficulty leasing property and finding construction crews to make repairs to his property.[118] Illegal alien tenants suffered greater difficulty in leasing and some were forced to move to new locations.[119] Rosa and Luis Lechuga, a couple who owned a Mexican products store in Hazleton, suffered a loss of their usual clientele due to the exit of illegal aliens and were forced to close the store.[120]

Next, the court opined, with little hesitation, that these injuries were traceable to the city's passing of the restrictive ordinances.[121] With respect to landlords and tenants, the court found that but for the Ordinance, they would not have suffered a loss.[122] The business owners were also able to show traceability to the city, but the link between the business owners' injuries and the city's actions was found to be only partial.[123]

Redressability, the final requirement in standing analysis, was the only issue in which the court severed the claims of the plaintiffs.[124] The court held that an injunction against the enforcement of these ordinances would free the landlords from the "burdens they face from such compliance" and ease the difficulty of securing

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efforts. *See* Discover: Resources—City of Farmers Branch, http://www.farmersbranch.info/discover/resources (last visited Jan. 20, 2009).

[112] *See, e.g.*, Campbell, *supra* note 109, at 1050. Title VII prohibits discrimination on the basis of origin. *See* 42 U.S.C. § 2000e (2006).

[113] Lozano v. Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

[114] U.S. CONST. art. VI, cl. 2.

[115] U.S. CONST. amend. XIV, § 1.

[116] *Id.*

[117] *Hazleton*, 496 F. Supp. 2d at 484–99.

[118] *Id.* at 488–89.

[119] *Id.* at 496–97.

[120] *Id.* at 490.

[121] *Id.* at 489.

[122] *Id.* at 489, 498.

[123] *Id.* at 491.

[124] *Id.* at 487–99.

tenants.[125] The court made the same observation with respect to tenants.[126] Only with respect to the business owners did the court balk at granting standing to sue, but this decision rested upon the fact that the business had already closed.[127] The court seemed to imply that had the owners expressed intent to reopen the store or to recover monetary damages, there may have been an avenue of redress.[128] At the conclusion of the standing analysis, the court granted the landlords, illegal alien tenants, and various organizations (Casa Dominicana of Hazleton, the Hazleton Hispanic Business Association, and the Pennsylvania Statewide Latino Coalition)[129] the right to be heard.[130]

After addressing standing and other procedural issues,[131] the court proceeded to address the merits of the case. First, the court addressed the plaintiffs' complaint that Hazleton's actions violated the Supremacy Clause, which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[132] Under this clause, any state law that "'interfere[s] with or [is] contrary to' federal law" is invalid.[133]

Federal law can preempt state law through one of three methods: "express or explicit preemption, implied preemption, or 'actual conflict' preemption."[134] After observing the employment provisions of the Hazleton ordinances in relation to the Federal Immigration Reform and Control Act of 1986 (IRCA), the court decided that federal law preempted those portions of the ordinances by all three methods.[135] After consideration of the tenancy provisions of the ordinances, the court concluded that because "Hazleton's ordinances burden[ed] aliens more than federal law by prohibiting them from residing in the city although they may be permitted to remain in the United States," the tenancy provisions are conflict preempted by federal law.[136]

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[125] *Id.* at 490.

[126] *Id.* at 498.

[127] *Id.* at 491.

[128] *Id.*

[129] To maintain simplicity, the court's discussion of these organizations' standing is not discussed in detail. In short, they satisfied the standards noted *supra* notes 94–99 and accompanying text. *See also Hazleton*, 496 F. Supp. 2d at 491–96.

[130] *Hazleton*, 496 F. Supp. 2d at 504.

[131] The court addressed the right of some plaintiffs to bring a claim anonymously and paid some credence to whether the court could or should decide the merits of the case based on amendments that were approved during the trial of this case. The analysis of these issues is not crucial to our discussion. For the court's discussion and holding in these matters, see *Hazleton*, 496 F. Supp. 2d at 504–17.

[132] U.S. CONST. art. VI, cl. 2.

[133] *Hazleton*, 496 F. Supp. 2d at 518 (quoting N.J. Payphone Ass'n, Inc. v. W. New York, 299 F.3d 235 (3d Cir. 2002)).

[134] Olde Disc. Corp. v. Tupman, 1 F.3d 202, 206 (3d Cir. 1993), *cert. denied sub nom.* Hubbard v. Olde Disc. Corp., 510 U.S. 1065 (1994).

[135] *See Hazleton*, 496 F. Supp. 2d at 518–29.

[136] *Id.* at 532. Some immigrants, although they may not be citizens or legal permanent

The court additionally addressed a procedural due process claim brought by the plaintiffs in deciding that the Illegal Immigration Relief Act passed by Hazleton was unconstitutional.[137] Other claims brought by the plaintiffs included violations of equal protection,[138] privacy rights,[139] the Fair Housing Act,[140] Section 1981,[141] Pennsylvania's Landlord and Tenant Act,[142] and abuse of police powers.[143] Further analysis of these claims is not essential to this Note's discussion.

The legal analysis encompassed in the *Hazleton* court's opinion is no extraordinary feat, but there is one important aspect of the opinion that should be afforded particular attention. The court went to great lengths to emphasize the inability of local governments to regulate immigration while remaining within their natural boundaries of power.[144] In the context of preemption, for instance, it would have been sufficient for the court to hold that either of three forms of preemption was evidenced by the IRCA. Instead, the court waded through the various types of preemption with painstaking detail, even noting at one point that the entire exercise was unnecessary.[145] At every turn, the court made an effort to express its firm belief that Hazleton's ordinances were preempted.[146] This point, and the fact that the court seemed so inclined to uphold federal supremacy, becomes more important in the next Part, where this Note explores other state and local attempts at regulating immigration.

B. Other Restrictive Ordinances and Legislation

Hazleton was not the only community in the nation to take such measures in the wake of federal inaction concerning immigration. Other notable attempts took place in Oklahoma,[147] Georgia,[148] and Texas.[149] A city in Texas—Farmers Branch—passed an ordinance similar to Hazleton's in May of 2007.[150] At the center of the Farmers

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residents, may be allowed to remain in the United States, for example, while applying for legal status or asylum. *See id.*

[137] *Id.* at 533–38.

[138] *Id.* at 538–42.

[139] *Id.* at 542–45.

[140] *Id.* at 545–46.

[141] *Id.* at 546–52.

[142] *Id.* at 552–53.

[143] *Id.* at 553–54.

[144] *Id.* at 517–33.

[145] *Id.* at 521.

[146] *Id.* at 517–29.

[147] 2007 Okla. Sess. Laws 112, *available at* http://www.ocsn.net/applications/ocsn/deliverdocument.asp?id=448995.

[148] *See* Emily Bazar, *Illegal Immigrants Moving Out*, USA TODAY, Sept. 26, 2007, at A3, *available at* http://www.smalltowndefenders.com/public/node/238.

[149] *See* Bill Turque, *Officials Face Constitutional Complexities*, WASH. POST, Sept. 7, 2007, at B5.

[150] *See* Stephanie Sandoval, *FB Prepares to Enforce Rental Ban; Letter to Apartments Explains Restrictions on Illegal Immigrants*, DALLAS MORNING NEWS, May 15, 2007, at 1B.

Branch ordinance was the requirement that landlords verify the immigration status of potential tenants before rent payments could be accepted.[151] A federal judge in the Northern District of Texas granted a temporary restraining order to the plaintiffs in that case one day before the ordinance was set to go into effect.[152] Currently, this case is still awaiting trial.[153] A second ordinance, aimed at restricting tenancy to citizens, passed in December 2007, and a lawsuit has been filed to challenge the validity of its passage.[154]

C. Legislation Providing Benefits to Undocumented Americans

To fully understand the impact of the *Hazleton* court's and other similar rulings on the ability of state and local governments to regulate immigration—and to lay the groundwork for the remainder of this discussion—the case should be contrasted with other immigration regulation by state and local governments. While Hazleton, Farmers Branch, and others responded to federal inaction with restrictive ordinances, others have responded by providing benefits.[155]

Kansas was among the first states to pass a statute providing benefits to illegal aliens that were not available to United States citizens, approving K.S.A. § 76-731a on July 1, 2004.[156] Under the statute, any student enrolled in or accepted to a college or university is considered a resident of Kansas for the purpose of assessing tuition and fees.[157] This seems all-inclusive, but the statute's definition of "individual" narrowed the scope a bit. Those students who had either attended a Kansas high school for at least three years, had graduated from a Kansas high school, or had obtained a GED within the state of Kansas were covered by the statute.[158] Those individuals without lawful immigration status, in order to qualify for state residency for tuition purposes, were required to sign an affidavit stating that they had either applied for legalization or they would as soon as they became eligible to do so.[159] Finally, those individuals who enjoyed legal, but not permanent, status in the United States, were

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[151] *See id.*

[152] *See* Villas at Parkside v. City of Farmers Branch, No. 3:06-cv-2371, 2007 WL 1498763 (N.D. Tex. May 21, 2007).

[153] *See* Patrick McGee, *Landlords Planning to Work with City*, FORT WORTH STAR-TELEGRAM, Jan. 24, 2008, at B1.

[154] *See id.*

[155] *See, e.g.*, KAN. STAT. ANN. § 76-731a (2008). It is not entirely clear why some states have chosen a course of action friendly to immigrants. One could argue that such legislation is aimed at offsetting those restrictive ordinances passed by other states and localities, but the fact that state and local governments *have* taken action, as opposed to the *motivation* for doing so, is the focus of this Note.

[156] *Id.*

[157] *Id.* § 76-731a(a).

[158] *Id.* § 76-731a(b)(2).

[159] *Id.*

required to affirm that they had "filed an application to begin the process for citizenship of the United States or w[ould] file such application as soon as . . . eligible to do so."[160]

The thrust of this statute was that an illegal alien, living inside or outside of Kansas, could be deemed a resident for purposes of registration and tuition so long as he had attended a Kansas high school for three years and had graduated or earned a GED.[161] Additional requirements were placed upon those who did not satisfy these standards,[162] but these additional requirements were by no means insurmountable. Of crucial importance is the fact that those benefits afforded illegal or undocumented immigrants by K.S.A. § 76-731a were ones for which out-of-state residents attending Kansas universities and colleges were not eligible.[163]

As is to be expected, parents of students who were residents of states other than Kansas and attending Kansas state schools, and the students of those parents, filed suit on several grounds.[164] Alleging that the law violated 8 U.S.C. §§ 1621 and 1623, and their equal protection rights under the Fourteenth Amendment, the students prayed for declaratory and injunctive relief.[165] A favorable judgment would prevent undocumented aliens from taking advantage of the new law and its resulting, more favorable in-state tuition rates.

Of the seven counts alleged before the U.S. District Court for the District of Kansas, the court dismissed six for lack of standing.[166] The most notable observation made by the court concerning this dismissal was that there was no "concrete and imminent" injury suffered as a result of the statute's passage.[167] Additionally, enjoining enforcement of the statute would not provide a remedy for out-of-state students.[168] Those students who filed suit were paying out-of-state tuition before the statute passed, and they would continue to do so regardless of the court's determination.

As to the final count alleged, the court accepted the parties' stipulation that the plaintiffs had standing to sue, but held that the federal statute under which that count was alleged, 8 U.S.C. § 1623, did not create a private right of action.[169] The question of standing with respect to this claim was not addressed in any detail.[170]

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[160] *Id.*

[161] *Id.* § 76-731a.

[162] *See id.* § 76-731a(b)(2).

[163] This assertion is made notwithstanding the possibility that Kansas schools may provide in-state status to out-of-state students as part of a scholarship or fellowship program.

[164] Day v. Sebelius, 376 F. Supp. 2d 1022 (D. Kan. 2005), *aff'd sub nom.* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[165] *Id.* at 1026–29.

[166] *Id.* at 1040.

[167] *Id.* at 1033 (citing Essence, Inc. v. City of Fed. Heights, 285 F.3d 1272, 1281 (10th Cir. 2002)).

[168] *Id.* at 1034.

[169] *Id.* at 1034–37.

[170] *Id.*

On appeal, the Tenth Circuit delivered an important opinion. The court's discussion of those counts dismissed for lack of standing was similar to that of the district court.[171] The court held there was no injury suffered as a result of the statute, and any injury that may be shown was not remediable by the court.[172]

This was not the entirety of the court's opinion, however. Also on appeal was the district court's determination that 8 U.S.C. § 1623 does not create a private right of action for the plaintiffs. Where the district court had simply accepted the parties' stipulation as to standing, the Tenth Circuit held that because § 1623 did not create a private right of action, the plaintiffs could not show injury amounting to the constitutional requirement of standing.[173] With this determination, the court precluded any action by the plaintiffs against the Kansas statute because of lack of standing.

The effect of this holding cannot be overstated. Assuming other courts reach the same conclusion, statutes such as K.S.A. § 76-731a will stand without challenge, and individual states will gain increasingly more power to regulate immigration, once an area of exclusive federal power.

IV. THE PROBLEMS CAUSED BY THE DIVERGENT USE OF STANDING IN IMMIGRATION REGULATION CHALLENGES

The problem created by divergent decisions involving standing is only magnified when one considers the drive by states and localities feeling the pressures of immigration discussed in Part II. Along with the nationwide passage of local ordinances similar to those of Hazleton, Pennsylvania, and Farmers Branch, Texas,[174] nearly a dozen states passed legislation similar to that at issue in *Day v. Bond*.[175] Other states are considering doing the same.[176] At least four other states have chosen the opposite track with respect to the educational opportunities of illegal immigrants, passing legislation that actively prohibits them from receiving in-state tuition rates.[177] With many states taking action, it is only plausible that neighboring states will begin to

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[171] *See* Day v. Bond, 500 F.3d 1127, 1132–35 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[172] *Id.* at 1135.

[173] *Id.* at 1135–36.

[174] *See, e.g.*, Stephen Deere, *Judge Backs Valley Park's Push Against Hiring Illegal Immigrants*, ST. LOUIS POST-DISPATCH, Feb. 2, 2008, at A15 (discussing immigration ordinance passed by Valley Park, Missouri); *see also* Marice Richter, *Lewisville to Debate English as the City's Official Language*, DALLAS MORNING NEWS, Oct. 6, 2008 (discussing immigration ordinance passed by Lewisville, Texas).

[175] *See* Ane Turner Johnson & Steven Janosik, *Illegal Immigrants; Assembly Should Determine Who Can Receive In-State Tuition*, RICHMOND TIMES-DISPATCH, Jan. 13, 2008, at E1.

[176] *See id.*

[177] *See id.*

feel pressure to follow suit.[178] In the end, our nation's immigration laws will reflect exactly that which has been feared since before ratification of the Constitution—a patchwork of immigration law with the potential to affect foreign policy in a negative way, a lack of uniformity making immigration regulation increasingly difficult at any level of government, and regulation of immigration by those governmental bodies least equipped and prepared to effectively enforce federal immigration legislation, namely states and localities.

V. POSSIBLE SOLUTIONS AND COUNTER-ARGUMENTS

So what can be done to combat the threat to uniformity in immigration law? Many ideas have been advanced in other contexts of law that lend themselves well to solving the problems caused by selective standing.

A. Allow Case Law to Take Its Course

The first possibility, which is also the easiest to implement, is to simply let the case law develop along the path it is currently taking. This idea can quickly be discarded. As seen from the discussion of the principle cases in this Note, courts will essentially intervene only when the activities of immigrants are restricted by legislation. When provision of benefits is the goal of legislation, on the other hand, courts will show deference to the wishes of state and local governmental bodies.

At first glance, it seems odd to offer the very problem as a possible solution, and that is why this approach is not a promising one. But one could argue, although rather unconvincingly, that allowing case law to develop in accordance with what has already been adjudicated does not implicate those foreign policy concerns that underlie a need for federal preemption and uniformity. After all, the main concern that encourages placing power over immigration regulation in the hands of the federal government is that mistreatment of immigrants may have drastic effects on the nation's relationships abroad.[179]

But again this solution is not really a solution at all and does not deserve any realistic consideration. Adopting this approach would be the equivalent of ignoring the problem. It is likely to be advanced only by those who have no issue with the current status of immigration law. For reasons stated above, the problem at hand is not

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[178] A front-page article in the *Houston Chronicle* on February 3, 2008, explores the results of an influx of immigrants fleeing to Texas from nearby Oklahoma and Arizona, both states where restrictive legislation has been the chosen weapon to combat illegal immigration. James Pinkerton, *Immigration: Crackdown in Nearby States Brings Influx*, HOUSTON CHRON., Feb. 3, 2008, at A1. The stress to the public fisc brought about by the influx of immigrants from Latin America is only magnified by additional immigration into the state from neighboring states. *See id.*

[179] *See supra* Part I.

one that we can ignore. Patchwork immigration regulation, because it creates a system of laws difficult for immigrants to navigate, carries serious foreign policy implications, and state and local governments should not be allowed to tie the hands of the federal government in such a crucial matter. Non-action, which is essentially what this option represents, is not a viable alternative.

B. Grant Standing Based on Associative, Economic, and Expressive Injury

A second idea is to grant citizenship standing to anyone challenging state and local immigration regulations. This proposal has been advocated by Professor Adam Cox,[180] and is not as removed from the doctrine of standing as first glance would imply. Citizenship standing would not be based on the mere fact that a plaintiff is a citizen but, as Professor Cox shows, would be based on concrete injury that citizens suffer at the hands of immigration laws.[181] The idea of citizenship standing in the context of immigration regulation is little more than an application of standing law already in place. Under Professor Cox's theory, there are essentially three types of injury plaintiffs can show at the hands of states and localities regulating immigration—associative injuries, economic injuries, and expressive injuries.[182] As will be demonstrated, the notion of expressive injury is the most viable alternative.

1. Associative Injury

Associative injuries refer to the desires of American citizens to freely associate with whomever they please.[183] As Professor Cox points out, the courts have acknowledged associative injuries in the context of family members,[184] American citizens inviting speakers from foreign nations,[185] and employment.[186] But courts have not included within this notion of injury those cases involving excluded immigrants that are not easily identifiable.[187]

Because a finding of associative injury is premised on the fact that immigrants are excluded, it should not be expected that courts' systematic finding of associative injuries would have much impact on the problem at hand. It is true that in cases similar to *Hazleton*, undocumented immigrants were targeted and excluded by the city ordinance,[188] and associative injury would provide a way to satisfy the requirements

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[180] Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373 (2004).

[181] *See id.*

[182] *Id.* at 391–96. Professor Cox's theory will only be discussed in the context of state and local regulation because the concerns discussed in this Note are specific to those entities.

[183] *See id.* at 391.

[184] *Id.* (discussing Fiallo v. Bell, 430 U.S. 787 (1977)).

[185] *Id.* (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)).

[186] *Id.* at 391–92 (citing Pesikoff v. Sec'y of Labor, 501 F.2d 757, 760–61 (D.C. Cir. 1974)).

[187] *Id.* at 392 (citing Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 800 (D.C. Cir. 1987)).

[188] *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf.

of standing. But standing in those cases is already granted based on traditional notions.[189] In cases similar to *Bond*, conversely, it is unlikely that associative injury will be found by the courts because no immigrants were excluded by the statute being challenged.[190] If anything, association was made more likely by the statute. All things considered, it seems that finding injury based on associative interests will bring about little change.

2. Economic Injury

Professor Cox's second idea for granting citizenship standing to challenge immigration regulations is based on economic considerations.[191] Not only are employers affected by immigration regulation through an increased or decreased supply of labor, but everyday citizens are also affected by regulation and the resulting ebb and flow of immigrants into their state and local communities.[192]

Because this notion encompasses the impact that the ebb and flow of immigrants has on state and local government, it seems well-tailored to solving the problems that lay at the root of most recent attempts at regulating immigration. But in the context of those cases that have been brought before the courts, a finding of economic injury would change little. In *Hazleton*, for example, standing was granted through general notions of standing, with no additional considerations of economic injury.[193] In *Bond*, the plaintiffs were denied standing because although undocumented aliens were granted additional benefits through state legislation, there was no showing that action by the court would alter the plaintiffs' economic situation.[194] In order for the plaintiffs in *Bond* to have a remedy, there must be some way for them to show not only injury, but redressability.[195]

3. Expressive Injury

The final and most promising alternative proposed by Professor Cox is a finding of standing based on expressive injury.[196] The notion of expressive injury is based on the interrelationship between expression on the one hand, and association and identity on the other.[197] Association, or the collection of community members with whom a citizen chooses to associate, helps to create an individual citizen's identity.[198] That

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[189] *See, e.g.*, Lozano v. Hazleton, 496 F. Supp. 2d 477, 487–504 (M.D. Pa. 2007).

[190] *See* KAN. STAT. ANN. § 76-731a(b)(2)(c) (2008).

[191] Cox, *supra* note 180, at 392–94.

[192] *See id.* at 393–94.

[193] *Hazleton*, 496 F. Supp. 2d at 487–504.

[194] Day v. Bond, 500 F.3d 1127, 1135 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008).

[195] *Id.* at 1134.

[196] Cox, *supra* note 180, at 394–96.

[197] *See, e.g., id.* at 394–95.

[198] *See, e.g., id.* Note that "association" in this context is distinct from "association" discussed in the text accompanying notes 183–90. Association in this context is the simple idea

identity, in turn, is one way by which that citizen expresses herself.[199] The illustration does not end here, however, because citizens are not limited to expressing themselves through individual identity. When individual identities are viewed collectively, they create local, state, and national identities as well.[200]

Because association is crucial to citizens' ability to express their identity, any infringement on a citizen's choice of association should be viewed as an expressive injury.[201] Applying this interrelationship to the current context, it becomes clear how immigration regulation may result in expressive injury. Because immigration regulation, whether implemented by the federal or a state government, has historically focused on excluding or including particular community members, citizens' ability to choose those with whom they associate has been restricted by such regulations.[202] As illustrated above, the regulation of association can have a great impact on individual and community identity. When identity is regulated and no longer controlled by individuals, expressive injury is the result.

It may be argued that because immigration regulation by state and local governments does not implicate the ingress and egress of immigrants on a national scale, it has little impact on national identity and, thus, has little impact on individual expression born from that national identity. However, this argument is misguided. As already discussed, regulation by some states and localities, if unchecked, could pressure neighboring states to follow suit.[203] The possibility of a nationwide policy resulting from such individual state action is not far-fetched or unreasonable, and the end result would be the same as if the federal government had taken action itself. In short, regulation of national ingress and egress is not the only means by which national identity may be implicated. Allowing state and local immigration regulation would simply place states and localities in place of the national government as arbiter of the nation's identity.

Additionally, interference with national identity is not the only means by which expressive injury may be suffered. As discussed, individuals as a community define state, local, and individual identity. Even if state and local immigration regulation had little impact on national identity, this would not remove the concern that such regulation would implicate state, local and individual identity. Accordingly, allowing states and localities to regulate association through legislation, regardless of whether

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that citizens socialize with one another, as opposed to any notion of injury that is premised on the exclusion of undocumented immigrants. *See, e.g.*, Cox, *supra* note 180, at 394–95.

[199] *See, e.g., id.* at 394. This explanation is based only roughly on Cox's formulation, but it highlights the way in which association and identity are related to the notion of expressive injury.

[200] *See, e.g., id.* at 394–95.

[201] *See id.* at 394–402.

[202] *See supra* Part I. Professor Cox also posits that it is not inconsistent with our nation's history to view immigration regulation as a means of defining national identity, including those we deem worthy and excluding those we deem unworthy. Cox, *supra* note 180, at 394–402.

[203] *See supra* Part IV.

that legislation pressures neighboring states to take similar action, deprives citizens of the right to identify and express themselves as they choose. Whether you view the result of state and local immigration regulation as having the potential for creating national policy or as a localized problem, expressive injury to citizens will be the result.

If the *Hazleton* and *Bond* courts had granted standing based on general notions of expressive injury, the results would have been more favorable for the future of immigration regulation. The court's finding in *Hazleton* would remain essentially unchanged, and this result is acceptable because the court's ultimate holding was to assert federal power over immigration regulation.[204]

The adjudication of *Bond*, however, would have been drastically different. Granting standing to the plaintiffs based on expressive injury would have allowed the court to address the more important federal preemption and supremacy concerns encompassed within Kansas's statute.[205] It can be argued with some force that the court would have resolved the case in favor of the plaintiffs.[206] Such a finding would have restored consistency and uniformity across the nation in the context of immigration law. The fears and concerns that originally underscored the placement of immigration regulation within the federal domain would no longer be endangered.

Granting standing to the plaintiffs in *Bond* becomes more desirable when one considers the fact that no other remedy can provide relief. Because the plaintiffs were out-of-state college applicants, access to political remedies was not available, and it was precisely this scenario that three justices in *United States v. Carolene Products Co.* implied is more deserving of judicial intervention.[207] Considering the reality that the courts are the only means by which the plaintiffs may obtain relief from their expressive injury, granting standing to the plaintiffs in *Bond* becomes paramount.

Even if, after granting standing based on expressive injury, the *Bond* court had upheld Kansas' statute, the result would still be beneficial to future adjudication of immigration regulation. Such a holding would only result if no federal supremacy

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[204] Lozano v. Hazleton, 496 F. Supp. 2d 477, 517–33 (M.D. Pa. 2007). Perhaps standing would have been granted to additional plaintiffs, but further analysis of that possibility is not essential to this discussion.

[205] It should be noted at this juncture that the *Bond* court also struggled with the lack of remediability. *See* Day v. Bond, 500 F.3d 1127, 1134–35 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008). This issue, too, would have been resolved by a finding of expressive injury. Because the plaintiffs' complained-of injury would have been expressive and not solely based on a higher tuition rate, the court would have had the power to strike down the statute and restore the plaintiffs' right to associate with whomever they choose.

[206] The complexity of predicting what the actual outcome of the case would have been makes such an exploration impractical at this point, but the general consideration enunciated in *Hazleton* lends support to this idea. *See Hazleton*, 496 F. Supp. 2d at 517–33 (discussing federal preemption of state and local regulation in the context of immigration). Additionally, it is possible that granting standing to the plaintiffs in *Bond* may raise Fourteenth Amendment equal protection concerns, but discussion of this possibility is beyond the scope of this Note.

[207] 304 U.S. 144, 152 n.4 (1938).

or preemption concerns were implicated by the Kansas statute.[208] In other words, the considerations that have historically supported federal power over immigration regulation[209] would be protected. It should be expected that courts recognizing a state's power to regulate immigration would only do so after effectively safeguarding these historical concerns. Though a finding for the defendants on the merits in *Bond* would signal a shift in immigration regulation and federal control thereof, that shift would only come through proper adjudication of the statute's impact on federal immigration regulation, and would not be based on the pretext of standing.

Aside from the efficacy of citizenship standing based on associative, economic, and expressive injury, there are policy reasons that cut against granting standing based upon such notions of injury.

First, there are concerns that such a loose definition of standing would subvert the intentions of the Framers in limiting judiciary power to "Cases" and "Controversies."[210] Although it may be argued that these notions of standing could be limited to immigration regulation, one can easily conceive of valid arguments in favor of extending the idea to other contexts of law. For example, it may be argued that standing based on expressive injury should be granted to a litigant because racial discrimination creates a stigma contrary to his chosen mode of expression.[211] Additionally, such a definition of standing would implicate the Court's prudential limitations that, among other things, bar against hearing "generalized grievances."[212] The assertion that the standing doctrine will be eviscerated does not necessarily follow a court's granting of standing based on expressive injury, however. Finding expressive injury in the context of immigration is not completely foreign to current case law, and a granting of standing based on such expressive injury would not require a vast expansion of existing adjudication.[213] Because expansion of the expressive injury concept would be narrowly drawn, expansion to other contexts of law is not a necessary result.

A second argument against granting standing in such a fashion holds that basing standing on such notions impermissibly shifts the focus surrounding immigration from undocumented immigrants to American citizens.[214] Encompassed within this

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[208] Analogizing to the court's decision in *Hazleton*, a court would likely conclude that Kansas's statute should be struck down at least under field preemption. Congress, although silent in recent years, has shown an historic intention of espousing a federal scheme of immigration regulation.

[209] *See supra* Part I.

[210] U.S. CONST. art. III.

[211] Professor Cox references *Allen v. Wright*, 468 U.S. 737, 753–56 (1984), in which this very argument in favor of standing was offered by the plaintiff. Cox, *supra* note 180, at 401 n.122.

[212] The Supreme Court discussed the prudential concerns surrounding standing based solely on an injury that is general, not specific to the plaintiff in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

[213] *See* Cox, *supra* note 180, at 394–402.

[214] *See* Stephen Lee, Comment, *Citizen Standing and Immigration Reform: Commentary*

argument is the thought that only through supporting the claims of immigrants, as opposed to those of citizens, "can we hope for a Constitution that takes explicit account of both substantive and procedural promises locked within the fundamental principles of due process."[215] Additionally, granting standing to citizens where courts may not grant standing to undocumented immigrants implies that courts are only concerned with the injuries of immigrants if those injuries are suffered by citizens as well.[216] Granting standing as Professor Cox proposes, however, does not distinguish between illegal immigrants and citizens.[217] An expansion of standing to allow challenges to state and local immigration regulation would not be limited to those challenges brought by citizens, and the focus of immigration reform would not shift from undocumented immigrants to citizens.

Third, as Professor Cox concedes somewhat in his article, it may be argued that the political process provides a more appropriate remedy for those challenging immigration based on citizenship standing.[218] After all, when injury is based upon the notion of expressive injury, the injury suffered is widespread and, at least in theory, suffered by all citizens alike.[219] As discussed previously, however, the political process is not always available to litigants bringing the types of challenges that are the focus of this Note. The plaintiffs in *Bond*, because they were challenging an out-of-state statute, provide a prime example. Additionally, simply because the option of political intervention is available does not prevent the courts from weighing in on the subject.[220] There is little reason to conclude that the political process is the only proper arena for this discussion.

Finally, it is possible that citizenship standing could spur a flood of litigation based on widespread injuries. If standing is based on expression alone, it is not difficult to conceive that a state law excluding undocumented immigrants would lead to an insurmountable number of litigants bringing actions against that state. The same effect would likely be seen in local governments as well. This flood of litigation, however, is not a necessary result. Furthermore, litigation is precisely the tool by which citizens are empowered to assert their expressive rights. If state and local attempts to regulate immigration are continually struck down, state and local governments will begin to modify their behavior in accordance with court holdings. This process is the same by which any individual rights are to be protected, and this process should not be viewed as a danger encompassed with this Note's proposed solution.

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and Criticism, 93 CAL. L. REV. 1479, 1499 (2005).

[215] *Id.*

[216] *See id.*

[217] *See* Cox, *supra* note 180.

[218] *See id.* at 409.

[219] *See id.*

[220] *See* Cox, *supra* note 180, at 409.

Although citizenship standing through associative and economic injury appears to be problematic, real promise is found in the notion of expressive injury. Through such an idea, courts would be free to hear citizen challenges to state and local immigration regulation, and the end result would be restoration of federal power over immigration regulation.

C. Distinguish Ingress and Egress Regulation from Within-the-Nation Regulation

A final, less promising, alternative is for the courts to adopt a distinction between those state and local regulations concerning ingress and egress of immigrants to the United States and those that simply regulate the activity of immigrants once they are present in the country. This alternative requires an assumption, based on the immediately preceding discussion, that courts would be willing to grant citizenship standing in the context of immigration regulation.

The idea of creating a distinction between ingress and egress regulation and within-the-nation regulation has some beneficial features.[221] First, it would be consistent with the system already in place because treatment of immigrants present in the country already depends somewhat on separate state regulations.[222] For example, some immigrant visas are dependent on state definitions of marriage, and offenses that spur deportation are often categorized by the states.[223] In essence, recognizing state and local power to prescribe within-the-nation regulation would not be any great extension of existing law.

It may also be argued that under this proposal, ingress and egress regulation, the area of immigration that has the greatest impact on foreign relations, would remain under exclusive federal control. The federal government would retain the power to regulate immigration to the extent necessary to ensure federal interests in avoiding foreign conflict. States and localities would be given free reign to legislate beyond this point simply because the foreign policy implications are not so acute.

Applying this solution to the cases, the *Hazleton* result would have been vastly different and the *Bond* result would have remained the same.[224] In *Hazleton*, the court would have simply stepped aside, allowing the city of Hazleton to legislate as it wished and restrict the movement of undocumented immigrants within its jurisdiction. In *Bond*, again assuming that standing was granted based upon citizenship status, the court could have heard the merits of the case, likely ruling in favor of the state of Kansas and upholding K.S.A. § 76-731a, ignoring any notions of federal supremacy.[225]

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[221] *See* Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357 (2002).

[222] *See id.* at 360.

[223] *See id.*

[224] *See* Day v. Bond, 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 2987 (2008); Lozano v. Hazleton, 496 F. Supp. 2d. 477 (M.D. Pa. 2007).

[225] *See* KAN. STAT. ANN. § 76-731a (2008).

The result in *Bond* would have been the same, but the consequence would be a more predictable line of case law and a better opportunity for state and localities to legislate in accordance with the law.

Possible benefits notwithstanding, there are serious flaws to granting citizenship standing and distinguishing between ingress and egress legislation and within-the-nation legislation. Although it may be argued that such an approach would be somewhat consistent with the nation's current handling of immigration law,[226] stepping aside while states and localities assert control over within-the-nation regulation would foster the creation of a patchwork legislative regime that implicates foreign policy.[227] Perhaps it is fortunate that we have yet to see difficulties resulting from divergent state views on the handling of immigrants to date,[228] or perhaps the danger involved with the current legislative regime has not warranted action. Assuming either of these possibilities represents reality, choosing to continue and extend this approach at a time when states and localities have great incentives to take action would greatly exacerbate the divergent treatment of immigrants and magnify the foreign policy implications lurking underneath. An approach that frustrates exclusive federal power over immigration regulation in such a way can only be tolerated to a point before it creates a dangerous situation.

Additionally, asserting that ingress and egress regulation is the only immigration regulation that implicates foreign policy is misguided. There are two sources of immigrant mistreatment that may implicate foreign policy—the denial of entrance into the nation and the inability of immigrants to understand and navigate divergent regulations across the nation.[229] Acknowledging state control over within-the-nation regulation implicates the latter. Even if exclusive federal power over ingress and egress regulation is preserved, the necessity of providing immigrants with a navigable system of laws nationwide would be left unaddressed. Considering the great fervor with which states and localities are pursuing immigration regulation, the result of allowing states to prescribe within-the-nation immigration regulation will be a wholly non-navigable system of law which will no doubt have a negative impact on immigrants and, as a result, have a negative impact on foreign policy.

It may be argued that eventually, action by some states will pressure neighboring states into taking similar action, thus creating a uniform system of immigration laws. Instead of sweeping federal legislation, states acting individually will be the source of this uniformity. But even if uniformity does result, there is no reason to believe all states will fall in line with a single viewpoint.[230] At best, small groups of

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[226] *See* Chang, *supra* note 221, at 360.

[227] *See supra* Part I.

[228] *See* Chang, *supra* note 221, at 360. James Madison offered the same sentiment in *The Federalist Papers*. *See supra* note 29 and accompanying text.

[229] *See supra* note 29 and accompanying text.

[230] The issue of same-sex marriage, another hot-button issue, provides an example of neighboring states not taking uniform action. *Compare* CAL. FAM. CODE § 297 (West 2008)

states will act in unison in regulating undocumented immigrants within the nation's borders. Although that result would create uniformity across particular regions of the country, uniformity across the entire country is necessary to ensure fair treatment of immigrants and avoid dangerous foreign policy implications.

CONCLUSION

It cannot be stressed enough that immigration is an issue of inexplicable importance in the nation today. States and localities cite a drain on resources unparalleled in history, increasing crime rates, and increased strain on the public fisc. Whether these harms are truly a result of increased immigration is a point of contention,[231] but the perception is great enough to spur tension and encourage action.

Adding fuel to the fire is the additional notion that immigration is an area of law that historically has been and should remain governed by the federal government. But there has been no response from the federal government in accordance with this historical power. States and localities have taken the law into their own hands, passing both restrictive and benefit-providing legislation that has inflamed the issue. Court cases have resulted, and the problem has fallen at the steps of courthouses nationwide.

The courts' responses have not been beneficial. Granting standing to some plaintiffs challenging state and local immigration regulation and denying standing to others has created confusion and disarray in the context of immigration law. Foreign policy implications that originally underscored the Framers' decision to place power over immigration in the hands of the federal government are implicated by recent court holdings.

Several alternatives have been discussed in this Note, the most promising of which is to grant standing based on expressive injury. This approach would allow for current cases to be heard on their merits, and federal power over immigration regulation would be reasserted. Given the foreign policy implications and other historical reasons for placing that power with the federal government, there is no reason to assert that this would not be a positive result. Even supposing federal power is not completely reasserted, this would only result if foreign policy were properly safeguarded and a new method of analysis provided for future adjudication.

Until a resolution is reached, it is safe to assume that non-federal bodies will continue to take action. As success is achieved, more action will be encouraged. Absent intervention by Congress, it seems that only citizenship standing based on expressive injury provides any meaningful semblance of a solution.

(establishing the right to domestic partnerships in California), *with* NEV. CONST. art. 1, § 21 (making same-sex marriage unconstitutional in Nevada), *and* ARIZ. REV. STAT. ANN. § 25–101 (2008) (statutorily prohibiting same-sex marriage in Arizona).

[231] *See, e.g.*, SIMON, *supra* note 82.